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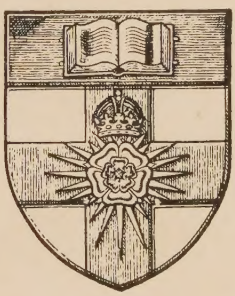

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ERRATA

Page 656: The solicitors appearing for the appellant in *Regina* v. *Bainbridge* were *L. Dawson & Co.*, and not as printed.

Page 735: The title of the note should be *Regina* v. *Sharp* and not as printed, and the year of the hearing should be 1957.

Page 816: *N. H. Curtis-Raleigh* appeared with M. A. L. Cripps Q.C. for the tenant in *Gladstone* v. *Bower.*

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5. —— *Plea—Fitness to plead—Burden of proof—Accused mute on arraignment—Whether onus of proof on prosecution to show mute of malice — Standard of proof — Accused found mute by visitation of God — Whether fit to plead.*
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THE
WEEKLY LAW REPORTS
Volume III
Containing those cases which are intended to be included in The Law Reports.

[COURT OF APPEAL.]

WALSH *v.* ALLWEATHER MECHANICAL GROUTING CO. LTD.

[1955 W. No. 1749.]

C. A.

1959
April 30;
May 1, 8.

Lord Goddard, Romer and Pearce L.JJ.

Factory—Definition—Temporary use of part for repairs—Apron of airfield in vicinity of hangar—Hangar a factory—Apron enclosed by security fence—Repairs being carried out to apron—Whether apron premises within "close or curtilage, or precincts" of factory—Whether apron "place situate within the close, curtilage, or "precincts forming a factory . . . used for some purpose other than "the processes carried on in the factory"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1) (6)—*Protection of Eyes Regulations*, 1938 (*S.R. & O.*, 1938, *No.* 654).

The plaintiff was a ganger in charge of a group of men engaged on breaking up and re-laying an area of concrete on the eastern apron of an airfield in the vicinity of a hangar used for testing and assembling aircraft. The defendants, who were the employers of the workmen, had contracted with the Air Ministry to do the work. The eastern apron was bounded by a security fence put up to prevent unauthorised spectators seeing what happened when 'planes were tested on the apron. As the plaintiff passed one of the workmen using a pneumatic drill a fragment of flying concrete injured his eye. In his action for damages against the defendants for, inter alia, breach of the Protection of Eyes Regulations, 1938, in that they failed to supply him with goggles, it was conceded that the hangar was a factory for the purposes of the Factories Act, 1937 [1]:—

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Factories Act, 1937, s. 151: "(1) Subject to the provisions of this "section, the expression 'factory' "means any premises in which, or "within the close or curtilage or "precincts of which, persons are "employed in manual labour in any "process for or incidental to any of "the following purposes, . . . being "premises in which, or within the "close or curtilage or precincts of "which, the work is carried on by "way of trade or for purposes of gain "and to or over which the employer

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Held, (1) that the eastern apron was within the close, curtilage or precincts of the hangar, being a space enclosed by the security fence, but

(2) that the replacement of the apron, not being an incident of the processes of aeroplane assembly and testing, was not something which was incidental to the processes used in the factory; but it was "a place solely used for some purpose other than the "processes used in the factory" within section 151 (6) of the Act of 1937, and therefore was excluded from the operation of the Act. Accordingly, the plaintiff was not within the Protection of Eyes Regulations, 1938, and his claim under them failed.

Cox v. *Cutler & Sons Ltd.* [1948] W.N. 345; [1948] 2 All E.R. 665; approved in *Street* v. *British Electricity Authority* [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679 applied.

Thurogood v. *Van Den Berghs and Jurgens Ltd.* [1951] 2 K.B. 537; [1951] 1 T.L.R. 577; sub nom. *Thorogood* v. *Van Den Berghs and Jurgens Ltd.* [1951] 1 All E.R. 682 distinguished.

Appeal from Glyn-Jones J.

The defendants had contracted with the Air Ministry to resurface a large area of concrete at Northolt airfield. The plaintiff, an employee of the defendants, was a ganger in charge of a group of men breaking up and re-laying concrete; the concrete was broken up and relaid in certain pre-arranged areas, but so that there was always an avenue of access to the hangars. The plaintiff had to supervise the spreading of the concrete and on the day of the accident, March 10, 1954, he was walking towards a lorry to direct the driver where to leave the concrete in the lorry when he passed a man using a load breaker, which threw up a piece of concrete injuring his right eye, resulting, ultimately, in its loss of sight.

The accident occurred on the eastern apron in the vicinity of hangar number 6. The apron was bounded by a removable fence of chestnut palings put up as a security fence to prevent unauthorised persons from seeing what happened when 'planes were tested on the apron. Hangar number 6 was in the occupation of the Fairey Aviation Co. Ltd., under licence from the Air Ministry; the annual licence fees were £4,900 and these fees included the occupation of the eastern apron within the security fence. It was a term of the licence that if any continued use was made of the western apron, additional charges would be payable by the licensee, and, that if the security fence necessitated the construction of a new road or pathway round it, the cost would be borne by the licensee.

The plaintiff brought an action against the defendants, claiming damages for the injuries he suffered because of the accident. He relied, inter alia, on the defendants' failure to

"of the persons employed therein "has the right of access or control. ". . . (6) Where a place situate 'within the close, curtilage, or pre- "cincts forming a factory is solely "used for some purpose other than "the processes carried on in the "factory, that place shall not be "deemed to form part of the factory "for the purposes of this Act, but "shall, if otherwise it would be a "factory, be deemed to be a separate "factory."

supply him with goggles pursuant to the Protection of Eyes Regulations, 1938, made under section 49 of the Factories Act, 1937. The trial judge held that the eastern apron was not within the close, curtilage or precincts of the hangar and, therefore, was not a factory within the Factories Act, 1937. Accordingly, the regulations of 1938 did not apply, and he dismissed the plaintiff's claim.

The plaintiff appealed.

John Platts-Mills for the plaintiff.
Martin Jukes Q.C. and *Bernard Caulfield* for the defendants.

The following cases were cited in argument, in addition to those referred to in the judgment: *Lewis* v. *Gilbertson & Co. Ltd.*[2]; *Acton Corporation* v. *West Middlesex Assessment Committee*[3]; *Whalley* v. *Briggs Motor Bodies Ltd.*[4]; *Brass* v. *L.C.C.*[5]; *Powell* v. *Kempton Park Racecourse Co. Ltd.*[6]; *Back* v. *Dick Kerr & Co. Ltd.*[7]; *Taylor* v. *Hickes*.[8]

Cur. adv. vult.

ROMER L.J. The judgment which Pearce L.J. is about to read is the judgment of the court.

PEARCE L.J. stated the facts and continued: The appeal turns on whether the place where the accident happened was a "factory" within the meaning of the Factories Act, 1937. The plaintiff's argument runs thus. Section 151 (1) of the Factories Act, 1937, defines a factory as follows: "Subject to the provisions of this section, the expression 'factory' means any "premises in which, or within the close or curtilage or precincts "of which, persons are employed in manual labour in any "process for or incidental to any of the following purposes, "namely:—(*a*) the making of any article or of part of any article; "or (*b*) the altering, repairing, ornamenting, finishing, cleaning, "or washing, or the breaking up or demolition of any article; or "(*c*) the adapting for sale of any article; being premises in which, "or within the close or curtilage or precincts of which, the work "is carried on by way of trade or for purposes of gain and to or "over which the employer of the persons employed therein has "the right of access or control." Hangar No. 6 was admittedly a factory. The work was being done by the defendants on the apron of hangar No. 6. The judge, it is said, should have found that this apron was within "the close, curtilage or precincts" of hangar No. 6 and was therefore part of the factory.

[2] (1904) 68 J.P. 323; (1904) 91 L.T. 377.
[3] [1949] 2 K.B. 10; 65 T.L.R. 168; [1949] 1 All E.R. 409.
[4] [1954] 1 W.L.R. 840; [1954] 2 All E.R. 193.
[5] [1904] 2 K.B. 336; 20 T.L.R. 464.
[6] [1899] A.C. 143; 15 T.L.R. 266.
[7] [1906] A.C. 325; 22 T.L.R. 548.
[8] (1861) 12 C.B.N.S. 152.

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Section 139 provides that: "Where in a factory the owner or "hirer of a machine or implement moved by mechanical power "is some person other than the occupier of the factory, the "owner or hirer shall, so far as respects any offence under this "Act committed in relation to a person who is employed in or "about or in connection with that machine or implement, and "is in the employment or pay of the owner or hirer, be deemed "to be the occupier of the factory." The result of that section is that a man who hires out his machine and his employee to be used in a factory is put in the same position as if he himself occupied the factory in which his machine and employee work. Presumably the section was inserted to prevent the evasion of duties under the Act of 1937 by the employment in factories of machines and men hired from independent contractors, who would not apart from this section be bound by the provisions of the Act.

If the place where the accident occurred was part of a factory, the defendants are deemed to be occupiers of it and all the duties imposed by the Act have to be complied with. Admittedly, if the Act is applicable in this case, it produces an anomalous and artificial result. For, when the bulk of the work is being done on the rest of the airfield, the precautions imposed by the Factories Act are not necessary; but, when a small part of precisely similar work comes within a certain distance of hangar No. 6, those precautions have to be observed.

Among the duties laid down by the Act, section 49 provides: "In the case of any such process as may be specified by regula- "tions of the Secretary of State, being a process which involves "a special risk of injury to the eyes from particles or fragments "thrown off in the course of the process, suitable goggles or "effective screens shall, in accordance with any directions given "by the regulations, be provided to protect the eyes of the "persons employed in the process." The Protection of Eyes Regulations, 1938, apply section 49 to certain scheduled processes, one of which is "Breaking or dressing of stone concrete "or slag." Therefore if the place of the accident was part of a factory it seems clear that the Protection of Eyes Regulations apply section 49 to the work that was being done by the defendants at that place.

The defendants, however, contend that the place of the accident was not within the close, curtilage or precincts of the factory. Alternatively, they argue that the provisions of section 151 (6) apply to the circumstances of this case and thereby the place is deemed not to form part of the factory, although it would otherwise do so. [His Lordship read section 151 (6) and continued:] The place of the accident would clearly not otherwise be a factory and was not a separate factory.

The defendants further argue that the plaintiff was not within section 49 since he was not employed in the process of breaking concrete but was a ganger supervising an operation, part of which

was the process of breaking concrete. On the view that we have formed it is not necessary to decide that question. The first question is whether the place of the accident was within the close, curtilage or precincts of hangar No. 6.

The defendants contend that the apron was merely a part of the continuous and vast stretches of concrete that ran around and about the airfield. It had, of course, to be used by the company to bring their aeroplanes into and out of the hangar, but they had no exclusive occupation and their licence to use it was, they argue, in the nature of a right of way. The portion of concrete that adjoined the hangar did not, it is said, by mere proximity or by the fact that aircraft were taken there for testing become part of the close, curtilage or precincts of the hangar. These contentions were accepted by the judge. While we appreciate the force of the arguments which weighed with him, we feel unable to come to the same conclusion, for the following reasons.

The annual payment of licence fees according to the licence "includes for the apron now within the security fence," and if the western apron is used there are to be extra charges. The company are therefore receiving and paying for special rights of use in respect of "the apron now within the security fence." The company were clearly intended to have a right of way to and fro over so much of the main area of concrete as was necessary to bring material to the factory, but they have a specified right to the apron over and above any right of way. That apron is regarded as something separate and apart from the main run of concrete further from the hangar and its use is expressly mentioned as included in the annual payment. The security fence is set there to give the company privacy from unauthorised persons. Moreover, the security fence, though on occasion removable, is regarded as of sufficient importance and permanence to justify the insertion of a term that the company must pay for the construction of any new road round it, if that were made necessary by the existence of the fence. It is true that the form of the company's occupation is described as a licence, and no doubt the Air Ministry always reserve to themselves full rights as an owner who has granted a mere licence. But the normal meaning and common sense of the agreement seems to us to be that the company are to use and enjoy the privacy of the apron for their own purposes of testing with a right to exclude unauthorised persons.

Neither side relied on any dictionary for the meaning of the words "close," "curtilage" or "precincts," or on any case defining those words with precision. It was conceded that the words "close" and "precincts" import the notion of a boundary surrounding an enclosure, but that the boundary might be a line or notional surround. The first meaning of "precinct" given in the Shorter Oxford Dictionary is: "The "space enclosed by the walls or other boundaries of a particular

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" place or building or by an imaginary line drawn around it, " especially the ground immediately surrounding a religious " house or place of worship." The word can also be used to mean " the environs." With all respect to the judge's contrary opinion, we think that this apron was within the close, curtilage or precincts of the hangar and that the position of the fence at the time when the licence was given (whether thereafter it was in situ or temporarily removed) must be regarded as the limit of the close, curtilage or precinct.

One must next consider whether the place in question, although it would otherwise be within the precincts of a factory, is by virtue of section 151 (6) deemed not to form part of the factory.

In order to satisfy the requirements of section 151 (6) the place where the concrete was being broken must be shown to be " a place solely used for some purpose other than the processes " used in the factory." That question must be largely a question of fact and degree. The judge did not make any finding on it, since on the view that he took it was unnecessary. It was therefore contended by the plaintiff that there should be a new trial on this issue. But in our opinion a new trial is unnecessary since the facts on which the point has to be decided sufficiently emerge and are not really in dispute.

The facts are these. In order not to interfere with access to and from the hangar the work was done in pre-arranged strips. The aeroplanes obviously could not move in or out over a part where the concrete was being broken or a part where it was being relaid. The whole of the east end of the hangar could be opened by sliding doors. There was a central girder with two sliding doors on each side of it. The defendants worked on areas that left a lane of access to and from each half of the hangar: that is to say, opposite each half of the whole eastern side of the hangar there would be a strip that was being interfered with by the defendants' work opposite one sliding door and a strip that was fit to carry aircraft opposite the other sliding door. Thus the place where the concrete was being broken by the defendants was being used solely for some purpose other than assembling or testing aircraft. For no aircraft could go on to it for any purpose.

But Mr. Platts-Mills contends that the words " the processes " carried on in the factory " include the incidental and necessary processes of repairing machinery and that they also include the repair of the apron as incidental to the processes. He relies on *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*,[1] a case in this court, where it was held that a place to which machines in a factory were taken for repair and testing was not " used for some " purpose other than the processes used in the factory." But that case is no guide in the matter before us. The testing and

[1] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; sub nom. *Thorogood* v. *Van Den Berghs and Jurgens Ltd.* [1951] 1 All E.R. 682.

repair of machines is a normal incident of factory life, and a repairs department of a factory is one of its ordinary adjuncts.

On the other side, Mr. Jukes relied on *Cox* v. *Cutler & Sons Ltd.*,[2] also a case in this court, where a clear analysis of the subsection was given by Wynn-Parry J., in which he pointed out that the "place" under section 151 (6) may be any part of the factory area as defined by section 151 (1), and concluded[3]: "At the time of the accident the western land was being used "for the purpose of reconstructing the gasholder, and, in my "judgment, that was a purpose within the meaning of sub-"section (6)." That judgment was cited and approved by Singleton L.J. in *Street* v. *British Electricity Authority*.[4] In that case, a part of a factory was already operating but part was still under construction, and the latter part was held to be a place within subsection (6). In each case it must be a question of degree whether a part of a factory is a place within subsection (6).

In *Cox* v. *Cutler & Sons Ltd.*[5] the reconstruction of the part in question was more radical than in the case before us, but, following the reasoning of that case, we think that the place of the accident in this case was within section 151 (6). The place where concrete was being broken up was a place clearly set apart and devoted by arrangement to the separate purpose of breaking up and relaying concrete. The renewal of the apron was not an incident of the processes of aeroplane assembly and testing. It is true that one could foresee that at some time or another the concrete apron would wear out and have to be relaid. One could also foresee that the hangar itself would at some time or another wear out and have to be rebuilt. But such radical replacements are not, normally speaking, recurring matters. They cannot be said to be incidental to the processes of the factory.

Therefore, in our judgment, section 151 (6) applies to the place of the accident and excludes it from the operation of the Factories Act, 1937.

The appeal therefore fails.

Appeal dismissed.

Solicitors: *Pearce & Sons; J. F. Coules & Co.*

[2] [1948] 2 All E.R. 665.
[3] Ibid. 673.
[4] [1952] 2 Q.B. 399, 410; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[5] [1948] 2 All E.R. 665.

[CHANCERY DIVISION.]

1959
April 29;
May 7.

Wynn-Parry J.

In re APEX FILM DISTRIBUTORS LTD.

[No. 00179 of 1954.]

Company—Winding up—Contributories—Call on contributories—Debts proved in the liquidation purchased by contributories after call—Whether liability on call reduced pro tanto by purchase of debts—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 212, 214.

In the compulsory winding up of a company the liquidator made a call on contributories who had transferred their shares within the year preceding the winding up. After the call the contributories purchased certain debts of the company which had been proved in the liquidation and which were owing before they had transferred their shares. On a motion by the contributories for a declaration that their liability on call was reduced by the amount of the debts thus purchased:—

Held, that, on the true construction of section 214 of the Companies Act, 1948,[1] the debt of the contributories became payable on call and could only be extinguished by payment; and that their liability was not reduced by the purchase after call of debts owed to the company before the transfer of their shares.

In re Blakely Ordnance Co., Brett's Case (1871) L.R. 6 Ch.App. 800 and (1873) L.R. 8 Ch.App. 800 considered.

In re Greening & Co., Marsh's Case (1871) L.R. 13 Eq. 388 not followed.

MOTION.

By this motion in the liquidation of a company, Apex Film Distributors Ltd., eight of the B contributories (members who had transferred their shares within the year before the winding-up order) sought a declaration that calls made on them by the liquidator were reduced in the circumstances set out below.

The following statement of facts is taken from the judgment: By an order dated March 23, 1954, the company was ordered to be wound up compulsorily on a petition presented on February 26, 1954. At all material times the issued capital of the company consisted of 42,000 redeemable preference shares of £1 each, on which 10s. per share had been paid; 42,000 preferred ordinary shares of 5s. each, on which 2s. 6d. per share had been paid; and 150 deferred shares of £1 each, all of which were fully paid up.

On July 23, 1953, the holders of 41,600 of the redeemable preference shares and 41,600 of the preferred ordinary shares

[1] Companies Act, 1948, s. 212: "(1) In the event of a company "being wound up, every present and "past member shall be liable to con- "tribute to the assets of the company "to an amount sufficient for payment "of its debts and liabilities, and the "costs, charges and expenses of the "winding up, and for the adjustment "of the rights of the contributories "among themselves. . . ."

S. 214: "The liability of a con- "tributory shall create a debt (in "England of the nature of a "specialty) accruing due from him at "the time when his liability com- "menced, but payable at the times "when calls are made for enforcing "the liability."

transferred their respective holdings of these shares to one Arnold Williams, who held the balance of each class of share. At the commencement of the winding up Williams, therefore, was the only A contributory, the B contributories being the transferors of the shares transferred on July 23, 1953, as above mentioned.

On December 14, 1955, the committee of inspection resolved that a call of 10s. per share on the redeemable preference shares and a call of 2s. 6d. per share on the preferred ordinary shares should be made by the liquidator on all the contributories of the company. On December 20, 1955, the liquidator gave notice to Williams to pay in respect of the call £26,250 on or before January 3, 1956. At the same time he sent a letter to each of the B contributories, enclosing a copy of the resolution of the committee of inspection and intimating that if the A contributory should fail to pay the call or should only pay part of it, a claim would be made accordingly on each of the B contributories.

In the event it proved impossible to obtain any contribution from the A contributory, and on May 3, 1957, the liquidator made calls on the B contributories according to their respective holdings, requiring payment to be made on or before May 18, 1957. On June 21, 1957, the liquidator issued a summons for a four-day order against the B contributories in respect of the calls made on them. In the course of preparing the evidence the liquidator reduced from £24,289 1s. 9d. to £22,472 17s. 8d. the amount of the debts, namely, "the old debts" incurred by the company prior to July 23, 1953.

On February 25, 1959, the registrar made an order for a total payment by the B contributories of £22,504, allowing a margin of just over £1,000 in respect of the costs of the liquidation. This order, however, was not drawn up.

Following that order the debts of two creditors who had proved in the liquidation and which were owed to the company before July 23, 1953 (when the B contributories transferred their shares), and amounted to £13,853 18s. 11d., were purchased by eight of the B contributories and transferred into the name of Film Finances Ltd. That company, by a deed dated March 2, 1959, released the Apex company, the liquidator and the contributories from all liability for those debts. If that release were effective for the purpose for which it was executed, the result would be that the liability of the B contributories would be pro tanto reduced.

On March 18, 1959, an application by eight of the B contributories was made to the registrar, asking him to recall his order of February 25, 1959, and to reduce the amounts to be paid by the B contributories by taking into account the deed of release. The registrar refused that application, and on March 18, 1959, made an order, which was duly completed, on the B contributories for the payment of calls calculated to produce a total of £23,504. The matter now came before the court on a motion

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for a declaration that the liability of the B contributories to contribute had been reduced by £13,853 18s. 11d. by the release of the two debts mentioned above.

J. G. Strangman Q.C. and *G. B. H. Dillon* for the applicants, the eight B contributories who had purchased debts proved in the liquidation.

Kenneth Mackinnon Q.C. and *Michael Wheeler* for the first respondent, the liquidator of the company.

M. J. Roth for the remaining respondents, B contributories who had not purchased debts.

The cases cited in argument are all referred to in the judgment.

Cur. adv. vult.

May 7. WYNN-PARRY J. read the following judgment which, after stating the facts as set out above, continued as follows: This case raises an interesting point, particularly when the state of the authorities is appreciated. It is conceded on behalf of the liquidator that such a transaction as took place in this case can be effective to reduce the liability of B contributories, provided that it is done in time. The contention on behalf of the liquidator is that if such transaction is to be effective it must be done before any call is made on the B contributories. On the other hand, the case for the contributories is that the transaction can be performed effectively at any time during the liquidation, or at any rate prior to distribution.

The first authority to which I was referred was *In re Accidental and Marine Insurance Corporation*,[1] in which Giffard L.J., affirming the decision of Stuart V.-C., held that in the winding up of a limited company the contributions of B contributories ought not to be divided exclusively among the old creditors in respect of whose debts they are made contributories, but form part of the general assets of the company for the payment of all the creditors.

In the course of his judgment Giffard L.J. said[2]: "On the "other hand, supposing there was any such right as is now "insisted upon by the appellants, the difficulties that would "arise would be endless, because each creditor, according to the "date at which the members of the company might happen to "retire, would have separate and distinct rights. That alone "would be reason enough for me to say that, unless you find "something in the Act of Parliament which clearly, in the event "of a winding up, gives that right to a creditor, no such right "exists. Looking at the 98th and 133rd sections of the Act [the "Companies Act, 1862], and seeing that the 38th section has "reference only to the liability of members, that partnerships

[1] (1870) L.R. 5 Ch.App. 428. [2] Ibid. 432.

" of this description, which may be more properly termed quasi " corporations, are entirely artificial in their construction, and " that, in point of fact, the past members' liability is entirely an " artificial liability, and introduced much more for the purpose " of preventing persons quite at the last moment leaving a " company, and thereby getting rid of their liability, than for " any other purpose, I think I should be putting a construction " on the Act which was not intended, which the words would " not warrant, which would lead to great inconvenience, and " which would be contrary to the whole spirit of the Act, if I " were to decide in favour of the appellants."

In *In re Blakely Ordnance Co., Brett's Case* [3] (to which I will refer as the first *Brett* case [3]) it was held that where a B contributory bought up and caused to be released to the company all the debts which were due by the company when he ceased to be a shareholder and which remained due at the commencement of the winding up, then, notwithstanding that the money raisable from the A contributories would be insufficient to pay the debts of the company, no call could be made on the B contributory.

Lord Hatherley L.C. made it clear in his judgment that he did not approve of the judgment of Giffard L.J. in *In re Accidental and Marine Insurance Corporation.*[4] At the start of his judgment Lord Hatherley said [5]: " It was most desirable " that this case should be fully argued, regard being had to the " decision of Giffard L.J. in the matter of the *Accidental and* " *Marine Insurance Corporation.*[6] The point in that case was " not exactly the same as that which we have now before us, " but the observations made by the Lord Justice in his judgment, " and the reasoning on which he relied, would be such as certainly " to render a decision in this case, affirming the decision of the " Master of the Rolls, inconsistent with that of Giffard L.J." With all respect to Lord Hatherley, I find difficulty in seeing how the decision in *In re Accidental and Marine Insurance Corporation* [6] can be said to be relevant to the decision of the question before the court in the first *Brett* case.[7]

Lord Hatherley posed the question thus [8]: " The question " is, whether the call can be enforced against Mr. Brett, a " shareholder, there being, at the time the call was made, no " debt which had accrued antecedently to the time of his ceasing " to be such shareholder."

Later in his judgment he said [9]: " One state of things must " arise, of course, upon any construction of this subsection of " the 38th section of the Act of 1862. It cannot be contended " now, that if at the date of the winding up there was no old " debt existing, the past member would be liable. What " difference can it make to the company that the debt has " afterwards ceased to exist? We have in vain asked for an

[3] (1871) L.R. 6 Ch.App. 800.
[4] L.R. 5 Ch.App. 428, 432.
[5] L.R. 6 Ch.App. 800, 802.
[6] L.R. 5 Ch.App. 428.
[7] L.R. 6 Ch.App. 800.
[8] Ibid. 803.
[9] Ibid. 805.

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" answer calculated to satisfy the demands of the case. Is it " reasonable that the partners in the company, or the creditors " of the company, should have no rights whatsoever against " past members in the event of all the old debts being cleared " off at the time of the winding up, but that if there should " happen to be an old debt of £1,000 at the date of the winding " up, they should have such a right that it would be impossible " before the call was made for the shareholders who are so " liable for this £1,000 among themselves to club together the " sums it might be necessary to raise, and pay off that liability? " Who can be reasonably said to be wronged by those persons " paying off the debt which they have contracted, liberating the " company from the debt altogether, and discharging themselves " from all further trouble or concern with the company? They " would, in fact, be doing more than they were obliged to do, " because they had a right to call on all the existing members " of the company to help in paying off all the debts."

As I read that judgment, it proceeds on the basis that the B contributory has a right to buy and release a debt before a call is made on him. It is true that in that case the debt was released before the call was made and it was urged on behalf of the respondents that, that being so, the court did not need to consider whether a release effected after a call had been made would be effective. Nevertheless the ratio decidendi of that case is that the release is effective, if it is effected prior to a call being made.

The next relevant authority in point of time is *Webb* v. *Whiffin*.[10] In this case the House of Lords affirmed the decision of Giffard L.J. in *In re Accidental and Marine Insurance Corporation*,[11] but a number of their Lordships cast doubt on the correctness of the decision in the first *Brett* case.[12] It is to that extent only that it is relevant to refer to *Webb* v. *Whiffin*[13] for the purposes of this judgment. Views were expressed that the liability of B contributories crystallised at the commencement of the winding up and no subsequent dealing with debts in respect of which they were placed on the B list could affect the quantum of their liability.

Following the delivery of the opinions in *Webb* v. *Whiffin*,[13] the first *Brett* case[14] was reheard on a petition of rehearing [*In re Blakely Ordnance Co., Brett's* case[15]] and I will refer to the rehearing as the second *Brett* case.[15] Lord Selborne L.C. posed the relevant question thus[16]: " whether calls can be made " upon past members in respect of any debt or liability of the " company contracted before they ceased to be members, which " has been released or extinguished between the date of the " winding-up order and the time of making such calls, and which,

[10] (1872) L.R. 5 H.L. 711.
[11] L.R. 5 Ch.App. 428.
[12] L.R. 6 Ch.App. 800.
[13] L.R. 5 H.L. 711.
[14] L.R. 6 Ch.App. 800.
[15] (1873) L.R. 8 Ch.App. 800.
[16] Ibid. 807.

" therefore, cannot participate in any dividend which may be " made out of the proceeds of such calls."

He continued [16]: " Neither of these questions came before " the House of Lords for decision in *Webb* v. *Whiffin*,[17] but " observations bearing more or less upon them were made by " four of the noble and learned Lords who then advised the " House, and some variety of opinion may be traced in those " observations. Certain passages in the speeches of Lord Chelms- " ford and Lord Cairns have been relied upon before us, as " favouring the view, that the measure of the liability of a past " member under the 38th section [of the Companies Act, 1862], " so far as it depends upon the existence of debts of the company " contracted before he ceased to be a member, ought to be " determined solely by the amount of such debts as they stood " at the commencement of the winding up, without reference to " any subsequent event by which that amount may have been " reduced or even wholly extinguished."

Later there occurs this very relevant passage [18]: " To swell " the amount of that indebtedness, by the fictitious process of " treating as then due and unpaid any part of the original amount " of those debts and liabilities which might have been previously " satisfied by dividends out of the property in hand, or by the " contributions of present members, or any part thereof which " might have been previously released or extinguished—to do this " (as it necessarily would be done in such a case as *Brett's* [19]) " for the sole purpose of increasing the dividends of those other " creditors whose debts were contracted after these past members " had left the company, would, as it seems to me, be a violation " both of the letter and of the spirit of the second subsection. " It would be introducing, for the benefit of the subsequent " creditors and to the prejudice of the past members, that very " principle of marshalling which (when proposed to be introduced " for the benefit of the prior creditors) was excluded by the " decision of the House of Lords in *Webb* v. *Whiffin*.[20] In this " section, and in sections 74, 75, ' liability to contribute to the " ' assets of the company in the event of the same being wound " ' up ' appears to me to be merely another expression for " liability to calls under section 102; and those calls are to be " made, to the extent of the liability of the several contributories, " for payment of all or any sums which the court deems necessary " to satisfy the debts and liabilities of the company—that is to " say, in the case of past members—debts and liabilities con- " tracted before they ceased to be members, and still constitu- " ting part of the indebtedness of the company when the calls " are made. This, with such costs and adjustment moneys (if " any) as may be properly incident thereto or consequent thereon, " is, in my opinion, the extreme measure and limit of the liability

[16] L.R. 8 Ch.App. 800, 807.
[17] L.R. 5 H.L. 711.
[18] L.R. 8 Ch.App. 809.
[19] Ibid. 801.
[20] L.R. 5 H.L. 711.

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" of past members to contribute to the assets of the company " under section 38. To enlarge that limit, because the fund, " when contributed, will be divisible pro rata among all the " creditors of the company, at whatever time their debts may " have been contracted, would, as it seems to me, be at least as " much against the express words and the real meaning of section " 38 (2), as the appropriation of the fund contributed by past " members to the payment of the particular class of creditors in " respect of whose debts they are called upon to contribute could " possibly be against the letter or spirit of sections 98 and 133.

" The time when the call is made must necessarily be looked " to, and the payments of present members after the commence- " ment of the winding up must necessarily be taken into account, " for the purpose of giving effect (in the case of a limited com- " pany) to another material qualification of the liability of past " members, contained in the 38th section, viz.: that ' no con- " ' tribution shall be required from any member exceeding the " ' amount, if any, unpaid on the shares in respect of which " ' he is liable as a present or past member.' Why, then, are " not the payments made after the commencement of the winding " up equally to be regarded, when the question has reference to " the amount of the debts and liabilities of the company, in " respect of which a past member is required to contribute? "

Pausing there, it is, I think, clear that Lord Selborne is considering only the case of a release of a debt prior to a call being made on the B contributory concerned. He is not envisaging a release at any later stage of the liquidation.

Then follows a passage on which Mr. Strangman for the applicants strongly relied.[21] " Let it be supposed, that, after " a winding-up order, all the debts due when the latest transfer " by a past member was executed were absolutely released by " the creditors, or voluntarily paid off by a stranger in exonera- " tion of the whole company, before the payment of a dividend " by the company upon any part of them. How could a call " on past members ' in respect of ' these debts—a call the pro- " ceeds of which would create a fund for division exclusively " among the subsequent creditors—be justified under such cir- " cumstances by the statute? What would be true in that " case of all the prior debts seems to be equally true of any " prior debt, or any part of a prior debt, in any lawful manner " released, paid off, or extinguished; and, as the property in " hand at the date of the winding up, and the contributions of " all the present members, were primarily and justly liable to " pay all the debts of the company rateably and equally, as far " as they would extend, before any liability of past members " could arise, I am unable to perceive any sound distinction " between the effect of a part payment so made, and a reduc- " tion to the same extent of the same debts by any other means. "

[21] L.R. 8 Ch.App. 811.

I am unable to see how that passage helps the applicants' case. True, Lord Selborne uses the phrase, "before the payment of a dividend by the company," but, having stated the hypothetical example, he then poses the question,[22] "How could a call on past members 'in respect of' these debts—a call the proceeds of which would create a fund for division exclusively among the subsequent creditors—be justified under such circumstances by the statute?"

It appears to me that the inescapable effect of that passage is to demonstrate that Lord Selborne is proceeding on the basis that the release precedes the call. I conclude, therefore, upon an analysis of both the *Brett* cases[23] that they are authority only for the proposition that a release of a debt in respect of which a B contributory is liable to be placed on the B list will be effective if it is brought about before a call is made on that B contributory.

In between the hearings of the first *Brett* case[24] and the second *Brett* case,[25] *In re Greening & Co., Marsh's Case*,[26] came before Bacon V.-C. The headnote is as follows[26]: "Past members of a company settled upon the B list of contributories having bought up the debts to which they were liable, *held* liable to pay the costs of settling the B list, unless the liquidator had money in his hands sufficient to pay them."

The statement of facts shows that the debts in question were bought up after the call had been made on the B contributories concerned. In the report of the argument of Mr. Amphlett, this appears[27]: "As soon as the debts existing when the B contributories retired have been satisfied, and it is immaterial whether payment has been made before or after the call—*Brett's* case,[28] overruling the judgment of Giffard L.J. in *In re Accidental and Marine Insurance Corporation*[29]—their liability ceases." Although, therefore, the question before the court was really one relating to costs, it cannot be said that the point was not mentioned that the release could be effective even if made after call.

At the end of his judgment Bacon V.-C. said[30]: "Nor can I give the B contributory any costs, and for this reason, that although he has since satisfied the court that he is under no obligation to pay any money in respect of debts for which he was liable, he has not until lately—the present moment almost—acquitted himself of that obligation. He had a right to reduce the amount of call; he had a right to pay off the debts, as he has done, as effectually as in *Brett's* case.[31] But I can give him no costs of that proceeding, because his acquitting

[22] L.R. 8 Ch.App. 811.
[23] L.R. 6 Ch.App. 800; L.R. 8 Ch.App. 800.
[24] L.R. 6 Ch.App. 800.
[25] L.R. 8 Ch.App. 800.
[26] (1871) L.R. 13 Eq. 388.
[27] Ibid. 389.
[28] L.R. 6 Ch.App. 800.
[29] L.R. 5 Ch.App. 428.
[30] L.R. 13 Eq. 392.
[31] L.R. 6 Ch.App. 800.

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" himself of the obligation came too late in the day. I give no " costs against him."

It is clear from that passage that Bacon V.-C., for the purpose of coming to a decision as to the incidence of costs, proceeded on the basis that a buying up of an old debt and a release in respect thereof was effective even if made after call. If I can properly treat *Marsh's* case [32] as an authority on the point before me, then I apprehend that I ought to treat myself as bound by it, in which event the case would be concluded in favour of the applicants.

On consideration, however, I do not think that I should follow that course. There does not appear to have been any substantial debate on the question whether a release after call is effective. It appears really to have been assumed that that was the case. Here I have the question directly raised and I think that I ought to examine it and express by own view on it.

I think that the answer turns on two sections of the Companies Act, 1948, namely, sections 212 and 214. Section 212 provides how the liability of a contributory is to be measured. Thus, the first duty of the liquidator in the case of B contributories is to quantify their liability by applying the relevant provisions of section 212. No doubt an element of estimation will enter into his calculation, but that does not affect the matter, because any necessary adjustment can be made later: see *In re City of London Insurance Co. Ltd.*[33] When the liquidator has quantified the liability of the B contributories he makes a call on them, assuming of course that default is made in whole or in part by the A contributories.

By section 214 the liability of the contributory, which came into existence when he first became a member, creates a debt which in England is in the nature of a specialty. That debt becomes payable when a call is made. That result is brought about by the express terms of section 214. It follows, to my mind, that once that debt becomes payable the only way in which it can be extinguished is by payment, and that once the debt becomes payable it is not open to a B contributory to reduce his liability by buying up any of the debts owed by the company before he transferred his shares, because the result of so doing would be to reduce the amount of the debt which the statute clearly says that he owes.

On this reasoning there is no room for extending the rule laid down in the two *Brett* cases.[34] If it were to be extended, I can foresee grave administrative difficulties arising in liquidations where B contributories are involved. It is true that my conclusion is contrary to the view accepted by Bacon V.-C. in *Marsh's* case,[35] but for the reasons I have given I have felt it

[32] L.R. 13 Eq. 388.
[33] [1932] 1 Ch. 226; 48 T.L.R. 169.
[34] L.R. 6 Ch.App. 800; L.R. 8 Ch. App. 800.
[35] L.R. 13 Eq. 388.

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necessary to come to my own conclusion on the matter and I feel free to give effect to that conclusion.

In the result the motion will be dismissed.

I will make a declaration that the liability of the B contributories of the company has not been reduced by £13,853 18s. 11d. by the release of the debt of £12,000 for which London Independent Producers proved as a creditor in the liquidation of the company nor by the release of the debt of £1,853 18s. 11d. for which A.C.T. Films Ltd. proved as a creditor in the liquidation of the company.

Declaration accordingly.

Solicitors: *Allen & Overy; Linklaters & Paines; Stanley Jarrett & Co.*

I. G. R. M.

[COURT OF APPEAL.]

GREEN *v.* RUSSELL. McCARTHY (THIRD PARTY).

[1956 G. No. 97.]

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April 22, 23, 24; *May* 14.

Hodson, Romer and Pearce L.JJ.

Fatal Accidents Acts—Damages—Insurance—Payment to employer under personal accident group insurance policy—Employer "absolute "owner" of policy—Employer's payment to deceased employee's dependant—Whether payment to be taken into account in assessing damages—Whether deceased employee had legal or equitable interest in policy moneys—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

Insurance—Interest of third party in policy—Life or accident insurance—Accident resulting in death to employee—Policy contracted by employer—Whether employee's estate has legal or equitable interest in policy moneys.

Contract—Parties—Enforcement by third party.

By section 1 of the Fatal Accidents (Damages) Act, 1908: "In "assessing damages in any action, . . . under the Fatal Accidents "Act, 1846, . . . there shall not be taken into account any sum paid "or payable on the death of the deceased under any contract of "assurance or insurance. . . ."

In 1951 an employer took out a personal accident group insurance policy which, after reciting "Whereas the insured is desirous of "securing payment of benefits as hereinafter set forth to any insured "person," provided that "if . . . any insured person shall sustain "bodily injury" resulting in death, the insurance company should pay a specified sum, and that "the company shall be entitled to "treat the insured as the absolute owner of this policy and shall "not be bound to recognise any equitable or other claim to or in "the policy and the receipt of the insured . . . alone shall be an "effectual discharge." The policy described the employer as the "insured" and named as the "insured persons" certain of his employees. Those employees knew of the existence of the policy

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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but it formed no part of the terms of their employment, nor did the employer undertake any obligation to maintain or renew the policy.

In 1955 one of the employees named as an "insured person" died in a fire which occurred on the employer's premises. The employee's mother brought an action under the Fatal Accidents Acts in which liability was admitted and damages were agreed at £1,300. On the question whether a sum of £1,000 paid under the policy by the insurance company in respect of the death to the employee's solicitors and paid or about to be paid by them to the employee's mother was a benefit arising out of the death which should be taken into account and deducted from the agreed damages:—

Held, (1) that the deceased employee had no right at law to the policy moneys, since he was not a party to the contract of insurance and therefore could not sue on it.

Dunlop Pneumatic Tyre Co. Ltd. v. *Selfridge & Co. Ltd.* [1915] A.C. 847; 31 T.L.R. 399; and dictum of Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70, 79; (1933) 49 T.L.R. 90 applied.

Dicta of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, 513, and in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [1954] 1 Q.B. 250, 269 not followed.

(2) That the mere intention to provide benefits was insufficient to create a trust, and, accordingly, the deceased employee did not have any equitable interest in the policy moneys.

In re Schebsman [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768 applied.

(3) (*Per* Hodson and Romer L.JJ.) that although the view was not accepted that the expression "paid or payable on the death "of the deceased under any contract of . . . insurance" in the Act of 1908, was descriptive of the sum received by the plaintiff, with the result that once a sum falling within that description was paid it was irrevocably stamped as a section 1 payment, notwithstanding that it was neither paid nor payable to the deceased employee or his estate, yet the sum still fell within the provisions of the Act because the Act contemplated and extended to payments contractually made to or on behalf of or for the benefit of employees or dependants.

(*Per* Pearce L.J.) That the money was paid "under" the terms of the policy because (a) it was a payment envisaged by the policy, and (b) the expression "paid or payable on the death of "the deceased under any contract of . . . insurance" was descriptive of the sum itself and did not involve the corollary that the sum must be paid or payable to the deceased under the contract of insurance.

Bowskill v. *Dawson* (*No. 2*) [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649 considered.

(4) That, accordingly, the money did not fall to be deducted from the agreed damages.

Decision of Ashworth J. [1959] 1 Q.B. 28; [1958] 3 W.L.R. 371; [1958] 3 All E.R. 54 affirmed.

APPEAL from Ashworth J.[1]

The plaintiff, Florence Green, a widow, suing on her own behalf and as the administratrix of the estate of her son, Alfred Edward Green, claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, in respect of the death of her son on June 6, 1955,

[1] [1959] 1 Q.B. 28; [1958] 3 W.L.R. 371; [1958] 3 All E.R. 54.

in a fire which occurred in the premises where he was employed, against the defendant, Sarah Anne Russell, widow, the administratrix of the estate of his employer, Arthur Henry Russell, who also died in the fire.

The defendant admitted liability in the action and took third party proceedings which were settled out of court. Damages were agreed at £1,300, subject to the issue, which was the only issue before the court, of whether £1,000 should be deducted from the agreed figure of damages. The sum of £1,000 represented a payment which had been made by the Yorkshire Insurance Co. Ltd. to the defendant, who then handed the money over to the plaintiff.

The money had become payable under the terms of a personal accident group policy issued by the insurance company in 1951 to Mr. Russell. The policy, after reciting that "whereas "the insured is desirous of securing payment of benefits as here-"inafter set forth to any insured person in the event of his "sustaining accidental bodily injury as hereinafter provided . . . "and has paid or agreed to pay the premium as consideration for "such insurance . . ." provided that "if at any time during the "currency of this policy any insured person shall sustain bodily "injury . . . and such injury shall . . . section A—result in death "the company shall pay the sum insured stated in section A in "the schedule."

By condition 5 of the policy: "The company shall be entitled "to treat the insured as the absolute owner of this policy and "shall not be bound to recognise any equitable or other claim to "or interest in the policy and the receipt of the insured or the "insured's legal representative alone shall be an effectual dis-"charge." By condition 8: "The due observance and fulfilment "of the terms conditions and endorsements of the policy in so far "as they relate to anything done or complied with by the insured "or any insured person . . . shall be conditions precedent to any "liability of the company to make any payment under this "policy."

The schedule to the policy set out as "insured Arthur H. "Russell," while under the heading "insured persons" there were listed the names of certain of the employees, among them that of the plaintiff's son, and the sum set out opposite his name in section A was £1,000. Although the existence of the policy was known to the employees named therein in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed, that did not affect their attitude to their employment so as to cause them, in consideration of those possible benefits, to refrain from giving notice or asking for an increase in salary, nor did the employer undertake an obligation to maintain or renew the policy.

The issue as to whether the £1,000 should be deducted from the agreed damages depended on whether it was "paid or pay-"able" on the death of the son "under any contract of

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" assurance or insurance " within the meaning of section 1 of the Fatal Accidents (Damages) Act, 1908.[2]

The trial judge held that the words " paid or payable . . . " under any contract of assurance or insurance " were descriptive of the sum in question and did not involve it being paid pursuant to the contract. Accordingly, the sum did not fall to be deducted from the agreed damages, and he gave judgment for the plaintiff for £1,300.

The defendant appealed.

M. Dunbar Van Oss for the defendant.

Marven Everett Q.C. and *John Ritchie* for the plaintiff.

The following cases were cited in argument, in addition to those referred to in the judgments: *Peacock* v. *Amusement Equipment Co. Ltd.*[3]; *Smith* v. *British European Airways*[4]; *O'Neill* v. *S. J. Smith & Co. (Bidford) Ltd.*[5]; *Davies* v. *Powell Duffryn Collieries Ltd.*[6]; *Prudential Staff Union* v. *Hall*[7]; *Woods* v. *Woods*[8]; *Tomlinson* v. *Gill*[9]; *Tweddle* v. *Atkinson*[10]; *Chelsea and Walham Green Building Society* v. *Armstrong*[11]; *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[12]; *In re Williams*[13]; *Dutton* v. *Poole.*[14]

Cur. adv. vult.

HODSON L.J. I have had the advantage of reading the judgment which ROMER L.J. is about to deliver. I agree entirely with that judgment and the reasons which he will give. I only wish to emphasise that those reasons are applicable to this particular case and I do not wish to be taken as going further than ROMER L.J. in answering the question left open by this court in *Bowskill* v. *Dawson (No. 2).*[1]

ROMER L.J. This is an appeal from an order of Ashworth J., under which the plaintiff was awarded the sum of £1,300 against the defendant in an action brought under the Fatal Accidents Acts, 1846–1908. The plaintiff sued as the administratrix of her

[2] Fatal Accidents (Damages) Act, 1908, s. 1: " In assessing damages " in any action, whether commenced " before or after the passing of this " Act, under the Fatal Accidents Act, " 1846, as amended by any subse- " quent enactment, there shall not be " taken into account any sum paid or " payable on the death of the deceased " under any contract of assurance or " insurance, whether made before or " after the passing of this Act."

[3] [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689.

[4] [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737.

[5] [1957] 1 W.L.R. 1204; [1957] 3 All E.R. 255.

[6] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[7] [1947] K.B. 685; 63 T.L.R. 392.

[8] (1836) 1 My. & C. 401.

[9] (1756) Amb. 330.

[10] 1 B. & S. 393.

[11] [1951] Ch. 853; [1951] 2 All E.R. 250.

[12] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[13] [1897] 2 Ch. 12.

[14] (1678) 1 Freem.K.B. 471; 1 Vent. 332.

[1] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

son, Alfred Edward Green, who was, at the time of his death, employed as an assistant architect by Arthur Henry Russell, and the defendant is Mr. Russell's legal personal representative.

The facts are not in dispute. Mr. Russell was an architect and had office premises at 11, Duke Street, Bermondsey. He and Mr. Green and other employees of Mr. Russell worked at these premises. On June 6, 1955, there was a disastrous fire at the premises which caused the deaths of both Mr. Green and Mr. Russell. As a result of this the plaintiff started the present proceedings. The defendant admitted liability but took third party proceedings, which were settled out of court, and this court is not concerned with them. It was agreed between the plaintiff and the defendant that the sum to be awarded as damages to the plaintiff should be £1,300, but subject to an issue which was argued before the judge, and which is the subject of the present appeal.

The point arises in this way. In the year 1951, Mr. Russell took out a group accident insurance policy with the Yorkshire Insurance Co. Ltd., in respect of certain members of his staff, including Mr. Green. The accident which caused the death of Mr. Green was covered by the policy in the sum of £1,000, and following upon his death a claim for this amount arose and was met by the company. The sum was paid to the defendant as representing the estate of her son, who was "the insured" under the policy. The question is whether this sum of £1,000 (which has been or is in the course of being paid over by the defendant to the plaintiff) falls to be deducted from the agreed damages of £1,300 by virtue of the provisions of section 1 of the Fatal Accidents (Damages) Act, 1908. The judge held that the sum was not deductible, and it is against that decision that the defendant has appealed.

The judge arrived at certain findings of fact which are relevant to the issue now before us in certain of its aspects, and he expressed them in the following terms[2]: "It is to my mind "plain that the terms of their" (namely the employees named in the policy) "employment did not include any provision in "regard to the policy. There was nothing in those terms which "resembled the provisions contained in the booklet issued by "the employers in *Bowskill* v. *Dawson* (*No. 2*).[3] On the other "hand, I think that the existence of the policy was known to "Mr. Russell's employees in such a manner as to create in "their minds a reasonable expectation of benefit for themselves "or their dependants in the event of their being injured or "killed. I should perhaps add, in view of a point taken in the "course of the argument in reply to Mr. Van Oss, that I can "find nothing which would justify the inference that the possi-"bility of benefit under the policy affected the employees' atti-"tude in regard to their employment; there was nothing to show

[2] [1959] 1 Q.B. 28, 38; [1958] 3 W.L.R. 371; [1958] 3 All E.R. 54.

[3] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

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"that they refrained from giving notice or from asking for an "increase in salary in consideration of the benefits which come "to them from the policy, nor was there anything to show that "Mr. Russell undertook an obligation to maintain or renew the "policy."

These findings of the judge were not challenged before us by either side, and it follows from them, in my judgment, that the £1,000 now in question would clearly have to be brought into account by the plaintiff, as a benefit arising out of her son's death, against the loss which she has sustained by reason of his death unless she is able to rely on section 1 of the Fatal Accidents (Damages) Act, 1908: *Baker* v. *Dalgleish Steam Shipping Co.*[4]; *Jenner* v. *Allen West & Co. Ltd.*[5] [His Lordship read section 1 of the Act of 1908 and continued:]

As the result of this appeal depends, in my judgment, primarily upon the terms of the policy which Mr. Russell effected with the Yorkshire Insurance Co. Ltd., I will refer now to its provisions in some little detail. It is described as a personal accident group policy, and has a recital: "Whereas the insured "is desirous of securing payment of benefits as hereinafter set "forth to any insured person in the event of his sustaining "accidental bodily injury as hereinafter provided, and by a "proposal and declaration, which shall be the basis of this "contract and be deemed to be incorporated herein, has applied "to the company and has paid or agreed to pay the premium "as consideration for such insurance during the period of in-"surance or during any period for which the company may "accept payment for the renewal of this policy." Then the policy witnessed: "That subject to the terms of exceptions and "conditions contained herein and of any endorsement hereof if "at any time during the currency of this policy any insured "person shall sustain bodily injury caused by violent accidental "external and visible means and such injury shall as the direct "sole cause thereof and independently of all other causes within "three calendar months from the occurrence thereof: section "A:—Result in death the company shall pay the sum insured "stated against section A in the schedule. Section B:—Result "in the loss by physical severance of one or both hands or "one or both feet or the complete and irrecoverable loss of "sight of one or both eyes the company shall pay the sum "insured stated against section B in the said schedule. Section "C:—Totally disable the insured person from engaging in or "attending to his usual occupation but shall not entitle him to "the sum insured under section B the company shall pay for "such total disablement the sum insured per week stated against "section C in the said schedule. Section D:—Partially disable "the insured person from engaging in his usual occupation but "shall not entitled him to the sum insured under section B the

[4] [1922] 1 K.B. 361; 38 T.L.R. 245.

[5] [1959] 1 W.L.R. 554; [1959] 2 All E.R. 115.

" company shall pay for such partial disablement the sum in- " sured per week stated against section D in the said schedule." Then there follow a proviso and exceptions to which I need not refer.

Then certain conditions are stated. It says: " This policy " and the schedule shall be read together as one contract and " any word or expression to which a specific meaning has been " attached in any part of this policy or of the schedule shall " bear such specific meaning wherever it may appear." Then there follow eight conditions of which I need mention only condition 5 and condition 8. Condition 5: " The company shall " be entitled to treat the insured as the absolute owner of this " policy and shall not be bound to recognise any equitable or " other claim to or interest in the policy and the receipt of " the insured or the insured's legal representative alone shall " be an effectual discharge." Condition 8: " The due observance " and fulfilment of the terms conditions and endorsements of " the policy in so far as they relate to anything to be done or " complied with by the insured or any insured person and the " truth of the statements and answers in the said proposal shall " be conditions precedent to any liability of the company to " make any payment under this policy."

Then under the schedule to the policy the insured is described as " Arthur H. Russell." Certain dates then appear, including dates of the period of insurance, and the renewal date. Then follows a list of the insured persons, and they include Mr. Russell himself. Opposite the name of each insured person under sections A, B, C, D and E respectively, there are sums mentioned, some capital and some weekly sums, which are payable on the happening of the insured risks. Then it is stated: " The " weekly benefits under sections C and D are payable collectively " for 100 weeks." The first premium is stated to be £24 18s. 9d., and the annual premium is the same amount.

Then there are some endorsements to the policy, and I need refer only to two, both of them dated September 7, 1951. The first one states: " It is hereby declared and agreed that in " addition to the weekly compensation payable under sections " C and D, the company will reimburse the medical expenses " necessarily incurred by any insured person up to an amount " not exceeding 15 per cent. of such weekly compensation." The other endorsement of the same date says: " Notwithstanding " anything herein contained to the contrary it is hereby declared " and agreed that the following section is added to the policy: " Section E:—Permanently and totally disable the insured per- " son from engaging in business of any kind but shall not entitle " him to the sum insured under section B, then on the expiration " of one hundred weeks from the date of such injury the com- " pany shall pay the sum insured stated against section E in " the schedule."

The judge decided the question in issue in the plaintiff's

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favour mainly on the ground which he expressed as follows [6]: "In my judgment the expression 'paid or payable on the death "of the deceased under any contract of insurance' is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance. Moreover I think that force is lent to this view by the double use of the word 'any'; any sum, any contract of insurance."

The plaintiff had further contended that Mr. Green and the plaintiff, as his personal representative, had a right enforceable in equity to receive payment of benefits under the policy, and submitted, alternatively, that Mr. Green and the plaintiff had contractual rights at common law in relation to the policy which the courts would enforce. The judge rejected the first of these contentions, but did not decide the second. Both of them are raised before us by a respondent's notice, which we gave the plaintiff leave to introduce at the close of the appellant's argument.

I think it is convenient at the outset to consider whether Mr. Green in his lifetime had any legal or equitable interest in the moneys which would become payable under the policy upon his death. The contention that he had a legal interest was founded upon the submission, as stated by the judge in his judgment: "that inasmuch as the sums payable under the policy were in "the light of the recital paid for the benefit of (inter alios) "Mr. Green he or his personal representatives had a right at "common law to claim the sums even though he was not a "party to the contract." This view, upon which the judge found it unnecessary to express a concluded opinion, is supported by passages in the judgments delivered by Denning L.J. in *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [7] and in *Drive Yourself Hire Company (London) Ltd.* v. *Strutt* [8] respectively. In both those cases, the Lord Justice, after a review of the authorities dealing with the matter, accepted as still surviving the principle that a person interested can sue on a contract expressly made for his benefit—and that apart altogether from section 56 of the Law of Property Act, 1925, upon which the plaintiff in the present case does not rely.

As is pointed out in Chitty on Contracts, 21st ed., Vol. 1, p. 62, Denning L.J. did not, when reviewing the earlier decisions, make any reference to *Bourne* v. *Mason* [9] or to *Price* v. *Easton*,[10] in both of which cases it was held in effect that a stranger to a contract could not sue upon it. Had these decisions been present to the Lord Justice's mind, it is possible that they might have affected his opinion on the matter. However that may be,

[6] [1959] 1 Q.B. 28, 41; [1958] 3 W.L.R. 371.
[7] [1949] 2 K.B. 500, 513; sub nom. *Smith* v. *River Douglas Catchment Board* (1949) 65 T.L.R. 628; [1949] 2 All E.R. 179.
[8] [1954] 1 Q.B. 250, 269; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.
[9] 1 Ventris 6.
[10] 4 B. & A. 433.

there is authority binding upon this court which, in my judgment, precludes us from deciding the point now under consideration in the plaintiff's favour. In *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[11] the appellants brought an action from breach of a contract made between the respondents and a third party which contained terms as to the re-sale of goods of the appellants' manufacture. It was held that the contract was unenforceable at the suit of the appellants. "In the law "of England," said Lord Haldane,[12] "certain principles are "fundamental. One is that only a person who is a party to a "contract can sue on it. Our law knows nothing of a jus "quaesitum tertio arising by way of contract. Such a contract "may be conferred by way of property as, for example, under "a trust, but it cannot be conferred on a stranger to a contract "as a right to enforce the contract in personam." So also in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[13] Lord Wright, in delivering the judgment of the Judicial Committee, said[14] that "no doubt at common law no one can "sue on a contract except those who are contracting parties and "(if the contract is not under seal) from and between whom "consideration proceeds"; and he cited the above passage from Lord Haldane's speech in the *Dunlop Pneumatic Tyre Co.* case.[15] Accordingly, on the authorities as they stand, it seems clear to me that Mr. Green had no right at common law to claim under the contract of insurance into which the company entered with Mr. Russell, and for which Mr. Green himself gave no consideration.

The next question, then, which arises is whether Mr. Green had an equitable interest in the policy, and in the sum which was paid on, and in respect of, his death. The plaintiff contends that Mr. Russell constituted himself a trustee for the various employees (including Mr. Green) named in the schedule to the policy in respect of the benefits attributable to each of them respectively. The judge rejected this contention and, in my opinion, rightly so. The suggestion that Mr. Russell assumed the position and obligations of a trustee was based primarily on the recital to the policy which I have already read and will not read again. I take the following definition of a trust from Underhill's Law of Trusts and Trustees, 10th ed., p. 3: "A "trust is an equitable obligation, binding a person (who is "called a trustee) to deal with property over which he has "control (which is called the trust property) for the benefit of "persons (who are called the beneficiaries or cestuis que trust), "of whom he may himself be one, and any one of whom may "enforce the obligation. Any act or neglect on the part of a "trustee which is not authorised or excused by the terms of the "trust instrument, or by law, is called a breach of trust."

[11] [1915] A.C. 847; 31 T.L.R. 399.
[12] [1915] A.C. 847, 853.
[13] [1933] A.C. 70; 49 T.L.R. 90.
[14] [1933] A.C. 70, 79.
[15] [1915] A.C. 847, 853.

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In my judgment, no such conception as that described by Sir Arthur Underhill arises from the recital to the policy. An intention to provide benefits for someone else, and to pay for them, does not in itself give rise to a trusteeship; and yet that is all that emerges from the recital. Nor does the judge's finding that the existence of the policy was known to the employees in such a manner as to create in them a reasonable expectation of benefit affect the matter. There was nothing to prevent Mr. Russell at any time, had he chosen to do so, from surrendering the policy and receiving back a proportionate part of the premium which he had paid. Nor was he under any obligation to pay the renewal premiums each year. The truth is that the benefits payable in pursuance of the policy were sums which the company would become contractually liable to Mr. Russell to pay if the insured risks matured; and as Lord Greene M.R. said in *In re Schebsman*,[16] to which the judge referred: "It is not legitimate to import into the contract "the idea of a trust when the parties have given no indication "that such was their intention. To interpret this contract as "creating a trust would, in my judgment, be to disregard the "dividing line between the case of a trust and the simple case "of a contract made between two persons for the benefit of a "third."

Apart from the recital in the policy, the plaintiff relied to some extent on a letter which the defendant's solicitors wrote to her solicitors on June 16, 1955. It was suggested that this letter recognised the existence of a trust affecting the £1,000 in question in favour of Mr. Green's estate. In my judgment, no such significance can be attributed to this letter. The writer of the letter was, in my opinion, inaccurate in saying that under the policy the £1,000 "would appear to be payable to the estate of the "above named (A. W. Green deceased) in consequence of his "death," but there is no doubt but that part at least of Mr. Russell's intention in effecting the policy was to secure benefits to his employees on the happening of certain contingencies, and the object of that letter was to carry such intention into effect. The annual payment of premiums by Mr. Russell, on which the plaintiff placed some reliance, was also referable to such intention and is quite insufficient, as I think, to support the conclusion that Mr. Russell had assumed the obligations of a trustee in relation to the policy.

It follows, therefore, that Mr. Green had, in my judgment, no right, whether at law or in equity, to claim under the policy, and the only question which remains is whether, nevertheless, the plaintiff, as Mr. Green's administratrix and dependant, can on other grounds claim exemption from accountability for the £1,000 by virtue of section 1 of the Act of 1908. The question in general whether sums which are paid under a contract of insurance on an

[16] [1944] Ch. 83, 89; 60 T.L.R. 128; [1943] 2 All E.R. 768.

employee's death, and in respect of which the employee had no more than an expectation of benefit which, in fact, materialises, fall within the Act was left open by this court in *Bowskill* v. *Dawson (No. 2)*.[17] It was unnecessary to decide the point in that case because the court held that the employees had an equitable interest in the policy moneys there in question, and that such an interest was sufficient to attract the operation of the Act of 1908. In my opinion, it is not necessary (even if it were possible), to answer the question in its general form in the present case; for, in my judgment, the plaintiff's rights fall to be determined mainly upon a consideration of the terms of the policy which Mr. Russell effected with the company, though the judge's finding as to the employees' knowledge of the policy and of their possible benefits under it is, perhaps, of some relevance.

Counsel for the plaintiff relied principally before us on the ground which commended itself to the judge and to which I have already referred. Section 1, said Mr. Everett, is descriptive of a particular category of money, namely, money paid or payable on the death of the deceased under any contract of assurance or insurance. The submission is that once a sum representative of that category is paid it bears, as it were, a label, and is thenceforth identifiable in the same way as, for example, a piece of jewellery would be. Therefore, it is said, upon payment by the insurance company to the defendant of the £1,000 in question, it became irrevocably stamped as a section 1 payment, notwithstanding that under the contract it was neither paid nor payable to Mr. Green or his estate, with the result that if by any means it should subsequently be received by the plaintiff, she could claim the statutory exemption for it which is conferred by the Act.

For myself, I find some difficulty in accepting this proposition. On the hypothesis that neither Mr. Green nor his estate had any legal or equitable title to or interest in the £1,000, it is clear that the sole legal and beneficial ownership of this sum would have become vested in Mr. Russell had he survived. Supposing he had put it on deposit account at a bank, enjoyed the interest on it during his life, and then bequeathed it by will to the plaintiff, then, according to her argument, on Mr. Russell's death the £1,000 received by the plaintiff would be within the scope of section 1. It is, of course, true that in such circumstances the plaintiff would not have to give credit for it, if only because the bequest might well not have been made by Mr. Russell when she claimed her damages; but I have used the illustration for the purpose of testing the "labelling" theory, and, in my opinion, the money receivable by the plaintiff in the events supposed would be a legacy and nothing else. The theory would also lead to great complication and difficulty where insurance money passed through several hands before finally reaching the estate of the deceased employee or his dependants, or where the insured, as legal owner

[17] [1955] 1 Q.B. 13.

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of the money, invested and reinvested it. As I say, therefore, I am unable for myself to accept this proposition of the plaintiff's.

I am, however, of opinion that the plaintiff is entitled to the benefit of the Act of 1908 for a different reason. As I ventured to observe in *Bowskill* v. *Dawson* (*No. 2*),[18] section 1 leaves something to the imagination. It envisages the payment of money on the death of the deceased under an insurance contract, but is silent as to the identity both of the payer and of the payee. The payer would normally be the insurer having regard to the words " paid under any contract of assurance or insurance." As to the payee, it seems clear that as the payment is relevant to the assessment of damages under the Fatal Accidents Acts, the payee or payees envisaged by the section must mean the estate or dependants of the deceased employee. Now if the payments contemplated by the section were to the estate or dependants direct, then, as it seems to me, the plaintiff in the present case could not succeed; for the section is dealing with sums paid or payable " under " a contract of insurance, and under the contract into which Mr. Russell entered with the Yorkshire Insurance Co. the £1,000 was payable and was paid to the defendant, and not to the plaintiff. It was, indeed, argued for the plaintiff that the company could have paid the money to the plaintiff direct, and then called upon the defendant to give them a receipt for it under condition 5. I do not accept this, however, for " the insured " under the contract and the person who paid all the premiums was Mr. Russell and no one else. Nevertheless, I do not think that section 1 was envisaging only payments made directly to the employees or their dependants, but extends to payments contractually made to or on behalf of or for the benefit of the employees or dependants.

In *Bowskill* v. *Dawson* (*No. 2*)[19] payments were held to be within the Act of 1908 which were made by the insurers to trustees on behalf of the employees; and, in my opinion, it would be within the language of the section, and the general sense of the legislation, to hold that if sums are received by an employer under a scheme which was designed for the benefit of the employees, but without conferring any enforceable right on them, and he pays the sums over to the estates or dependants of the men when the risk matures, then the provisions of the Act apply. That the policy which Mr. Russell effected for members of his staff in 1951 and thereafter maintained was intended by him to benefit those members is not open to question. The recital of the policy expressly reveals such an intention. The schedule mentions the members concerned by name, and specifies the capital or weekly sums payable in respect of each of them on the happening of the insured contingencies. The weekly sums payable in respect of each " insured person " are described in the schedule as " the weekly benefits." Sections C and D of the policy refer

[18] [1955] 1 Q.B. 13. [19] [1955] 1 Q.B. 13.

to the insured persons in terms of entitlement, as also does one of the indorsements dated September 7, 1951. Another indorsement of the same date provides that the company "will reimburse "the medical expenses necessarily incurred by any insured "person" up to a prescribed amount.

In these circumstances, it is clear that part, at least, of Mr. Russell's intention in effecting and maintaining the policy was to benefit his employees, and the defendant has now implemented that intention in favour of Mr. Green's estate. It would, in my judgment, be an undue restriction on the language used in section 1 to hold that it does not apply to the terms and provisions of Mr. Russell's policy, and to the facts of the present case. In my opinion the section does apply, and I would accordingly dismiss the appeal.

PEARCE L.J. In this case, the defendant, Mrs. Russell, received £1,000 from the Yorkshire Insurance Co. as a result of Mr. Green's death and paid it over, or is in the course of paying it over, to the plaintiff. For the defendant, it is contended by Mr. Van Oss that the £1,000 so paid to the plaintiff must be taken into account and deducted in assessing the damages payable to her under the Fatal Accidents Act, 1846, in respect of Mr. Green's death. The £1,000 is not, he argues, excluded from being so taken into account by the Fatal Accidents (Damages) Act, 1908, since it is not "any sum paid or payable in respect "of the death of the deceased under any contract of assurance or "insurance." Admittedly, the £1,000 paid by the insurance company to the defendant came within that definition; but thereby payment under the contract was exhausted, and the payment made by the defendant to the plaintiff did not constitute a payment under any contract of insurance. It was, he argues, a payment made by the defendant purely of her own volition. It is assumed for the purposes of this argument that the judge was right in holding that (whatever her moral claims might be) the plaintiff had no enforceable right to the £1,000 in law or in equity.

The policy is a personal accident group policy. It provides for various benefits for various persons in the event of accident. By its form it is clearly intended as a means whereby one policy holder can secure such benefits for several persons, the policy holder being the person to whom the insurance company looks for payment of premiums, and the person whom it is entitled to treat as the absolute owner and as the recipient of the various benefits arising under the policy.

The policy starts with the recital: "Whereas the insured is "desirous of securing payment of benefits as hereinafter set forth "to any insured person in the event of his sustaining bodily injury "as hereinafter provided." I read the word "secure" in the context as meaning to provide or obtain for the insured person. I do not accept the contention that the word means "obtain for

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" himself the money so that it will be safely available if and when " he himself of his volition wishes to benefit the insured persons." The use of the words " secure to " any insured person indicates an intention that the insured person shall certainly receive it. The policy then provides that, if any insured person shall sustain bodily injury caused by accident, and this results in death, " the " company shall pay the sum insured stated against section A in " the schedule." The sum stated against Mr. Green's name in section A in the schedule (which is expressly said to be part of the contract), was £1,000 in the event of death.

It will be observed that the policy clearly takes cognisance of Mr. Green as a named individual, coming within the class of insured persons (a class whose due observance of certain things is expressed in clause 8 to be a condition precedent to the insurance company's liability to pay), and that the benefit secured to him is a payment of £1,000 under the policy in certain circumstances. Clause 5 by implication recognises the fact that other persons than the policy holder may have some equitable or other claim or interest in the policy. As a matter of machinery the company by that clause unilaterally reserves to itself the right to treat the insured as the absolute owner of the policy, and to be effectually discharged by his receipt (or that of his legal representatives). It would obviously be inconvenient to have the various insured persons making their own claims and dealing with the company direct.

From the terms of the policy, therefore, the parties contemplate that the policy holder is securing benefits to a named person, Mr. Green, and that the insurance company will pay £1,000 on Mr. Green's death by accident. It is true that the company are entitled (as a matter of convenient machinery) to deal direct with the policy holder, and to treat him as if he alone were intended to get the benefits of all the insured persons. But the terms of the agreement as a whole make it clear that (whatever may be Mr. Green's legal or equitable rights against the policy holder) the £1,000 payable on Mr. Green's death is intended by the parties to be a benefit to Mr. Green's estate, and is not intended for the pocket of Mr. Russell. Moreover, I think that the terms of the agreement as a whole show that the parties envisage payment of the £1,000 direct to the policy holder and payment over by him to Mr. Green's estate.

Thus the second payment, namely, by the defendant to the plaintiff, is a payment envisaged by the contract, and is clearly in my view a sum paid under a policy of assurance within the terms of the Fatal Accidents (Damages) Act, 1908.

But I would prefer not to rest my decision on such narrow grounds, derived as they are from particular words in the policy. I think that the proper construction of the Act is that adopted by the judge, who said [20]: " As it seems to me there is no need

[20] [1959] 1 Q.B. 28, 40.

" to strain the language in order to give effect to the plaintiff's " claim; on the other hand, to give effect to the defendant's " argument involves the notional inclusion in the section of " words of limitation restricting the scope of the section to " cases in which the deceased or his representative had some " enforceable right to 'the sum in question.'" And again [21]: " In my judgment the expression 'paid or payable on the death " 'of the deceased under any contract of insurance' is descrip- " tive of the sum itself, and does not involve by implication " the corollary that the sum was paid or payable to the deceased " under the contract of insurance. Moreover I think that force " is lent to this view by the double use of the word 'any'; " any sum, any contract of insurance." I wholly agree with those observations.

Morris L.J. in *Bowskill* v. *Dawson* (*No. 2*) [22] said, in a passage on which the judge relied: " It is true that the deceased " was not a party to the contract of assurance, but it is to be " noted that the Act of 1908 refers to 'any' contract of assur- " ance or insurance and appears, therefore, to cover and include " contracts of assurance or insurance other than those made with " the deceased. When it is sought to reduce the damages recover- " able by the relations of Mr. Dawson because of the receipt of " the sum of £3,300, it can in my judgment be shown that such " sum had the attribute or feature of being a sum paid on the " death of Mr. Dawson under a contract of assurance." Although he expressly left open the question raised by the present argument, those two sentences are I think rightly applicable to the case before us.

The Fatal Accidents Act, 1846, s. 2, provided, inter alia: " and in every such action the jury may give such damage as " they may think proportioned to the injury resulting from such " death to the parties respectively for whom and for whose " benefit such action shall be brought." The task was expressly left to a jury and was put in broad and simple terms. Subsequent cases established that in estimating such injury, actual and prospective gains as well as actual and prospective losses must be taken into account in order to arrive at the net loss. Where the man, whose death was the subject-matter of the claim, had kept up an insurance on his life, the payment under it would lessen the amount of damages recoverable by his widow. Thus the tortious defendant secured the benefit of his victim's thrift and foresight in place of the victim's widow for whom it had been intended. The object of the Fatal Accidents (Damages) Act, 1908, was to remove this injustice. By section 1, it provided that in assessing damages in any action under the Fatal

[21] [1959] 1 Q.B. 28, 41.

[22] [1955] 1 Q.B. 13, 23.

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Pearce L.J.

Accidents Act, 1846, "there shall not be taken into account "any sum paid or payable on the death of the deceased under "any contract of assurance or insurance."

It is obvious that in each case there must be an assured or insured person and a payer and a payee. It would have been possible to insert in the Act detailed provisions dealing with these matters. But the Act, deliberately as I think, dealt with the matter on broad lines as the original Act had done. It was excluding a certain type of consideration from the broad and difficult task which the jury had to achieve in each case. The legislature contented itself with describing the nature of the moneys that were not to be taken into account, without seeking to limit the exact path of those moneys or specifying from whom and by whom they had to be received. Since the Act introduced an exception to the general rule, I agree that the words must not be strained to achieve any meaning beyond their clearly avowed intention; but they are entitled to be read in their simple normal sense without any gloss or artificial restrictions. The view put forward by the defendant does in my view put an unduly restricted meaning on the words, and writes into the Act words that are not there.

Whether a sum comes within the definition in the Act read in its normal sense is a question of fact in each case, subject, of course, to the legal limitation that it may not be possible as a matter of law for a certain sum in a particular case to come within that definition. In my view, on the facts of this case, the £1,000 paid by the defendant to the plaintiff does come within that definition. It is, in the normal sense, money paid on the death of her son under a contract of insurance.

We have been pressed by Mr. Van Oss with endless difficulties that might occur unless his argument is accepted. He suggests that if money passing through several hands could still be said to be a sum paid under any contract of insurance, confusion would arise. However, I see no reason why such money should pass through several hands. And if it did, the court is left to decide whether, when it comes to the hands of the widow, it still sufficiently retains the quality of a sum paid on the death of the deceased under any contract of insurance. On the facts of this case, I see no difficulty in holding that the sum paid to the plaintiff did retain that quality.

I agree with the judge and with my Lords that the plaintiff had in respect of the £1,000 no right that was enforceable in law or in equity. *Dunlop* v. *Selfridge* [23] compels us to hold that since she was not a party to the policy, she had no legal rights enforceable by action. Nor do the terms of the policy themselves suffice to create a trust which she could enforce in equity in a case like this where the insuring of the employee was purely voluntary, and was no part of the terms of his

[23] [1915] A.C. 847.

employment. She cannot, therefore, bring herself within the decision in *Bowskill* v. *Dawson.*[24] But for the reasons I have given, she has no need to do so.

In my opinion the appeal fails.

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Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Greenwoods; Abbott, Baldwin & Co.*

[24] [1955] 1 Q.B. 13.

[CHANCERY DIVISION.]

In re WHITEHEAD'S WILL TRUSTS. PUBLIC TRUSTEE *v.* WHITE AND OTHERS.

[1957 W. No. 3134.]

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March 12, 13, 19; *May* 13.
Harman J.

Capital or Income—Administration or trust—Unit trust—Sub-units forming part of residuary estate—Distributions described as capital—Distinction between capital and income required by trust deed—Distinction made for tax purposes—Not wholly capital payments—Whether apportionable between capital and income interests.

A testatrix by her will empowered her trustees to retain any unauthorised trustee investments. Among the investments comprising her residuary estate were a number of sub-units in fixed investment trusts, the sub-units being a share of a unit which comprised various investments. Certain of the half-yearly distributions from the trusts were described as capital; the trust deeds required the warrants or cheques for payment to distinguish between capital and income, but did not recognise any equitable interests in the sub-unit. According to the explanations accompanying the payments most of the items so described arose from the sale of bonus shares, although others arose from some form of dividend payment. On a summons by the trustees to determine whether the so-called items were to be treated as capital or income for the purposes of the will of the testatrix:—

Held, that the provision in the trust deeds requiring the trusts to distinguish between capital and income were inserted merely for income tax purposes; and the trustees of the will were, notwithstanding those provisions, bound in any case of doubt to inquire into the source of each distribution which was labelled capital distribution, and to treat it as income or capital just as if they were the direct shareholders of the shares included in the sub-unit.

In re Doughty [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207 applied.

ADJOURNED SUMMONS.

The trustees of the will of Emma Whitehead, who died on July 15, 1947, took out this summons for the determination of the question whether certain sums included in periodical distributions from time to time received by them in respect of

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sub-units in fixed investment trusts for the time being comprised in her residuary estate and described as capital in the counterfoils attached to the relevant warrants for payment ought for the purposes of her will (a) to be treated wholly as income or (b) to be treated wholly as capital or (c) to be apportioned in some and what manner between capital and income of her residuary estate.

The following statement of facts is taken from the judgment: the testatrix by her will dated August 10, 1944, appointed the plaintiffs, the Public Trustee and another, as executors and trustees and bequeathed to them her residuary estate upon the usual trusts for sale and conversion, and out of the proceeds to pay her debts and funeral and testamentary expenses and to invest the residue in authorised trust investments and to stand possessed of them and of all parts of her estate for the time being unsold upon trust to pay the income to her three nieces, the first three defendants, in equal shares, with remainders as to both capital and income upon their several deaths for other persons represented by the last three defendants.

By para. 6 the testatrix authorised her executors to retain "either temporarily or permanently all or any of the investments "standing in my name at my decease or which I may be then "possessed of or entitled to although such investments do not "come within the range of investments hereinbefore authorised." She made a codicil not relevant to the present question. Included in her property were 940 sub-units—Scottish Fixed Trust; 500 sub-units—"A" National Fixed Trust and 1,130 sub-units —"B" National Fixed Trust.

The plaintiffs sold 430 of the last mentioned, but retained the rest until paid off in the years 1953, 1954 and 1955. During the years of retention the plaintiffs received half-yearly payments from the managers of the trusts. Most of these payments were income and were so described; but sums amounting in the whole to £660 19s. 3d. were described by the payers as capital and were provisionally retained by the plaintiffs, and it was in connection with these sums that the present question arose.

Investments in the fixed trusts were regulated by trust deeds. The first such deed regulating the Scottish Fixed Trust Unit was dated May 17 and 20, 1935, and was made between the National Fixed Investment Trust Ltd. (thereafter called the trust) and the Clydesdale Bank Ltd. described as the trustees. It recited the intention of the trust to transfer (as was done) into the name of the trustees or their nominees a group of investments particularised in the First Schedule thereto "with the intention that the "same shall constitute a unit as below defined and be held by the "trustees subject to the provisions of this deed."

Clause 1 of the deed was the definition clause, and provided that "first unit" meant the said group of investments subject to variation under the deed; "unit" meant a group of like

investments; "unit investment" meant any one of the investments comprised in a unit; "sub-unit" meant "a share in a "unit entitling the owner to the beneficial interest in one-four "thousand eight hundredth part" of a unit; "cash produce" meant "all dividends, bonuses, and other sums whether capital "or income received by . . . the trustees in respect of a unit "or any unit investment in cash or by warrant, cheque or money "credit." "Specie produce" meant "all dividends, bonuses "and other sums whether capital or income received by . . . "the trustees in respect of a unit or any unit investment in "any shape or form other than" as aforesaid. "Trust period" meant 20 years from the date of the deed.

Clause 2 provided that the trustees were to stand possessed of each unit when received during the trust period upon the trusts declared by the deed but if during that time any investment should cease to pay dividends or for certain other reasons the investment trust considered it to be in the interest of the certificate holders that any unit should be sold the trustees were bound on the trust's request to realise the investment and deal with its proceeds as if they were cash produce. Clause 3 provided for the issue by the trustees as required by the trust of certificates in favour of persons purchasing sub-units. Clause 4 provided that until sale sub-units should belong to the trust. Clause 7 provided that the trustees should during the trust period stand possessed of all cash produce and specie produce upon trust to procure the realisation of all specie produce and to convert the same into money and to distribute all cash produce and the proceeds of the realisation of all specie produce among the certificate holders according to their interests half yearly in June and December.

Clause 8 (b) provided: "In the event of any part of the amount "distributable being in respect of capital moneys the trustees "shall arrange that the cheque or warrant shall contain a state-"ment to that effect and shall distinguish between the amounts "payable by way of capital and income respectively." Clause 8 (d) provided: "The trustees shall together with every cheque "or warrant as aforesaid issue a certificate . . . to the effect "that all income tax payable in respect of the amount dis-"tributed has been or will be duly paid. . . ." Clause 9 provided that if any of the unit investments should during the trust period be redeemed, either with or without an option to convert into some other investment, the trust might at its sole discretion call on the trustees either to accept the cash payment or exercise the option, and the cash received on any such repayment should be deemed "cash produce" but if the option were exercised the resulting investments should become unit investments subject to the trusts thereof and should not be regarded as "specie produce."

Clause 15 (b) provided that the executors or administrators

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of a deceased certificate holder should be the only persons recognised by the trustees as having title to the sub-units comprised in such certificate. Clause 16 provided: "No person shall be "recognised by the trustees as holding or being entitled to the "benefit of any sub-unit upon any trust and the trustees shall "not . . . be bound by or required to recognise any equitable "or partial interest in any sub-unit or any other than an absolute "beneficial right either in the investment trust or the certificate "holder or joint certificate holders. . . ."

Clause 19 dealt with the realisation and distribution of the units upon the expiration of the trust period and provided in particular that all cash produce and specie produce for the last six-monthly period should be distributed as though it were part of the proceeds of realisation of the units. Clause 31 contained a power of modification. Clause 34 contained an undertaking by the trustees to purchase sub-units at a certain price if called upon.

The power of modification was exercised by a supplemental deed of January 15 and 22, 1947, whereby a new clause was inserted obliging the trustees to send to a certificate holder half-yearly copies of audited accounts showing (a) the gross amount of the cash produce and specie produce per unit received during the period and the amount of income tax deducted by the trustees or before receipt by the trustees; (b) the cash produce and specie produce per unit received by the trustees as aforesaid free of and without deduction of income tax; and (c) the net amount proposed to be distributed per unit distinguishing between capital and income and indicating the source of such capital.

The National Fixed Trust Unit "A" was regulated by a trust deed of July 9, 1933, made between the National Fixed Investment Trust Ltd. and the Midland Bank Executor and Trustee Co. Ltd., and was on similar lines to the deed above recited. This unit contained 4,000 sub-units, and the trust period was 20 years from June 8, 1932. The half-yearly distribution dates were May and November. The deed did not require cheques or warrants to distinguish between capital and income, but did require that distinction to be shown in the half-yearly accounts.

The National Fixed Trust Unit "D" was regulated by a trust deed of July 16, 1934, made between the last-mentioned parties and was subsequently varied by two further deeds. The trust period was 20 years from July 16, 1934. Half-yearly distribution dates were January and July. The principal trust deed required cheques or warrants to distinguish between the capital and income distributed, but that provision was deleted by a modifying deed which required those details to be shown in the half-yearly accounts.

All those deeds were exhibited to the affidavit in support of the summons, which set out in detail the various payments by

way of half-yearly distributions on each group of sub-units. It showed the total net sum received on each occasion and the portion (if any) of that sum declared in accordance with the provisions of the deed to be capital. Counterfoils to the warrants contained explanations of the so-called capital items; most of them arose from the realisation under the terms of the deed (by virtue of which they were defined as "specie produce") of bonus shares issued by the several companies whose shares figured in the portfolio of the unit. These realisations which converted specie produce into cash produce were distributed in accordance with clause 7 of the deed of 1935 and the trust in distinguishing between capital and income was acting under clause 8 (b) thereof. Distributions described as capital were not all proceeds of sale of bonus shares; for example, there was a special tax free dividend issued by the Imperial Continental Gas Association, and a sum described as "capital repayment" made by the same company. There were also payments called "capital distributions" from the Staveley Coal and Iron Co. Distributions by the other two trusts were on similar lines.

E. I. Goulding for the trustees.
Mervyn Davies for persons interested in income.
T. L. Dewhurst for persons interested in capital.

The following case, other than those cited in the judgment, was referred to in argument: *Baker* v. *Archer-Shee*.[1]

Cur. adv. vult.

May 13. HARMAN J. read the following judgment: The late Emma Whitehead left included in her estate property of a comparatively novel kind, namely, certain sub-units in three fixed trusts. These her trustees retained during their currency and thus became possessed of what I may call the produce of the sub-units. The problem is that of the allocation of this produce to the beneficiaries under the will, whether interested in capital or income of the estate, and this seems to be a novel question in these courts, and one which may become of increasing importance, as this form of investment, or something like it, seems to be the fashion of the day. [His Lordship stated the facts as set out above and continued:]

It is at once evident that here is a new type of investment raising thorny questions for trustee recipients charged with the duty of holding the balance true between the conflicting interests of beneficiaries under a will or settlement, some entitled to income and some to corpus. It is true that trustees holding investments in limited companies face similar problems, but these have long been familiar and are regulated by well-known

[1] [1927] A.C. 844; 43 T.L.R. 758.

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authorities, but a sub-unit is not, directly at any rate, such an investment. Unit trusts are not controlled by the shackles of the Companies Act, 1948. Within the wide limits set by the trust deed they may retain income receipts as capital or distribute capital receipts as income at their will. The use of the word "produce" underlines this freedom.

The trusts are, by their charters, not bound or, indeed, entitled to look beyond the registered holder of each sub-unit. It does not matter to them whether that holder be the absolute owner or a mere trustee or a partial owner. When he is, in fact, the absolute beneficial owner he can, of course, deal with sums realised as he chooses. It was argued that the object of the provisions requiring the trust to make distinction between capital and income must have been for the convenience of sub-unit holders so as to show them which distribution had suffered deduction of tax or was liable to it, and which was regarded from an income tax point of view as not subject to tax. When, however, a trustee is the registered holder he must consider the rights on the one hand of life beneficiaries and, on the other, of remaindermen.

Three views are possible. First, that the whole of the "produce" ought to be treated as income; secondly, that all so-called capital sums should be treated as capital, and, thirdly, that the trustees must inquire, just as trustees holding directly the shares which form the portfolio of a sub-unit must do, whether the sum received is in truth capital like a bonus share, or income like a dividend paid out of capital profits. The difficulty of the last course would seem to be that owners of sub-units are not directly interested in the companies whose shares make up the portfolio and, therefore, have no right to make the inquiries to which a shareholder is entitled. No doubt the trusts themselves being the shareholders can make these inquiries, but I see nothing to oblige them to do so, and they might well decline to add to their duties.

The argument that all realisations shall be treated as income may, I think, be stated thus. The testatrix held these sub-units: she authorised her trustees to retain them as investments: she must, therefore, be supposed to have intended that her beneficiaries should enjoy the investments as they found them, that is to say, subject to the provisions of the trust deeds, as to converting specie produce into cash produce, and deputing to the trusts the right to decide what to distribute as income and what to treat as part of the capital of the sub-unit. It was submitted by Mr. Mervyn Davies that the provisions of the trust deed impressed on every distribution the character of income, and that there is nothing in the will to contradict this. There is, however, I observe, no provision in the will excluding the rule in *Howe* v. *Lord Dartmouth*.[1] This, if the right view, will have

[1] (1802) 7 Ves. 137.

resulted in the present case in a considerable portion of the original corpus of the unit finding its way into the hands of income beneficiaries in the form of proceeds of bonus shares which, in the case of an ordinary trust, rank as capital. Even more striking results might ensue if, under clause 9 of the recited deed, the trust should direct the proceeds of redemption of a unit investment to be received in cash, for it would then be distributed as cash produce. On the other hand, the trust might elect to exercise an option to convert, with the result that the investment received would then remain corpus, thus affecting the beneficial interests in a way over which the beneficiaries had no control.

The contrary view would have the opposite effect, for it would convert into capital certain payments, which, if the will trustees were direct holders of the shares in question, would be distributable as income; for ever since the decision of Lord Russell in *Hill* v. *Permanent Trustee Company of New South Wales Ltd.*,[2] distributions by a company still a going concern and not being by way of reduction of capital remain income and are only distributable as such. This is subject to the modification, which is not relevant here, noted in *In re Duff's Settlement*.[3] There were some startling illustrations of *Hill's* case[4] during the tenure of office by the Labour Government (when nationalisation was the order of the day), notably in the case of holdings in Thos. Tilling & Co., a large part of whose business was compulsorily acquired by the Crown under the Transport Act, 1947, in exchange for Government stock. The firm continued in existence and distributed the stock among its shareholders: this was held to be income in the hands of trustees: see *In re Sechiari*.[5]

My attention was directed to a decision of Tomlin J. in *In re Taylor*,[6] where he says that it is the intention of the distributing company that controls the result. In this, he followed similar opinions expressed in *Bouch* v. *Sproule*[7] and *Inland Revenue Commissioners* v. *Blott*.[8] In the present case, the distributing companies are those included in the unit portfolio and the trust, accordingly, received the shares or cash impressed with the character which their intentions pointed to. Is this process to be repeated when the trust carrying into effect the terms of the trust deed made distributions to the holders of sub-units? I do not think there is any authority on this point, but will assume the answer to be affirmative.

Looking, then, at the trust deed, do I find that it directs the trust to alter the nature of the money or securities received? I think not. It is true that they are directed to distribute everything received as "produce" of the shares in the portfolio and

[2] [1930] A.C. 720.

[3] [1951] Ch. 721; [1951] 2 T.L.R. 474; [1951] 2 All E.R. 534; affirmed [1951] Ch. 923.

[4] [1930] A.C. 720.

[5] (1950) 66 T.L.R. (Pt. 1) 531; [1950] 1 All E.R. 417.

[6] [1926] Ch. 923.

[7] (1887) 12 App.Cas. 385.

[8] [1921] 2 A.C. 171; 37 T.L.R. 762.

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distribute it as cash, but I do not think that in this deed "produce" is synonymous with income. There is no doubt it is aptly described as the "yield" of those shares, in the sense that it is the holding of them that is the source of the distribution, but that is true of a bonus share issued on a capitalisation of profits which has always been treated as capital: see *Blott's* case.[9]

It was further argued that the testatrix who was the owner of the sub-units ought to be taken to have agreed to abide by the decision of the trust as to what part of their yield was capital and what income, and that having authorised her trustees to retain the sub-units she had put them in a like position. As I have already observed, the trust was forbidden to look beyond the registered holder of a sub-unit. He or she could of course treat the yield in his or her hands as a capital or an income receipt. I come to the conclusion that the provisions in the trust deeds requiring the trust to distinguish between capital and income were merely inserted for income tax purposes in an effort to ensure that the portions described as capital should not be treated in the recipient's hands as subject to income tax. The case may be considered as analogous to *In re Doughty*[10] where the headnote reads[11]: "It was provided by the articles of association of a limited company that '. . . the company in general meeting of the directors . . . may . . . pass a resolution . . . that any surplus capital moneys or capital profits in the hands of the company whether arising from the realisation of capital assets . . . or received in respect of any capital assets . . . shall be divided among the members of the company by way of capital distribution in proportion to their rights.'"

"*Held*, that the article, on its true construction, merely authorised distribution of capital profits, and did not purport to fix their character as between tenant for life and remainder-men; and that accordingly the sums received by the executors must be treated as income and paid to the tenant for life."

Cohen L.J., delivering the first judgment, cites this passage from *Hill's* case[12, 13]: "'(1) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A absolutely or as trustee for A for life only. (2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by

[9] [1921] 2 A.C. 171.
[10] [1947] Ch. 263; 63 T.L.R. 257; [1947] 1 All E.R. 207.
[11] [1947] Ch. 263.
[12] [1930] A.C. 720, 727.
[13] [1947] Ch. 263, 270.

" ' means of which it parts with moneys to its shareholders must " ' and can only be made by way of dividing profits. Whether " ' the payment is called " dividend " or " bonus," or any other " ' name, it still must remain a payment on division of profits. " ' (3) Moneys so paid to a shareholder will (if he be a trustee) " ' prima facie belong to the person beneficially entitled to the " ' income of the trust estate.' " Lord Cohen then goes on after expressing agreement with these principles [14]: " It seems " to me that, on its true construction, the article which we have " to consider, and the resolution passed thereunder, merely " authorise distribution of capital profits in such a way as, if " possible, not to attract income tax, and do not purport to deal " with the question of their character as between tenant for life " and remainderman."

So, here, it seems to me that the managers are not concerned, except from the bonus point of view, with the character in which the sub-unit holders receive the cash produce twice yearly and have no intention of dictating to them, even if they could do so, whether, from any other point of view, the distribution were capital or income. Similar reasons appear to me to negative the argument that the decision of the trust to call some part of the yield capital impresses that part with a capital nature. I do not think there can be any authority directly in point. The will trustees must, in my judgment, notwithstanding the provisions of the trust deeds, which do not affect anything beyond the absolute rights of the registered holders, inquire in any case of doubt into the source of each distribution which is labelled a capital distribution and treat it as income or capital just as if they were the direct shareholders of the shares included in the portfolio.

There may be a difference in the case of the Imperial Continental Gas Association, which is a company limited or governed by a private Act of Parliament, and different considerations could arise there as against a company limited under the Companies Acts.

I declare that the sums referred to in the originating summons ought to be treated as income or capital for the purposes of the will of the testatrix according to the quality in which such sums were respectively received by or on behalf of the trustees of the Fixed Investment Trusts.

Declaration accordingly: costs to be paid out of the entirety of the corpus fund.

Solicitors: *Gardiner & Co. for D'Angibau & Malim, Boscombe; Donovan J. Smalley & Co.; D. J. Hall, Ilford, Essex.*

I. G. R. M.

[14] [1947] Ch. 263, 271.

[CHANCERY DIVISION.]

1959
April 15, 16, 17; *May* 13.

Upjohn J.

FOOTBALL LEAGUE LTD. *v.* LITTLEWOODS POOLS LTD.

[1958 F. No. 1178.]

Copyright—Literary work—Information—Compilation—Football championship fixtures list—Whether fixtures list subject of copyright—Publication of extracts on football pools coupons—Whether infringement—Copyright Act, 1956 (4 & 5 *Eliz.* 2, *c.* 74), *ss.* 2 (1), (5) (*a*) (*b*) (*f*), 48 (1).

The plaintiffs, the Football League Ltd., were incorporated to promote Association Football and to arrange football competitions for their member clubs, which were grouped in four divisions. The rules of the League provided for the arrangement and subsequent confirmation at annual meetings of League championship fixtures, copyright in such fixtures to be vested in the League. In the championship each club in each division played every other club in the division twice in a season, once at home and once away. When each club had indicated its wishes as to the arrangements for matches in answers to a questionnaire sent out by the League, the clubs' fixtures lists were compiled by one S., who received a fee from the League for so doing, it being agreed that the copyright should belong to the League, and S. (who had done the work for some years) had from time to time made assignments of the copyright in their favour. The compilation entailed a great deal of work and required a high degree of skill and ingenuity. The clubs' fixtures lists were circulated to the clubs, and after they had made any necessary amendments and an annual fixtures meeting, at which remaining difficulties were settled, had been held, S. prepared a chronological fixtures list. This list was printed with the names of the clubs in alphabetical order and sent to the clubs and the press upon payment, a claim to copyright and a warning against reproduction without permission being printed upon it; it was also published in the same form in the Football League Handbook for the season. The making of the chronological list was not difficult but it required hard work and a painstaking accuracy.

The defendants, Littlewoods Pools Ltd., ran a system of gambling based on the results of the league matches, and each fortnight they sent out to their customers coupons containing lists of fixtures which were admittedly copied from the League's chronological list of which they had procured a copy.

In an action by the plaintiffs claiming, inter alia, a declaration that they were entitled to a subsisting copyright in the chronological lists, and an injunction to restrain the defendants from infringing the copyright:—

Held, (1) that, on its true construction, the word "any" in section 2 (5) (*a*) of the Copyright Act, 1956,[1] was not wide enough

[Reported by MARGARET THOMAS, Barrister-at-Law.]

[1] Copyright Act, 1956, s. 2: "(1) Copyright shall subsist, subject "to the provisions of this Act, in "every original literary, dramatic or "musical work which is unpublished, "and of which the author was a "qualified person at the time when "the work was made, or, if the "making of the work extended over "a period, was a qualified person for "a substantial part of that period. . . . "(5) The acts restricted by the copy-

to extend protection to compilations which had not been protected under the Copyright Act, 1911, so that the matter fell to be determined in accordance with the principles laid down under the earlier Acts.

(2) That, although there can be no copyright in information per se including that of the predetermination of future events of one's own creation, and even though there was insufficient skill, labour or effort in reproducing the chronological list from the clubs' list to support a claim to copyright in the former, of necessity the information in the programme of fixtures had to be reduced to writing, and the skill, labour, time, judgment and ingenuity of the League, their servants or agents, which, on the facts, had been brought to bear in compiling the clubs' fixtures list could not be separated from the work of compiling the chronological list, and that, accordingly, the League were entitled to claim copyright in the chronological list.

Purefoy Engineering Co. Ltd. v. *Sykes Boxall & Co.* (1955) 72 R.P.C. 89 and *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.* [1926] Ch. 433; 42 T.L.R. 370 considered.

(3) That the deliberate systematic pirating by the defendants week by week of the relevant part of the chronological list under a claim of right amounted to a reproduction of that compilation and an infringement of the League's copyright, and the League, therefore, was entitled to the declaration sought, but, since the 1958–59 season was now over and no chronological list for the next season was yet in existence, an injunction would be refused.

Cate v. *Devon and Exeter Constitutional Newspaper Co.* (1889) 40 Ch.D. 500; 5 T.L.R. 229 applied.

Held, further, that even if the compilation of the chronological list had merely consisted of the reproduction of the clubs' fixtures lists, so that there was no element of skill and ingenuity, there was nevertheless sufficient painstaking hard work to justify a claim for copyright.

H. Blacklock & Co. Ltd. v. *C. Arthur Pearson Ltd.* [1915] 2 Ch. 376; 31 T.L.R. 526 followed.

Quaere, whether, had the defendants scrambled the list of matches so that they were not in alphabetical order, they could successfully have argued that they were only using the information and not reproducing the compilation.

ACTION.

The plaintiffs, the Football League Ltd., were incorporated in 1904 to promote Association Football and to make rules including arrangements for the benefit of clubs in membership with the League for football competitions. Membership of the League consisted of clubs which were full members, grouped together in two divisions known as the First and Second Divisions of the League championship, each division containing 22 clubs, and clubs which were associate members grouped together in the Third and Fourth Divisions, each division containing 24 clubs. Under rule 22 of the League's rules provision was made for championship fixtures to be arranged and then confirmed at

"right in a literary, dramatic or "musical work are—(*a*) reproducing "the work in any material form; "(*b*) publishing the work; . . . "(*f*) making any adaptation of the "work."

S. 48 (1): ". . . 'literary work' "includes any written table or com- "pilation."

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annual fixtures meetings and for the copyright to belong to the League in whom the copyright should vest. In the League championship each club in each division played every other club in the division twice in a season, once at home and once away; the season began each year late in August and continued to the end of April.

In March of each year a questionnaire was sent out by the secretary of the League to each club to discover its wishes as to certain matters, such as with which club in the same area it wished to "pair," that is, to play away, when that club was playing at home, and as to Bank Holiday and floodlighting arrangements. When the answers were received the secretary held a conference with one, Harold Sutcliffe, who prepared from them fixture lists of the matches to be played during the following season. For this Sutcliffe received a fee, it being agreed that the copyright in the lists should belong to the League and from time to time he had executed assignments of the copyright in their favour. The compilation entailed a great deal of work and required a high degree of skill and ingenuity. The fixture lists were then sent out to the clubs with a claim to copyright printed thereon and after they had made any amendments and the annual fixtures meeting attended by club representatives had been held Sutcliffe prepared a chronological fixture list which was printed and sent out to the clubs, and to the press upon payment, together with a warning against reproduction except with permission. The list was also published in the same form in the Football League Handbook for the season. The making of this list required painstaking accuracy and hard work.

The defendants, Littlewoods Pools Ltd., ran a system of gambling based on the results of the league matches and they sent out each fortnight coupons containing lists of football matches, which lists were admittedly copied from the League's chronological list, a copy of which they had procured.

By this test action the plaintiffs claimed (1) a declaration that they were entitled to a subsisting copyright in the chronological lists; (2) an injunction to restrain the defendants by their servants or agents or otherwise from infringing the copyright by reproducing the chronological lists or any substantial part thereof on football pools coupons or otherwise and from distributing any such coupons or other infringing material without the consent of the plaintiffs; and (3) damages for infringement of copyright and conversion.

By their statement of claim the plaintiffs alleged that a large number of companies, including the defendants, had for a number of years carried on the business of promoting football pools whereby the public were invited to estimate each week the results of football matches in the plaintiffs' league championship, very large sums being paid each week by the public and large prizes being won; that for those pools the defendants and other pools promoters used coupons upon which were printed parts

of the plaintiffs' current chronological lists; that in connection with the 1958–1959 football season correspondence had recently taken place between the plaintiffs and the Pools Promoters Association, of which the defendants were members, in which the plaintiffs had stated that they would in future require a licence fee for the use of their fixture lists, but the Association had denied the subsistence of such copyright; that the defendants had reproduced the 1958–1959 chronological fixture list and threatened and intended to continue reproducing the lists on their coupons, and that the coupons infringed the plaintiffs' list and the defendants, by issuing the coupons, had converted it to their own use.

The defendants denied that any copyright could or did subsist in the chronological lists.

The facts are more fully stated in the judgment.

Sir Milner Holland Q.C. and *F. E. Skone James* for the plaintiffs.

K. E. Shelley Q.C. and *D. W. Falconer* for the defendants.

The following cases were cited in argument: *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.*[2]; *H. Blacklock & Co. Ltd.* v. *C. Arthur Pearson Ltd.*[3]; *Canterbury Park Race Course Co. Ltd.* v. *Hopkins*[4]; *King Features Syndicate (Incorporated)* v. *O. and M. Kleeman Ltd.*[5]; *Hawkes & Son (London)* v. *Paramount Film Service Ltd.*[6]; *Saunders* v. *Smith*[7]; *Bramwell* v. *Halcomb*[8]; *Cate* v. *Devon & Exeter Constitutional Newspaper Co.*[9]; *Winterbottom* v. *Wintle*[10]; *Odhams Press Ltd.* v. *London and Provincial Sporting News Agency*[11]; *Leslie* v. *Young & Sons*[12]; *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.*[13]; *G. A. Cramp & Sons Ltd.* v *Frank Smythson Ltd.*[14]; *Hanfstaengle* v. *Empire Palace Ltd.*[15]; *Collis* v. *Cater, Stoffell & Fortt Ltd.*[16]; *Purefoy Engineering Co. Ltd.* v. *Sykes Boxall & Co.*[17]; *Greyhound Racing Association Ltd.* v. *Shallis*[18]; *Kelly* v. *Morris*[19]; *Walter* v. *Steinkopff*[20]; *Chilton* v. *Progress Printing & Publishing Co.*[21]

Cur. adv. vult.

[2] [1926] Ch. 433; 42 T.L.R. 370.
[3] [1915] 2 Ch. 376; 31 T.L.R. 526.
[4] (1931) 49 W.N.(N.S.W.) 27.
[5] [1940] 1 Ch. 523, 806; [1941] A.C. 417; 57 T.L.R. 586; [1941] 2 All E.R. 403.
[6] [1934] Ch. 593; 50 T.L.R. 363.
[7] (1838) 3 Myl. & Cr. 711.
[8] (1836) 3 Myl. & Cr. 737.
[9] (1889) 40 Ch.D. 500; 5 T.L.R. 229.
[10] (1947) 50 W.A.L.R. 58.
[11] [1935] Ch. 672; 51 T.L.R. 554; [1936] Ch. 357; 52 T.L.R. 229; [1936] 1 All E.R. 217, C.A.
[12] [1894] A.C. 335.
[13] [1910] 2 Ch. 297; 26 T.L.R. 527.
[14] [1944] A.C. 329; 60 T.L.R. 477; [1944] 2 All E.R. 92.
[15] [1894] 2 Ch. 1; 10 T.L.R. 229.
[16] (1898) 78 L.T. 613.
[17] (1955) 72 R.P.C. 89.
[18] (1923–28) Macg.C.C. 370.
[19] (1866) L.R. 1 Eq. 697.
[20] [1892] 3 Ch. 489; 8 T.L.R. 633.
[21] [1895] 2 Ch. 29; 11 T.L.R. 329.

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May 13. UPJOHN J. read the following judgment: This action is brought to restrain the defendants, Littlewoods Pools Ltd., from copying a list of league football matches prepared by the plaintiffs, the Football League Ltd., in which copyright is alleged to exist. The League are responsible for organising each year that well-known series of football games known as league matches between clubs who are members or associate members of the League. Football must now be taken as the national winter sport of this country and it attracts vast crowds of followers or fans who watch these games. League football together with the Football Association Cup matches form the major opportunities for this interest. All members or associate members of the League are professional clubs who provide sport for the populace and at the same time have financially to make both ends meet. Seeing the use made by pools promoters of league matches through gambling activities based on the results, the League think, perhaps not unreasonably, that they might receive some contribution. The defendants and other companies who promote pools do not share that view. Hence this action. I say no more on that score, but return to a brief description of league football activities.

Nearly all league matches are played on a Saturday afternoon, that being the day on which the large section of the British public who are interested in watching football matches are free to take their recreation. The league is organised into four divisions. Formerly there were three divisions, but since the beginning of the last season (the 1958–1959 season) there have been four. In each of the first two divisions there are 22 clubs and in each of the other divisions there are 24 clubs, making a total of 92 clubs. The essence of league competition is that each club in each division plays every other club in its division twice in a season, once at home and once away. It is essentially a "ladder" competition. At the end of the season in the first three divisions the two at the bottom of each division are relegated to the top of the next lower division and the top two of the second, third and fourth divisions are promoted to the next higher division. In the fourth division the bottom four clubs have to stand for re-election. The club at the top of the first division holds the League Championship for that year. The organisation of these matches and the arrangement of fixtures between clubs is a responsible and difficult matter. It is not a matter of drawing lots or anything of that sort, but for the reasons that I will explain in a moment, the arrangement of these fixtures is a highly skilled matter.

The supreme body governing the sport in this country is the Football Association, and as is well known they have each season a competition for the Football Association Cup. The season starts in late August in each year and continues to the end of April, the final of the Football Association Cup always being

played at Wembley on the first Saturday in May. The arrangements for the following season start in March with an interview between the secretary of the League, at present a Mr. Hardaker, and representatives of the Football Association. The secretary is then informed which Saturdays will be available for playing league matches and on which Saturdays matches will be played for the Football Association Cup ties. This is very important, for the first two rounds of the Football Association Cup take place on Saturdays before Christmas and on those occasions the lower divisions do not play in league matches as they are playing in those rounds. The top divisions only enter the Football Association Cup in the third round, which takes place after Christmas, and on the day appointed for that round they do not play in league matches. Matches in the later rounds naturally depend entirely on the success of the clubs in the earlier rounds.

The next step is for the secretary to send out a questionnaire to all the league clubs. In 1958 it was sent out on March 31. The first question is "What club do you desire to be paired "with? that is, to be away when such club is at home." That shows at once the real difficulty of preparing the list of fixtures. To take a simple example, if Manchester City is playing at home on a given Saturday, it is essential that Manchester United should be playing away. If both are playing at home the gates will suffer and the clubs will not make sufficient money. If both are away, football followers, the all-important customers, will be disappointed of a top class game and what perhaps is equally important may not spend any money on football that week. They must therefore "pair." I have given a simple example, but in densly populated areas the matter is more complicated. Let me give another example: Burnley pairs with Blackburn Rovers, Blackburn Rovers with Preston North End and Preston North End with Blackpool. That means that to obtain a satisfactory state of affairs (that is, to please the football followers and to obtain good gates) for any given Saturday if Burnley is playing at home Blackburn Rovers must be away, Preston North End at home and Blackpool away. So that the difficulty of preparing a really satisfactory fixture list in each division is at once apparent. That is not the only difficulty. As I have said, each club must play every other club in the same division twice, so that each club will play 42 matches for example in the first division, but there will only be 35 or 36 Saturdays available, so that some matches must be played in the middle of the week or at Bank Holiday weekends. Some clubs are prepared to play in the evening under floodlights while others will not do so. Obviously a mid-week match must be played on the local early closing day. The questionnaire is therefore designed to find out clubs' wishes in respect of these matters. I will read the remaining questions: "(2) What is "your best day for midweek matches? (3) Have you, or will

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" you have, floodlighting installed for season 1958–1959? (4) Are " you prepared to play under floodlights? (5) Have you any " particular local holiday date when you desire to play at home? " (6) Two games will be played at Christmas on December 25, " 26 or 27. Which date do you prefer for a home fixture? " (7) Do you desire a home fixture on January 1, 1959, instead " of a mid-week fixture or a Christmas or Easter fixture? In " this respect please note that the Third Round of the F.A. " Cup will be played on January 10, 1959. (8) If January 1 " is not a holiday in your area are you prepared to play away " on this day? (9) Do you prefer Good Friday, Easter Monday " or Tuesday for your home game at Easter? Easter Saturday " is classed as an ordinary Saturday. (10) Any other relevant " information, including any particular difficulty last season." The clubs answer this questionnaire and a summary of the answers is prepared in the secretary's office.

The next step is for the secretary to have a conference with one, Harold Sutcliffe. Mr. Sutcliffe is a practising solicitor, but he, like his father before him, seems to have a special flair for settling league fixtures and this he does every year for and on behalf of the league and for which he is paid a fee. He has no other connection with the League. Mr. Sutcliffe and the secretary have a discussion on the summary to try and iron out any obvious difficulties or snags. Mr. Sutcliffe is told the available Saturdays for league matches and he takes away the questionnaire and summary and prepares a draft fixture list. By this time he knows what clubs will be promoted and what clubs will be relegated. He does not know however which clubs will be elected or re-elected to the lowest four places at the bottom of the fourth division and he calls them A. B. C. D. This work of preparing the list of fixtures is one that requires much skill and hard work. It is not possible to give effect to perfect pairing in every match nor to give effect to the wishes of every club in every particular; that would be beyond human ingenuity and skill, but Mr. Sutcliffe tries so far as his undoubted skill and ingenuity can do so to meet the wishes of all the clubs and to observe the essential of pairing. To assist him in this work he has two charts, one for the first and second divisions and one for the third and fourth divisions, which were prepared many years ago by his father when he used to undertake this work. Mr. Sutcliffe, whose evidence I accept unreservedly, explained to me fully how the chart works and I shall do no more than try to make a short summary of his evidence. Let me take the chart for divisions 1 and 2 as an example. There are 22 vertical columns because there are 22 clubs. The horizonal lines represent the playing days. The chart is so arranged that columns 1 and 2, 3 and 4, 5 and 6 and so on down to 21 and 22 form complete pairs, that is to say, the club in column 1 will always pair with a club in column 2, the club in column 3 will pair with the club in column 4 and so on. It was then found that,

if one omits horizontal columns 8 to 11, vertical columns 1, 3 and 5 each pair with columns 2, 4 and 6 throughout the chart, so that for last season Mr. Sutcliffe made Blackburn Rovers No. 2, and Preston North End No. 3, making a complete pair; Blackpool No. 4 and Burnley No. 5, again making a complete pair and in addition Preston North End pairing with Blackpool and Blackburn Rovers with Burnley. In addition to this the mid-week fixtures and Bank Holiday weekend fixtures have to be worked out. It is largely a matter of painstaking trial and error. Mr. Sutcliffe makes a trial shot, filling in clubs on the chart in columns Nos. 1 to 22, works it out and sees how the result comes out. The operation may take 9 or 10 hours, but before he is fully satisfied he may make 9 or 10 trial shots, putting clubs in different order at the top of the chart. Finally he gets results which satisfy him and meet, so far as possible, the wishes of the clubs. It is fair to say that in doing this work he also tries to fit in on the same principles other leagues, and reserve teams, and this greatly complicates his work. Nevertheless I am satisfied that his work in connection with the four league divisions with which I am concerned represents a vast amount of labour and a high degree of skill and ingenuity.

He then prepares a typewritten list of club fixtures, which I shall refer to as "the clubs' list." That shows on one page for each club the fixtures the club will play throughout the season. That is sent to the secretary to the League, who carefully checks it, and then a print containing complete series of fixtures club by club for all the divisions is prepared, and a claim to copyright, rightly or wrongly, is printed thereon in large letters. Copies of this document are sent to each of the clubs. Last season it was sent out on May 21, 1958, together with information as to the clubs likely to be A. B. C. and D. The covering letter appointed a day (last season May 31) for the club fixtures meeting to be held in accordance with rule 22 of the rules of the Football League. Each club sends its representative, probably the secretary, and any difficulties are raised and discussed and finally settled at the meeting which Mr. Sutcliffe attends as adviser. According to rule 22 the final decision on the fixture list rests with the League, but in practice resort to the League is unnecessary. There is not great controversy, the meetings are not expected to take more than half an hour because, to use Mr. Sutcliffe's words, the clubs have been educated to recognise that making changes in fixtures may well upset the scheme, especially in the case of Saturday fixtures. Occasionally changes have to be made, but for the season 1958–1959 out of the total number of 2,028 matches to be played in all four divisions, only 17 changes were made at the meeting. The lists are finally agreed at this meeting and the representative of each club has to sign the list relating to his club and it is handed in to the secretary. These documents are then handed to Mr. Sutcliffe, who takes them away and in two or three days produces the chronological fixture list,

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which I shall call "the chronological list." A claim to copyright is printed on this document. This is the document in which copyright is alleged to exist and which is allegedly infringed. It shows day by day throughout the season who is playing whom and where, for the home team is always shown first. In each division the list is arranged alphabetically.

The preparation of this list from the final edition of the clubs' list is, of course, automatic and requires only a painstaking accuracy. The chronological list is then sent out to the clubs and to the press upon payment, together with a warning against reproduction except with permission.

I can deal with the activities of the defendants very shortly. This is a test action and the defendants are sued in fact, though not in form, as being representative of the Pool Promoters Association. I do not propose to give any explanation of their activities as they are so well known and so widespread that they have even attracted to themselves some statutory obligations. Suffice it to say that, as is well known, they run a system of gambling based on the results of the league matches on Saturdays. For this purpose they send out every fortnight coupons for the following two Saturdays containing lists of football matches upon which their customers make their choice. The object is to try and pick out matches which result in a draw. Basically these lists for each Saturday contain the league matches to be played on that Saturday. On Cup Tie Saturdays, the defendants use the list of cup ties, which are no concern of the League, but on every other Saturday, which form, of course, the great majority of Saturdays in the season, the league matches are the basis. Some time was taken up in evidence before me exploring differences in the defendants' list compared to the chronological list due to the incidence of cup ties and changes of ordinary league matches, but in the end no argument was based on it and so I do not review it. Subject to these immaterial differences it is clear that throughout the season, Saturday by Saturday, league matches are the basis of the defendants' coupons. Each week the defendants prepare coupons for the use of their customers and it is not in dispute that the list for their treble chance pool is copied directly from the chronological list of which the defendants have managed to procure a copy. The selection of matches for other pools is made from the same list. This was most fairly admitted by the defendants' executive officer responsible for the production of their football pool coupons, Mr. Clare, a most candid and fair witness. To the treble chance list there will be added some Scottish matches. The defendants have 29 agents situated in various parts of the country who check on the matches to be played each week, because sometimes, although on the whole infrequently, the dates and places of some matches between members of the league are altered with the assent of the League. This happens more frequently towards the end of the season when

a cup tie may have had unexpected results. Perhaps some third division club has survived more rounds than was expected, or perhaps some first division club has got knocked out unexpectedly early. In such cases changes in league fixtures have to be made to meet the situation, but on the whole they are few compared to the great body of matches and I am satisfied that substantially the defendants copy week by week throughout the season the entries for that week directly from the chronological list. Indeed, the defendants have been perfectly candid about it and it is not disputed. For a short time they did transpose two matches in each division, but it is not relied on. In those circumstances I do not propose further to review the evidence, which I accept, as to how the various items on the defendants' coupons are prepared.

I conclude the facts by saying that if any copyright in any relevant document resides in Mr. Sutcliffe he has assigned it to the League.

Upon those facts two main points arise: first, is the League's chronological list susceptible of being the subject-matter of copyright and, if so, secondly, has it been infringed by the actions of the defendants? Copyright is statutory and depends on the terms of the Copyright Act, 1956. Section 2 (1) is in these terms: "(1) Copyright shall subsist, subject to the provisions of this "Act, in every original literary, dramatic or musical work which "is unpublished, and of which the author was a qualified person "at the time when the work was made, or, if the making of the "work extended over a period, was a qualified person for a "substantial part of that period." Section 2 (5), so far as is relevant, is in these terms: "(5) The acts restricted by the copy-"right in a literary, dramatic or musical work are—(*a*) repro-"ducing the work in any material form; (*b*) publishing the work; ". . . (*f*) making any adaptation of the work." Section 48 defines "literary work" as including any written table or compilation.

Read literally, the use of the word "any" in section 2 (5) (*a*) makes the definition of included material very wide indeed, wider possibly than under the Copyright Act, 1911, but, in my judgment, no extension was intended, and the matter must be determined in accordance with the principles laid down in the authorities on the earlier Acts. Compilations frequently, though not, of course, necessarily, consist of merely quasi-statistical reference matter such as railway time tables, horse-breeding material, catalogues, indices, solar and lunar calendar events and reference directories. Such material has no literary merit in the sense of having grammatical composition. The chonological list falls into this category of compilations; as to such compilations the law is clear but difficulty arises in its application. Copyright for such a compilation can be claimed successfully if it be shown that some labour, skill, judgment or ingenuity has been brought to bear upon the compilation. The

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amount of labour, skill, judgment or ingenuity required to support successfully a claim for copyright is a question of fact and degree in every case.

Lord Atkinson put the matter in this way in the Judicial Committee of the Privy Council in *Macmillan & Co. Ltd.* v. *K. & J. Cooper*[1]: "What is the precise amount of the knowledge, "labour, judgment or literary skill or taste which the author of "any book or other compilation must bestow upon its composi- "tion in order to acquire copyright in it within the meaning of "the Copyright Act of 1911 cannot be defined in precise terms. "In every case it must depend largely on the special facts of "that case, and must in each case be very much a question "of degree." That passage was treated as laying down the law by Lord Simon L.C. in *G. A. Cramp & Sons Ltd.* v. *Frank Smythson Ltd.*[2] There are many authorities in the books, some on one side of the line, some on the other, but I shall not refer to them for it is largely a question of fact and degree in each case, and this case, in particular, must turn on its own peculiar facts.

Mr. Shelley, for the defendants, has argued, in effect, that in the circumstances of this case the above formulation of the law has small relevance. He submits, and I agree with him, that it is clearly settled law that there can be no copyright in information or in an opinion per se. Copyright can only be claimed in the composition or language which is chosen to express the information or the opinion. There are many cases to that effect: see, amongst others, *Walter* v. *Steinkopff*,[3] *Chilton* v. *Progress Printing & Publishing Co.*,[4] and *Odhams Press* v. *London & Provincial Sporting News Agency*.[5] Mr. Shelley rightly points out that in this case the League is in the unique position of being the only person in the world who, prior to publication, is in possession of the information contained in the fixture lists. The League creates that information and it alone knows who will play whom and where on any given date. Copyright, it is submitted, cannot be claimed in respect of such information: if, says Mr. Shelley, you create information, for example, as to the composition of the next M.C.C. team to try and recover the Ashes, the selectors cannot claim the exclusive right to publish it for it is mere information. You cannot, he submits, have a statutory monopoly (that is, copyright) in the mere publication of the predetermination of future events when such events are, and must necessarily be, of your own creation; thus the publication of future football fixtures is the mere announcement of information in the exclusive possession of the announcer, that is, the League, and anyone is entitled to use that information. Mr. Shelley admits that there is some limitation

[1] (1923) L.R. 51 Ind.App. 109, 125; 40 T.L.R. 186.

[2] [1944] A.C. 329, 335; 60 T.L.R. 477; [1944] 2 All E.R. 92.

[3] [1892] 3 Ch. 489; 8 T.L.R. 633.

[4] [1895] 2 Ch. 29; 11 T.L.R. 329.

[5] [1936] 1 Ch. 357; 52 T.L.R. 229; [1936] 1 All E.R. 217.

upon that proposition, namely, that, where the facts are represented in some special way, it then becomes a question of fact and degree as to whether the skill and labour involved in such special representation of the information is entitled to copyright. With these general propositions I agree. It is in their application to this case that the difficulty arises.

Those general propositions Mr. Shelley applies to this case in this way. He submits that the skill, labour and ingenuity expended by Mr. Sutcliffe are directed to the production of information; they are not directed to the preparation of a fixture list at all, but to the production of a programme of football games to be carried out by members of the League: a programme designed to give the most satisfactory results to league football and to its followers by reducing clashing events to a minimum and by meeting so far as it is possible to do so the wishes of each club. So, he says, Mr. Sutcliffe's work had really nothing to do with the production of a document. He was preparing information which of necessity had to be reduced to written form, but, being purely creative information, the mere reduction into writing of that information could not give rise to any claim for copyright.

Mr. Shelley illustrated his point by reference to *Purefoy Engineering Co. Ltd.* v. *Sykes Boxall & Co. Ltd.*[6] The facts in that case were very complicated and ranged far beyond anything I have to consider. Putting the relevant facts very shortly, the plaintiffs were makers of standard parts to be used by customers in the manufacture of jigs. The defendants copied these jigs and it was recognised that this was permissible in the absence of passing off. The plaintiffs also prepared elaborate catalogues. It was argued that the plaintiffs' goods "repre-" sented" in physical form the description in the catalogues and therefore any catalogue issued by the defendants, though not copied directly from the plaintiffs' catalogues, must infringe the plaintiffs' copyright, for both catalogues would describe the same goods and therefore the defendants' catalogues must necessarily be closely akin to those of the plaintiffs. This argument was rejected and in doing so Lord Evershed M.R., reading the judgment of the court, said[7]: "In our judgment, "Mr. Shelley's argument involves the transposition of an "essential sequence in the chain. For, in our judgment, it is "not true to say that the parts made and offered by the "plaintiffs 'represented' in physical form the descriptions in "the catalogue—at least in any sense relevant to the considera-"tion of copyright in the latter, as a literary work. Rather, the "contents of the catalogue described the parts made and offered "by the plaintiffs. And the considerable skill and labour devoted "by the plaintiffs in making their selection was devoted to the "selection of the range of goods in which the plaintiffs were to "trade and not for the purpose of bringing into existence the "literary work, namely, the catalogue. No doubt skill and

[6] (1955) 72 R.P.C. 89.

[7] 72 R.P.C. 89, 99.

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"labour were employed for the latter purpose, but skill and "labour of a different order. The selected range of goods "existed or was capable of existing for trading purposes inde- "pendently altogether of the plaintiffs' catalogue or of any "catalogue."

Mr. Shelley submits that the state of affairs here is analogous. The work that Mr. Sutcliffe did resulted in the preparation of the clubs' list. Whether copyright could have been claimed for the clubs' list is not in point here, but if Mr. Shelley is right I doubt whether there would be such copyright (though Mr. Shelley would not commit himself on the point), for the essence of his case is that Mr. Sutcliffe is not basically concerned with the production of documents but with information leading to real fixtures to be played, and that the reduction of such information into writing is a mere incidental. So the argument runs.

However, whether or not copyright could have been claimed for the clubs' list, Mr. Shelley submits that there can be no such claim for the chronological list for insufficient labour is expended thereon to justify a claim for copyright. He submits that the only skill, labour and effort which can be called in aid in support of a claim to copyright is that involved in reproducing the chronological list from the clubs' list and that requires no element of taste or selection, judgment or ingenuity and nothing more than the good offices of a clerk whose only qualifications need be painstaking accuracy. To this point I shall return later.

The problem, therefore, at this stage resolves itself into the question whether, as Mr. Shelley submits, you must regard the activities of the League, its servants and agents (and that really means the activities of Mr. Sutcliffe) in producing the fundamental scheme for the following season's football programme as being an activity directed to the production of non-copyright information to be made readily available to the public, or whether the League's activities may properly be regarded as leading to the production of Mr. Sutcliffe's documents, the clubs' list or the chronological list, so that they may be regarded as compilations to which the entire energies of Mr. Sutcliffe may be attributed. If the latter be the true view, then let me say at once that I am satisfied, on the evidence, that the energies of Sutcliffe from start to finish are of a high order judged by any standard. His work represents much skill, labour, time, judgment and, above all, ingenuity, and on this view therefore is entitled to copyright.

Sir Milner Holland, for the League, submits that, if Mr. Shelley's point is sound, a number of the earlier authorities must have been differently decided. Thus, he says, in *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.*[8] it was decided that the British Broadcasting Company had copyright in the "Radio Times," which published the week's radio programmes. In that case Mr. Macgillivray, for the defendants,

[8] [1926] 1 Ch. 433; 42 T.L.R. 370.

took very much the same point as does Mr. Shelley, that you cannot have copyright in a programme consisting of a bare list of items. Astbury J. held that the plaintiffs' compilation was a publication involving considerable time, skill, labour and expense and, being a compilation of several advance programmes, was entitled to copyright whatever might have been the result with regard to one programme. That case certainly decides that you can have copyright in the material form in which you present original created information, but I do not think it decides the point I have to decide, namely, whether you can take into account the early work done by Mr. Sutcliffe in preparing the fixtures. When Astbury J. held that the plaintiffs' publication was one involving considerable skill, labour and expense, I do not understand him as including the preliminary work (which is analogous to part of Mr. Sutcliffe's work in this case) such as fixing dates, times and artists, but to be referring to the actual work of compilation after those matters had been fixed.

The next case on which Sir Milner relied was *Collis* v. *Cater Stoffell & Fortt.*[9] The plaintiff, who carried on a chemist's business, prepared an alphabetical list of patent and proprietary preparations which was copied by the defendants. Thus that again was a case where the plaintiff expended skill mainly in the way of selection and in actually preparing the list. It does not help me on this point.

Finally, there is the Australian case of *Winterbotham* v. *Wintle*,[10] where a " Race Card " of runners was prepared, which was then sent to the handicapper who, after much study of the form, allotted weights to the various horses. It was argued, as here, that the handicapper's undoubted skilled labour was directed not to the preparation of a list of entries but to the achievement of a close race by allotting weights to the various horses, and of course that was so. It was then argued that the race card merely " eventuated " and could not be the subject-matter of copyright. Wolff J. held [11] that the race card was the result of sufficient skill and labour to attract a claim to copyright and therefore I understand him to say it was unnecessary for him finally to decide the point I have to decide. He dealt with the matter very shortly and in any event the judgment does not bind me.

Every case must depend on its own facts. It is perfectly true that Mr. Sutcliffe was not employed to produce a work of art per se nor even a work primarily as a book of reference, such as a directory or a railway guide, but he was employed to produce the best possible programme of fixtures. Of necessity, however, that programme had to be reduced to writing. The League's duty is to arrange the best possible programme of games to please the football public in general and the clubs' finances in particular and they can only do that by producing a list or lists

[9] (1898) 78 L.T. 613.
[10] (1947) 50 W.A.L.R. 58.
[11] 50 W.A.L.R. 58, 67.

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of those games. If, as a result of prolonged cogitations, Mr. Sutcliffe reaches the conclusion that it will be best if, for example, Arsenal plays Manchester City at Highbury on September 20, 1958 (as the programme provided), he is doing so no doubt primarily because that is best from the point of view of league football, but if, as the result of the whole of his prolonged and skilled cogitations, he produces in a particular form the season's list consisting of 2,028 matches or thereabouts, in my judgment he or the League (who have, by direct assignment, any copyright which might otherwise vest in him) are entitled to claim that the chronological list is produced as a result of the entire skill, labour, time, judgment and ingenuity of the League, their servants and agents. In my judgment, on the facts of this case, it is not open to the defendants to try and dissect and break down the efforts of Mr. Sutcliffe in the way suggested. Accordingly, in my judgment, the plaintiffs are entitled to copyright in the chronological list.

I return to Mr. Shelley's point that if, contrary to my view, he is right on his major premise and that the only work of compilation consists in the production of the chronological list from the clubs' list then that, he says, does not involve a sufficient element of skill and labour to justify a claim for copyright. I should regard this as a borderline case. I accept it at once that in such a compilation there is no element of skill, of selection, of taste, of judgment or of ingenuity. As the secretary of the League said, there is no difficulty—it is automatic. But, I would add, it involves a great deal of painstaking hard work with complete accuracy as the keynote. That was all that was required, for example, in *H. Blacklock & Co. Ltd.* v. *C. Arthur Pearson*.[12] I think that the matter may be tested in this way. Suppose the League did no more than issue the clubs' list. Suppose an enterprising publisher conceived the idea of publishing a complete chronological list, which he thought might prove useful to football patrons, and puts one on the market. That work proving successful, suppose it is pirated, that is, deliberately copied by another. In my judgment the enterprising publisher (though perhaps by the narrowest of margins) would be entitled to claim that the work involved sufficient work and labour to justify the existence of copyright therein. True there would be in that supposititious case the argument that there was competition between infringer and infringed, and there is none here, but that is not decisive: see *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.*[13] Had it been necessary to do so, I should have been prepared to find in the League's favour on this ground also.

The next main question is whether the defendants have infringed the League's copyright. The defendants' case is that where you have a mere compilation with no true literary merit

[12] [1915] 2 Ch. 376; 31 T.L.R. 526.

[13] [1910] 2 Ch. 297, 305.

in the sense of grammatical composition there can be no infringement by copying in weekly instalments. It is submitted that, if you have some book which has true literary merit in the sense of grammatical composition (though it may be the worst journalese) to copy one instalment may well be a breach of copyright, but where that is absent, as admittedly it is here, and you are copying a mere list you must look at the plaintiffs' document and the defendants' alleged infringement and compare them. So judged, there can be no infringement. No authority was cited for this and I do not think it right to bring into the realm of copyright tests appropriate and familiar in trade mark and passing off cases. Once the League establishes copyright the real question is whether the defendant is "reproducing the "work in any material form," or "making any adaptation of "the work." That depends on the facts of this case.

The undisputed facts fundamental to my decision in this case are that the chronological list itself is taken by the defendants and used by them line by line and division by division in exactly the same order as the plaintiffs for the preparation of each of their coupons week by week throughout the season (except in the few cup tie weeks, which together with a few league match changes, as I have already pointed out, may be disregarded as de minimis) and they do this deliberately and under a claim of right so to do. True it is that in this case there is no competition between plaintiffs and defendants, but as I have already pointed out that is not decisive of the case. If the defendants like to use the information contained in the chronological list and prepare their own lists by "scrambling" the order of matches so that the divisions were all mixed up and so that there was no alphabetical order, it is possible that it could be successfully argued that they were using only the information and were not reproducing the compilation, but that is not a question I decide, nor do I speculate on the defendants' customers' reactions on receiving such a list. What in fact the defendants have done each week is in substance to copy exactly the League list for that week, throughout the season.

I find some assistance on this point from *Cate* v. *Devon & Exeter Constitutional Newspaper Co.*[14] In that case the plaintiff published weekly a list of bankruptcies, bills of sale and so on, the names being listed by counties. The defendants took week by week such names for the county of Devon. The relevant entries pirated formed naturally a very small part of the whole. That case, while not on all fours with the present, has, however, a strong family resemblance. North J. said[15]: "Then there is a "further point raised by the defendants that the amount that "has been taken from the copyright publication is very small. "In one paper I think out of the three weeks' papers which "have been put in evidence there was only one entry taken;

[14] (1889) 40 Ch.D. 500; 5 T.L.R. 229.

[15] 40 Ch.D. 500, 507.

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" in another there were, I think, four; in the third only a small " number; but in considering these it must be borne in mind " that all that is material for the defendants for the purpose of " their newspaper has been taken, and that it is taken entirely— " copied exactly from the paper—taken regularly, systematically, " every week, and published for the purpose of giving informa- " tion to the very persons to whom the plaintiffs intend their " publications to give that information; and, what is more " important still, the defendants now claim to do it as of right; " and that of itself is quite sufficient to put them in the wrong " in the action and get over any question as to the amount of " matter actually taken from the particular publication which is " in evidence. It seems to me, therefore, that the defendants " have been wrong throughout: they had no right to take this " matter in which the plaintiffs have copyright, and the action " is well founded."

Upon the whole I have come to the conclusion that this systematic pirating by the defendants week by week throughout the season of that part of the League's list which is relevant to that week deliberately and (by their defence of this action) under a claim of right amounts in the end to a reproduction of the plaintiffs' compilation and infringes accordingly.

I propose to declare that the League is entitled to copyright in their chronological list. I shall further declare that by copying the League's chronological list week by week in their coupons for the football season 1958–1959 the defendants infringed the League's copyright.

I shall not grant any injunction for the 1958–1959 season as the season is now over, and I do not propose to grant any injunction relating to next season or to give liberty so to apply, first because I do not know what methods the defendants will employ to prepare their coupons for next year, and, secondly, because of the difficulty pointed out by North J. in *Cate's* case [16] in his judgment immediately following the passage I have read to the effect that it is difficult to see how the plaintiffs can now claim any protection for a document which, judged by last season's dates, at the moment has no existence though no doubt it is now in the course of preparation.

Declarations accordingly. Inquiry as to damages; costs reserved.

Solicitors: *Johnson, Weatherall & Sturt for Parker, Rhodes & Co., Rotherham; Jaques & Co. for North, Kirk & Co., Liverpool.*

[16] 40 Ch.D. 500, 507.

[COURT OF APPEAL.]

CLIFFORD SABEY (CONTRACTORS) LTD. *v.* LONG AND ANOTHER.

[Plaint No. P. 3283.]

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April 30;
May 1, 6.

Lord Evershed M.R., Ormerod and Willmer L.JJ.

Landlord and Tenant—Rent restriction—Decontrol—New tenancy proposed by landlord—Unreasonable refusal—Political anticipation—Premises decontrolled by Rent Act, 1957*—Landlords' proposal for new tenancy—Proposals refused on ground that law might be amended—Whether tenants' refusal "unreasonable"—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11 (1)*—Landlord and Tenant (Temporary Provisions) Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 68), *ss.* 1, 3 (1).

The defendants were tenants of a dwelling-house which became decontrolled pursuant to the provisions of section 11 of the Rent Act, 1957, which came into operation on July 6, 1957. On July 10, 1957, the landlords wrote to the tenants determining their right to possession on October 6, 1958, and at the same time offering to grant to the tenants a new tenancy from September 29, 1957, for a term of five years at an increased rent, subject to repairing covenants. That offer was open for one month. It was refused by the tenants on the ground that they considered that, having regard to the then state of public opinion, there might be further legislation which would improve their position. The tenants having continued in possession, the county court judge, on the application of the landlords made an order for possession, and he refused to suspend the execution of that order under the Landlord and Tenant (Temporary Provisions) Act, 1958,[1] holding that the landlords' proposals were reasonable, and that in determining whether a tenant had "not "unreasonably refused" to accept a landlord's proposals for the purposes of section 3 (1) of the Act of 1958, the consideration that there might be a change in the law was not a factor which he could take into consideration:—

Held, (1) that in determining the question of reasonableness or unreasonableness in connection with the provisions of section 3 (1) of the Landlord and Tenant (Temporary Provisions) Act, 1958, the relevant date was the date of the tenant's refusal of a landlord's offer rather than the date of the hearing, and that the matter accordingly must be considered as on August 10, 1957 (the latest

[1] Landlord and Tenant (Temporary Provisions) Act, 1958, s. 1: "(1) It shall not be lawful for the "owner of a dwelling-house to which "this Act applies—(*a*) to enforce "against the occupier, otherwise than "by proceedings in a court of com- "petent jurisdiction, the right to "recover possession of the dwelling- "house . . . (2) Subject to subsection "(3) of this section, this Act applies "to any dwelling-house to which the "Rent Act ceased to apply by virtue "of subsection (1) of section 11 of "the Rent Act, 1957, being a "dwelling-house in the case of which "[certain conditions are satisfied] ". . ."

S. 3: "(1) Without prejudice to "the power of any court . . . to post- "pone the operation or suspend the "execution of an order for possession, "if in proceedings by the owner "against the occupier for the recovery "of possession of a dwelling-house to "which this Act applies the occupier "satisfies the court—(*a*) that he has "not unreasonably refused or failed "to accept any proposal made by the "owner for the grant of a new "tenancy of the premises . . . being a "tenancy for a term of not less than "three years . . . then . . . the court "shall suspend the execution of any "order for possession. . . ."

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date when the landlords' offer could be accepted); and that, on the facts of the case, the "political prospects" were irrelevant for the county court judge's consideration.

Dictum of Lord Greene M.R. in *Cumming* v. *Danson* (1942) 112 L.J.K.B. 145, 147; 59 T.L.R. 70; [1942] 2 All E.R. 653 applied.

Semble, that there might be circumstances in which "political prospects" would be relevant for consideration in determining whether a tenant's refusal was unreasonable: if it were proved that at the relevant date amending legislation was pending or even probable, which legislation would be likely to affect later agreements containing terms such as those in the agreement preferred by the landlord, it might be that a court would, for that reason, hold it was not unreasonable for a tenant to decline to bind himself and to play for time. It was not relevant for the court to take into consideration the mere possibility of some change of legislation in the near or foreseeable future.

APPEAL from Judge Leon sitting at Willesden County Court.

The defendants Mr. and Mrs. Long were the tenants of 233 Carlton Avenue, Wembley, under an agreement of June 20, 1940. The premises became decontrolled on July 6, 1957, under the Rent Act, 1957. By letter of July 10, 1957, the plaintiffs, Clifford Sabey (Contractors) Ltd., as landlords, served notice on the tenants to give up possession on October 6, 1958, the earliest date on which possession could be claimed under the Act of 1957. At the same time the landlords offered to the tenants a new tenancy for a term of five years from September 24, 1957, at a rent of £150, subject to certain repairing obligations. That offer, which was open for one month, was refused by the tenants. The ground of the refusal was that the tenants considered that there might be amending legislation which would improve their position. On April 16, 1958, the Landlord and Tenant (Temporary Provisions) Bill was presented to the House of Commons to give effect to the government's intentions, first announced on April 2, to amend the Act of 1957. The Landlord and Tenant (Temporary Provisions) Act, 1958, was passed and came into force on August 1, 1958.

The tenants having failed to give up possession, the landlords in these proceedings sought to recover possession. The tenants asked the court to postpone making an order for possession under the power conferred by section 1 of the Landlord and Tenant (Temporary Provisions) Act, 1958.

The county court judge, after holding that the landlords' proposal was reasonable, made an order for possession holding further that he was not entitled to take into consideration the political situation in determining whether the tenants' refusal was unreasonable so as to entitle him to suspend the execution of his order for possession under section 3 (1) of the Act of 1958. His judgment is fully stated in that of Lord Evershed M.R.

The tenants appealed.

Bernard Marder (*Miss Bisschop* with him) for the tenants.

Derek Wheatley for the landlords.

No case was referred to in argument which is not mentioned in the judgments.

Cur. adv. vult.

May 6. LORD EVERSHED M.R. read the following judgment. The appellants in this case have been for many years tenants of premises known as 233 Carlton Avenue, Wembley, being premises which were subject to the Rent Restriction legislation. The question which has arisen is whether they should now obtain under section 3 of the Landlord and Tenant (Temporary Provisions) Act, 1958, a suspension of the right of the plaintiffs, their landlords, to an order for possession to which otherwise the plaintiffs are entitled by virtue of the Rent Act, 1957.

On July 10, 1957, which was very shortly after the Rent Act, 1957, had come into operation and decontrolled these premises, the landlords made an offer in writing, by letter, for the grant of a new lease from September 29 then following of the premises for a period of five years at a rent of £150 per annum exclusive of rates and on terms that there should be a full repairing covenant on the part of the lessees.

The sole question is whether the tenants, the appellants here, were justified in not accepting that offer within the period of one month given by the letter in which the offer was made.

Section 11 (1) of the Rent Act, 1957, which is the provision which "decontrolled"—for that is the word generally used—these premises provides: "The Rent Acts shall not apply to "any dwelling-house the rateable value of which on the 7th day "of November, 1956," exceeded a certain figure, and that applied to these premises. Subsection (7) of the same section made applicable the transitional provisions stated in the Fourth Schedule to the Act. I need not refer in detail to these provisions but the effect is this: The Act came into operation one month from the date of the Royal Assent being given to it, namely, on July 6, 1957. By virtue of these provisions, one in the position of the tenants was entitled (provided, of course, he complied with obligations as to paying rent and performance of 1958. But the transitional provisions also contained a further covenants and so on) to remain in possession until October 6, clause to the effect that the landlord in such a case could make an offer of the grant of a new lease for not less than three years at a rent which would not include a premium, and, if that offer were accepted, then the tenants would thenceforth hold under the terms of the lease offered, and the other provisions of the Fourth Schedule would then be suspended. But it will be observed that the terms of section 11 (1) did contemplate in law that, when the proper time came, a landlord might eject a tenant whose premises had become decontrolled, without having to go to the court for an order, a proceeding well established by the common law in matters of this kind. The Landlord and Tenant (Temporary Provisions) Act, 1958, somewhat assisted tenants,

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like the tenants, whose premises had been decontrolled by the Act of 1957. By section 1 of the Act of 1958 it was enacted that a landlord could not get possession against an unwilling tenant save by order of the court.

For present purposes, the important section is section 3, which, in certain circumstances, suspended the execution of an order for possession. Subsection (1) provides: "Without prejudice to the power of any court apart from this section to postpone the operation or suspend the execution of an order for possession, if in proceedings by the owner against the occupier for the recovery of possession of a dwelling-house to which this Act applies the occupier satisfies the court—(*a*) that he has not unreasonably refused or failed to accept any proposal made by the owner for the grant of a new tenancy of the premises or part of the premises, being a tenancy for a term of not less than three years and not being a tenancy to be granted at a premium or requiring the payment of increased rent in respect of any period before the date on which the proposal was made."

Then there follow three other paragraphs referring to conditions which the occupier must also satisfy, but which raise no question for the present purpose. The subsection proceeds: ". . . then, subject to the provisions of this section, the court shall suspend the execution of any order for possession made in the proceedings for such period, not being less than three nor more than nine months from the date of the order, as the court thinks fit."

Subsection (3) is in these terms: "In considering whether any of the conditions specified in paragraph (*a*) or paragraph (*b*) of subsection (1) of this section are fulfilled, regard shall be had, among other things, to the means of the occupier, to his age, and to any disability to which he may be subject, and (without prejudice to the generality of the foregoing provision) in considering whether a refusal or failure to accept any such proposal as is referred to in the said paragraph (*a*) was reasonable, regard shall be had in particular to the terms of that proposal relating to repairs, improvements or maintenance."

Two grounds were suggested for the view put forward by the tenants that they had not unreasonably failed or refused to accept the offer of July 10, 1957, and had fully satisfied paragraph (*a*). The first was because of the figure inserted in the offer for rent and perhaps also because of the suggested full repairing covenants. This ground was rejected by the county court judge and was but faintly argued before us. I am satisfied that there is no substance in this point and that the judge was entitled to hold, as he did, that the terms as to rent and repairs were reasonable and that, in the circumstances, including means and age and so forth, the tenants do not show a case on this ground under paragraph (*a*).

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I pass, therefore, to the second ground put forward by the tenants. It was said that because of current public feeling—that is, current at the time of the offer being made—and criticism of the Government's policy on the Rent Acts, which the tenants thought might result in some change in the legislation, they were entitled to play for time. This ground was stated by the judge (and it is not suggested that it was wrongly stated) thus: "He"—that is the first defendant—"felt that owing to the considerable agitation which the passing of the Rent Act, 1957, had produced politically and publicly, there was a good chance that the law would be altered in his favour and he wanted to wait to see if it would be before he accepted the offer." On this ground, the argument was substantially confined before us, and, we thought, having regard to the novelty of the point and the nature of the legislation, we should put our conclusions into writing.

The judge's view upon it is as follows: "With regard to the second ground, I appreciated that in one sense it may be reasonable for a person to consider the political situation and whether there is going to be a General Election, whether the Government is likely to introduce fresh legislation and kindred matters before coming to a conclusion as to a particular source of conduct. Business men do this regularly and no-one can say that they are unreasonable in so doing. The Act of 1957 was new at the time of the landlord's offer, and counsel for the tenant pressed on me the submission that it must have been reasonable for the tenant, in view of the strong political reaction which the passing of the Act of 1957 has provoked, to consider whether this would have any effect before accepting the landlord's offer. He urged on me too in support of this argument that the passing of the Act of 1958 did mitigate the law from tenants' point of view and that in consequence it must have been reasonable for the tenant to wait to see if such legislation took place. I held that in spite of the above considerations the expression 'not unreasonably' in the Act of 1958 did not entitle the tenant to consider the political situation, the possibility of further legislation and such matters. I said that the only matters the tenant was entitled to consider were (1) the nature of the offer itself, i.e., the rent and other terms and the fair value of the tenancy and the like (2) his own means and his situation generally present and future including, of course, that of his family and similar matters. If every tenant were entitled to say he refused an offer because he thought there might be a General Election or further legislation such an argument might successfully be raised by almost every tenant who had refused an offer. I did not consider that the fact that the Act of 1957 was new at the time of the landlord's offer made any difference. Either the argument was valid or it was not, and, having regard to the object of the Act of 1958 and the matters with which it was dealing, I

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"held that it was not. I held that the tenant did in fact have "in mind the possibility of further legislation when he rejected "the offer and if I was entitled to take that into consideration "in considering whether he acted unreasonably or not I should "have suspended execution of the order for the 6 months. "Holding as I did that that was not a matter I was entitled to "take into consideration I held that the tenant had been un- "reasonable in refusing the offer and dismissed his application "under the Act of 1958."

Mr. Marder's argument for the tenants was that the question of reasonableness or unreasonableness is one of fact throughout, and that the political prospects in July and August, 1957, whatever their weight, character or effect, were facts at that date and should not have been wholly excluded from consideration. In other words, he contended that the judge was wrong in saying as a matter of law that these political prospects were irrelevant for his consideration, and he drew attention particularly to the statement at the end of the judgment that "I should, if I could "have taken them into account, have suspended the execution "of the order for six months."

I venture to make two preliminary observations. First, in considering the question of reasonableness or unreasonableness in connection with this legislation, I cite, as I have many times done before, the language used by my predecessor, Lord Greene M.R. in *Cumming* v. *Danson* [1]: "The duty of the judge is to take "into account all relevant circumstances as they existed at the "date of the hearing. That he must do in what I venture to call a "broad, common sense way as a man of the world, and come to "his conclusion, giving such weight as he thinks right to the "various factors of the situation. Some factors may have little or "no weight, others may be decisive." In the present case, the relevant date is the date of the refusal rather than the date of the hearing, but the words I emphasise are: "That he must do "in a broad common sense way as a man of the world," etc. The conclusion must be arrived at as on August 10, 1957, the latest date when the offer could have been accepted.

Secondly, I observe that (apart from the introduction to the requirements by section 1 of the Act of 1958 that an order for possession must be obtained, which is not, I think, of significance for present purposes) the law as it appeared in the Act of 1957, and so far as is relevant for present purposes, has not changed at all in fact. The tenants in August 1957 had a choice of two alternatives—to remain on till October 6, 1958, under the existing statutory tenancy, or to accept the offer made for a five-year tenancy from September 29, 1957, at the rent and on the terms suggested. The character and incidents of neither of those alternatives have since been changed by the subsequent legislation.

[1] (1942) 112 L.J.K.B. 145, 147; 59 T.L.R. 70; [1942] 2 All E.R. 653.

Applying, therefore, what I conceive to be the proper test in saying whether a tenant's refusal is unreasonable, I should not wish to lay it down, nor is it necessary to do so, that no circumstances existing at the relevant time which could properly be comprehended by the formula which I have for convenience used, namely, "political prospects" would be relevant for consideration. If it were proved that at the relevant date amending legislation were pending or even probable, which legislation would be likely to affect later agreements containing terms such as those in the proffered agreement, it may be that a court would, for that reason, hold it not unreasonable for a tenant to decline to bind himself and to play for time. But those are not the facts in the present case. At most, on the evidence, there was some political agitation. As the judge said: "What the tenants really wanted "was much longer time to see if the Government yielded to "pressure and passed legislation to ameliorate the position from "tenants' point of view."

On the facts of the present case I agree with the judge that these "political prospects" were irrelevant for his consideration. I agree with him that it is not relevant for the court to take into account the mere possibility of some change of legislation in the near or foreseeable future—a possibility which is at all times present.

I further agree with Mr. Wheatley that, if the answer were otherwise, the inquiry involved, if not impossible, would be foreign to the normal judicial function, since the court would have to inquire into and form its own estimate upon the political temper and pressures of the day. I add, too, that the question in any case is not whether the tenants' hopes and wishes were reasonable, but whether, judged objectively, they unreasonably refused the offer which the landlords made.

Mr. Wheatley also invoked the terms of section 3 (3). He said that, without seeking to restrict the guidance indicated by the subsection to the instances which it contained, the subsection plainly inferred that the circumstances relevant for consideration fall broadly under two heads, namely, (1) those personal to the tenant, his finances, health, age and so on; and (2) those related to the terms of the landlord's offer but particularly in regard to repairs; and that "political prospects" of the kind present in this case were far removed from either head.

For reasons already given, it might be otherwise if it were proved that amending legislation was actually in prospect, which would affect, for instance, the terms of the landlords' offer relating to repairs, etc.; but, subject to this proviso, and without attempting any further exposition of the intent and effect of subsection (3), I think its terms lend support to the view I have expressed. I would therefore dismiss the appeal.

I should add that ORMEROD L.J. has authorised me to say that he agrees with the judgment which I have delivered.

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WILLMER L.J. I also agree and have nothing to add to what my Lord has said.

Appeal dismissed with costs.

Solicitors: *Seifert, Sedley & Co.; Curwen, Carter & Evans.*

B. A. B.

[COURT OF APPEAL.]

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April 7, 8, 9; *May* 11.

Lord Evershed M.R., Ormerod and Harman L.JJ.

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

Revenue—Income tax—Penalty—"Treble the tax which . . . ought to "be charged"—Bank interest misstated in income tax return—Additional assessment made—Claim for penalties—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 25 (3).

Judicial Precedent—Statute—Construction—Assumed construction in Court of Appeal and House of Lords for decision on different point—Adopted construction not binding.

The defendant, in making a return of income for the year ending April 1952, stated that interest from his Post Office Savings Bank account amounted to £18 6s., and was assessed for tax accordingly. In fact the interest was £51 5s. 9d., and when that was discovered an additional first assessment was made on the defendant for the amount understated, the tax on which was £14 5s. Subsequently, the Inland Revenue Commissioners, by writ dated June 13, 1956, claimed £438 14s. 6d. for penalties, being triple the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20, under section 25 (3) of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver . . . a true "and correct . . . return which he is required under the preceding "provisions of this chapter to deliver shall—(*a*) if proceeded "against by action in any court, forfeit the sum of £20 and treble "the tax which he ought to be charged under this Act; . . ."

On appeal from a decision that the triple penalty was of the difference between the amount which should have been charged and the amount which, at the date of the proceedings, had actually been charged:—

Held, (1) that the words "the tax which he ought to be "charged" in section 23 (3) meant the tax appropriate to the item or items not disclosed at a date or dates when disclosure should have been made.

(2) That a decision of the House of Lords on a different issue did not bind the Court of Appeal to accept a different construction of these words which had not been argued, but had been assumed to be correct.

Attorney-General v. *Till* [1910] A.C. 50; 26 T.L.R. 134 reversing [1909] 1 K.B. 694; 25 T.L.R. 342 considered.

Decision of Diplock J. [1959] 1 Q.B. 327; [1959] 2 W.L.R. 32; [1958] 3 All E.R. 682 varied.

APPEAL from Diplock J.

The defendant, Albert Edwin Hinchy, was a civil servant employed in the Customs and Excise Department and his salary

was taxable under Schedule E, tax being levied at the source under P.A.Y.E. On April 19, 1952, he filled up a form prepared for the purpose by the direction of the Inland Revenue Commissioners containing a return of income and claim for allowances for the income tax year 1952/53 in which he stated that the interest received by himself and his wife on accounts on deposits in banks, including Post Office and other savings banks, was £18 6s. His liability for tax was assessed accordingly at £125 6s. 6d. in respect of his total income. In fact the interest from his Post Office Savings Bank account for that year was £51 5s. 9d. He had made similar understatements of this interest for a number of previous years. The matter was discovered by the Inland Revenue and on November 30, 1955, an additional first assessment was made on the defendant for £139 11s. 6d., being the tax under Schedule E, plus £14 5s. which the Court of Appeal found represented the tax on the undisclosed amount of the bank interest.

On June 13, 1956, by a specially indorsed writ, the Inland Revenue Commissioners claimed a penalty in the amount of £438 14s. 6d., under section 25 (3) of the Income Tax Act, 1952,[1] being three times the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20. Lord Evershed M.R., delivering the judgment of the court, pointed out that the basis of the claim in the writ was not in all respects consistent with the Crown's submission in the Court of Appeal. Leave was given to defend the action. Diplock J. decided that only the forfeited sum of £20 was payable, for he held that the relevant time for ascertaining the amount of the penalty (which in his Lordship's view in a case where some charge had been made, was £20 and treble the amount of the difference between the charge which was made and that which should have been made) was the time when proceedings were brought. In the present case the defendant had at that date been charged with all the tax for which he was liable.

The Commissioners appealed.

Sir Reginald Manningham-Buller A.-G., Q.C., John Pennycuick Q.C. and *Alan Orr* for the commissioners.

The defendant taxpayer appeared in person.

[1] Income Tax Act, 1952, s. 25: "... (3) A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this chapter to deliver shall —(*a*) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (*b*) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment. (4) The commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid."

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In addition to the cases referred to in the judgment, the following were cited in argument: *Whitney* v. *Inland Revenue Commissioners* [2]; *In re Tapp* [3]; *In re Weigall's Trusts* [4]; *In re Duke of Norfolk.* [5]

Cur. adv. vult.

May 11. LORD EVERSHED M.R. The judgment which I am about to read is the judgment of the court.

The question arising on this appeal is apparently short and simple enough: it is the meaning of a few words in section 25 (3) (*a*) and (*b*) of the Income Tax Act, 1952—" . . . treble the " tax which he ought to be charged under this Act." But the full arguments of the Attorney-General and Mr. Pennycuick have at least made clear that not only the subsection but the whole fasciculus of sections 18 to 30 inclusive, which form part of Chapter II of the Act, and which in large measure trace their descent through the Income Tax Act, 1918, from that of 1842, has in the course of 117 years and in greatly changed circumstances acquired an obscurity, and in some respects an artificiality, quite remarkable even in a taxing statute. As long ago as 1909, Cozens-Hardy M.R. described the prototype of the subsection under review, section 55 of the Act of 1842, as " ungrammatical and almost unintelligible." The language of that section has nevertheless been reproduced, substantially unchanged, in the two consolidating statutes of 1918 and 1952. We shall, in the course of this judgment, have occasion to refer to more than one of the problems which the present subsection and its fellows present, problems which (if they are soluble at all) it is fortunately unnecessary for us to solve.

It is the contention of the Crown that the words we have cited mean " treble the taxpayer's whole (properly) assessed tax " for the relevant year." If that view be right, results and anomalies of an extravagant kind follow. Yet it is clear that the court (unlike the commissioners) has no dispensing power under the subsection. The remedy in the last resort, according to the Crown's argument, is found in the power of the commissioners or the Treasury (for example, under section 500) to mitigate or remit the penalty before or after judgment. It has indeed been urged upon us that the Crown's practice has been consistent for over a century and that we should give judicial sanction to it, relying upon the Treasury in the exercise of its statutory discretion to avoid harshness or injustice. We have no warrant to suggest that the Treasury's discretion has not at all times been most fairly and properly exercised, and certainly in the present case we can see no ground for sympathy with the defendant, who, being an officer in the Department of Customs

[2] [1926] A.C. 37; 42 T.L.R. 58.
[3] [1959] 2 W.L.R. 541; [1959] 1 All E.R. 705.
[4] [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312.
[5] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695.

and Excise, deliberately failed to make true and correct disclosure over many years of one source of untaxed income of his wife and himself, namely, the Post Office Savings Bank. Nevertheless, we venture to think that the results of the Crown's contention —particularly at a time when present rates of taxation may swell the penalty for a trifling mistake to almost astronomical figures —are most unsatisfactory however well the Treasury's discretion be exercised; and we express the hope accordingly that Parliament may find time to review the sections in question.

The facts of the case are themselves not free from obscurity; but for the purpose of this appeal they may not greatly matter. We have said that the defendant was and is a servant of the Crown employed in the Customs and Excise Department. His salary as such was taxable under Schedule E, and tax was levied at the source under P.A.Y.E. For the tax year 1952/53 this levy was £125 6s. 6d. He had for the same year disclosed in his income tax return the sum of £18 6s. for Post Office Savings Bank interest received by himself and his wife. It is not now in doubt that the true amount of such interest was £51 5s. 9d. As we have said, he had made similar understatements for a number of previous years. He has now been duly assessed for the year 1952/53 in the full sum of £51 5s. 9d. According to the writ in the action the full tax assessment for the year is £139 11s. 6d., namely, £125 6s. 6d. Schedule E tax in respect of his employment and £14 5s. 0d. " Income Tax Schedule D in " respect of untaxed interest." In an earlier paragraph of the writ reference is made to the amount of £18 6s. 0d. which the defendant had disclosed. But the sum of £14 5s. 0d. represents arithmetically 9s. 6d. in the £ on £30—9s. 6d. being the appropriate rate of tax. From one of the documents in the case, containing a computation by the Crown of the amount of tax properly due from the defendant in respect of the difference between the sums received for Post Office Savings Bank interest and the sums disclosed, there appears against the year 1952/53 the item for bank interest " Assessed, say £21," a sum less by £30 than the true amount of such interest; and £14 5s. 0d. is shown as the amount of tax (at 9s. 6d. in the £) on this figure of £30. In the circumstances, it must, we suppose, be assumed for the purpose of this case that the defendant had been assessed and taxed in respect of Post Office Bank interest on the sum of £21 but that, as later appeared, the true and correct amount of such interest for the year was £30 more, namely, £51.

Even so, however, the claim made by the writ appears to be entirely at variance with the Crown's so-called practice, according to which he should now be charged the treble penalty not only on the P.A.Y.E. tax and not only on the tax on the excess income of £30, but on the full amount of the Post Office Bank interest, £51 odd—let alone on certain other income which appears from his return. For the purposes of this case, however, and in view of the conclusion which we have formed, it is sufficient to say

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that £14 5s. 0d. must be taken to represent the tax (at 9s. 6d. in the £) on the undisclosed amount of bank interest, namely, £30.

It is nevertheless to be observed that the Crown's view of the true construction of the subsection which forms the second ground of appeal stated in the notice in the present case is inconsistent with the claim in the writ at least in two respects: first, the claim was not confined to sums charged by direct assessment as it included P.A.Y.E. levy; second, £14 5s. 0d. was not the tax on the whole Post Office interest but only on the balance of £30 undeclared.

We return now to the question of construction of section 25 (3). The view of the judge was that the Crown's claim must be limited to £20 only. He was of opinion that since before the issue of the writ the defendant had been assessed in the sum of £139 11s. 6d., namely, £125 6s. 6d. under Schedule E plus £14 5s. 0d., it could no longer be said that, at that date, there was any tax which the defendant "ought to be charged under "the Act." It was also the judge's view, though this is not reflected in his decision, because of the opinion above referred to, that the essential phrase, "the tax which he ought to be "charged," is limited to the tax for which he should be charged, but was not in fact charged upon his income tax return as a result of his incorrect statement therein of the amount of bank interest—that is, in figures, £14 5s. 0d. Upon this third view the Crown would be entitled to judgment (in addition to the sum of £20) for three times £14 5s. 0d., or £42 15s. 0d. The Crown's dissent from this view forms its first ground for the present appeal, as the notice shows.

We propose to consider the question first as a matter of construction of the Act, without reference to any decided cases; and then to see whether the conclusion at which we so arrive is affected by any decision binding upon this court. It is necessary, first, to refer at some length to the group of sections to which we have already alluded.

Section 18 is the first of a series of sections under Chapter II with a crossheading "Returns and Assessment." Subsection (1) reads: "It shall be the duty of every person who is chargeable "to income tax for any year of assessment to give notice to the "surveyor that he is so chargeable at or before the end of that "year . . ." I can pass over the proviso. Subsection (2): "If any person, without reasonable excuse, fails to give such a "notice as aforesaid, he shall (*a*) if proceeded against by action "in any court, forfeit the sum of £20 and treble the tax which "he ought to be charged under this Act; or (*b*) if proceeded "against before the General Commissioners, forfeit a sum not "exceeding £20 and treble the tax which he ought to be charged "under this Act, and where he is proceeded against before the "General Commissioners, the penalty shall be recovered in the "same manner as any other penalty under this Act, and "the increased tax shall be added to the assessment."

Section 19: "Every individual, when required so to do by a "notice given to him by the surveyor, shall, within the time "limited by the notice, prepare and deliver to the surveyor a "true and correct return in the prescribed form of all the sources "of his income and of the amount derived from each source for "the year preceding the year of assessment, computed" as therein provided; and again I can pass over the proviso.

Section 20 contains a similar provision relating to the current year's chargeable income, and I need not read that; or the supplemental provisions in subsections (2), (3) and (4); but I should perhaps add that there is at the end of subsection (4) a proviso as follows: "Provided that the penalty inflicted upon "any person proceeded against for not complying with this "provision who proves that he was not chargeable to tax shall "not exceed five pounds for any one offence."

Section 21 (1): "Every person acting in any character on "behalf of any incapacitated person or person not resident in "the United Kingdom who, by reason of such incapacity or "non-residence in the United Kingdom, cannot be personally "charged under this Act, shall, whenever required to do so by "a notice given to him by the surveyor, within the time limited "by the notice and in any division in which he may be charge-"able on his own account, deliver such a statement as in the "last preceding section is described of the profits or gains in "respect of which tax is to be charged on him on account of "that other person, together with the prescribed declaration." Subsection (2): "Where two or more such persons are liable to "be charged for the same person (*a*) one statement only shall be "required to be delivered which may be made by them jointly, "or by any one or more of them"; and then there is a second provision, (*b*), which I need not read.

Section 22 is a somewhat similar provision, which I think I can summarise by saying that it involves the obligation to deliver a list by persons in receipt of taxable income belonging to others containing a true and correct statement of all income and the names and addresses of the persons concerned, etc.

Section 23: "Every person, when required so to do by a "notice served on him by the surveyor, shall, within the time "limited by the notice, prepare and deliver to the surveyor a "list, in writing, containing to the best of his belief (*a*) the name "of every lodger or inmate resident in his dwelling-house; and "(*b*) the name and ordinary place of residence of any such "lodger or inmate who has any ordinary place of residence else-"where at which he can be assessed," etc. Section 24 I can, again, summarise as being related to returns as to the annual value of land.

I come to section 25. Subsection (1): "Any such lists, "declarations, statements and returns as are provided for by "the preceding provisions of this chapter shall be in such form "as the Commissioners of Inland Revenue shall prescribe, and

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" in prescribing forms under this subsection the commissioners " shall have regard to the desirability of securing, so far as may " be possible, that no person shall be required to make more " than one return annually of the sources of his income and the " amounts derived therefrom." Subsection (2) I think I can pass over, as it provides for a general declaration as regards profits under Schedule A, B, D or E.

Subsection (3) (which is the vital subsection for the purposes of this appeal): " A person who neglects or refuses to deliver, " within the time limited in any notice served on him, or wilfully " makes delay in delivering, a true and correct list, declaration, " statement or return which he is required under the preceding " provisions of this chapter to deliver shall (*a*) if proceeded " against by action in any court, forfeit the sum of £20 and " treble the tax which he ought to be charged under this Act; " or (*b*) if proceeded against before the General Commissioners, " forfeit a sum not exceeding £20 and treble the tax which he " ought to be charged under this Act, and where he is proceeded " against before the General Commissioners, the penalty shall " be recovered in the same manner as any other penalty under " this Act, and the increased tax shall be added to the assess- " ment." It will be noticed that these penal provisions are ipsis verbis the same as those already once stated in section 18.

Subsection (4): " The commissioners shall also proceed to " assess or cause to be assessed every such person who makes " default as aforesaid." Subsection (5) provides for some relief, for it contains a provision that if a person required to deliver a list (etc.) states the reasons for his inability to have done so he shall not be liable to the penalty if the commissioners are satisfied with his reasons and if he delivers within a further time " as perfect a list . . as the nature of the case permits." I leave out subsections (6) and (7).

Section 26 also I can summarise, as it relates to returns by persons coming to reside in a particular division. Section 27 I must read more fully. Subsection (1): " Every employer, when " required to do so by notice from the assessor, shall, within the " time limited by the notice, prepare and deliver to the assessor " a return containing (*a*) the names and places of residence of " all persons employed by him; and (*b*) the payments made to " those persons in respect of that employment "—as provided in the rest of the subsection. I need not read the further provisions of that subsection, and I pass to subsection (2), which provides: " Any director of a company, or person engaged in the manage- " ment of a company, shall be deemed for the purposes of this " section to be a person employed "; and subsection (3): " Where " the employer is a body of persons, the secretary of the body, " or other officer (by whatever name called) performing the " duties of secretary, shall be deemed to be the employer for " the purposes of this section: Provided that where the employer

" is a body corporate, that body corporate shall be liable to a " penalty for failure to deliver a return in pursuance of this " section as well as the said secretary or other officer."

Section 28, having been repealed, I do not read. Section 29 (1): " Every person carrying on a trade or business who, in " the ordinary course of the operations thereof, receives or retains " money in such circumstances that interest becomes payable " thereon which is paid or credited without deduction of income " tax, and, in particular, every person carrying on the trade or " business of banking, shall, if required to do so by notice from " a surveyor, make and deliver to the surveyor, within the time " specified in the notice, a return of all interest paid or credited " by him as aforesaid during a year specified in the notice in the " course of his trade or business or any such part of his trade " or business as may be so specified, giving the names and " addresses of the persons to whom the interest was paid or " credited and stating, in each case, the amount of the interest." I can pass over the proviso to that subsection; and I can also omit a reading of the remainder of the section.

Section 30 (which is the last of this series of sections) is: " The provisions of section 25 of this Act with respect to the " failure to deliver lists, declarations, statements and returns " —and I interpose by way of reminder that that is the section with the provisions of which we are now concerned—" shall " apply to returns under the three last preceding sections." Having regard to the repeal of section 28 that should, of course, now read " sections 27 and 29 "—the obligation to deliver lists of employees and what I for convenience call compendiously the bankers' obligation.

Whatever other epithets the language of the sections or any of them may invite, it is impossible to acquit them of a considerable degree of repetition or overlapping and inelegance. The two parallel and independent penalties exigible by the General Commissioners on the one hand and by the court on the other, which are found in section 25 (3), are found also in section 18 (relating to the failure of persons chargeable to tax to give notice of chargeability): these same penalties are expressed in section 25 (3) to be exigible on default in delivering a " true " and correct statement or return " as required by any of the sections 19 to 24 inclusive: further, by section 30 the penalties under section 25 are made applicable to the returns required by sections 27 and 29. Much more curious is the phrase at the end of section 18 (2) repeated at the end of section 25 (3), " and the " increased tax shall be added to the assessment." To no part of the subsection was the use of the adjective " unintelligible " by Cozens-Hardy M.R. more appropriate than to this baffling sentence. It was strongly contended by the Attorney-General that by the words " increased tax " was meant the amount of treble the tax (or less) which the commissioners are by subsection (2) of section 18 and subsection (3) (*b*) of section 25

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entitled to forfeit. The argument finds support in the submission that otherwise the provisions of subsection (4) of section 25 (at least in cases of proceedings before the commissioners) would be otiose, notwithstanding the use therein of the word " also "; but perhaps more forcibly in the old statutory provisions (see, for example, section 21 (6) of the Taxes Management Act, 1880) that penalties exacted by the commissioners should be recoverable by way of their being made the subject of assessment. But the contention involved the Attorney-General in the concession that the word " penalty " in the penultimate line of section 18 (2) and of section 25 (3) meant only the fixed sum of £20—a concession very difficult to accept on more grounds than one, including the use of the same word " penalty " in subsection (5) of section 25, where it would be virtually impossible so to confine it. But the difficulties of interpretation of this perplexing sentence are much enhanced by the circumstance that section 25 (3) might well, and section 18 (2) almost inevitably would, apply to cases in which there had previously been no assessment at all. We have, however, come to the conclusion that the solution, if possible at all, of this particular problem cannot materially assist in providing the answer to the instant question. We therefore confine ourselves to observing that the difficulty created by the sentence mentioned may well illustrate the justice of the comment made in the Irish case later mentioned that amendments and additions have been made in the course of time to the original enactment without any proper appreciation of their effect; and certainly reinforces our earlier plea that Parliament should find time to consider the advantage of making penal provisions of a taxing statute reasonably intelligible to those who may be affected by them.

We return once more to the essential formula for present purposes " . . . the tax which he ought to be charged under this " Act." We do not at all deny that the words are capable of the meaning which the Crown attributes to them, namely, the tax (that is, the entire amount of tax) which ought to be charged, as distinct from the (smaller) amount, if any, which has in fact been charged by reason of the deficiency of the taxpayer's return. This, however, is not in truth the meaning attached to it by the Crown, which in practice omits income not taxed by direct assessment, but by deduction, with an exception, illustrated in this case, of income deducted under P.A.Y.E. (See the second ground of appeal.) Moreover, no reference is made in the subsection to the year of assessment. The Crown seeks to overcome this difficulty by observing that any return must in the nature of things be related to a year: and if this were the only difficulty the answer might, we will assume, suffice. But there are other and far graver difficulties: for it is not in doubt (nor has the Attorney-General sought to deny or excuse it) that the Crown's contention involves anomalies so extravagant as to be shocking in a penal provision. We do not attempt an exhaustive list.

but observe that the penalty is one which the court (according to the Attorney-General) is bound to exact without remission or mitigation and is so bound notwithstanding that the offence may be relatively trivial or even adverse to the taxpayer's interest. It is first to be noted that " tax " will include surtax as well as income tax at the standard rate—though surtax in any year is commonly payable in respect of a different year of assessment from income tax. It is true that the intrusion of surtax, not dreamt of in 1842, presents, on the third view above formulated, an inescapable difficulty in any case; for if " the " tax which he ought to be charged " be limited to tax evaded by the incorrect return, such " tax " would include surtax; and there is no indication which year is intended nor whether the undisclosed income should, for penalty purposes, be treated as that part of the income which in the particular case attracts the highest rate of surtax.

We will next refer to the effect of the Crown's contention upon a case arising under section 21 (and similarly under section 22) where one or more persons (and commonly it will be more than one) are bound to make returns of the taxable income of a third party. The Attorney-General expressly conceded that, in such a case, where a statement incorrect in some respect had been made, each of the persons liable to make such a return would be liable to a penalty including a sum equivalent to three times his own personal tax liability—a penalty which would be liable to vary enormously as between one such person and another, both equally at fault, according to their own respective incomes. An escape from so apparently absurd and unjust a conclusion might be found by relating the tax penalty to that of the person on whose behalf the return was made; but this means of escape was not embraced by the Attorney-General.

In this connection the Attorney-General informed us, and the stated ground of appeal shows, that, according to the practice of the Treasury " the tax which the taxpayer ought to be charged " excluded tax deducted at the source other than P.A.Y.E.—by way of distinction from cases arising under paragraph 4 of Schedule VI to the Act, to which we later refer. With all respect to the Attorney-General, we have failed to find any justification in the statute for the distinction: but assuming it to be well-founded, it follows that a startling anomaly arises in point of liability between a taxpayer whose income is wholly or substantially directly taxable and one whose income is substantially derived from sources attracting tax deduction at the source —an anomaly which might well be thought to run quite contrary to ordinary justice, giving (as it does) an immense advantage to the taxpayer whose income is wholly or substantially unearned.

Even more startling are the anomalies arising under sections 23, 27 and 29; for failure to return accurate lists under any of these sections will expose the defaulter to penalties wholly unrelated to the extent of the default but calculable by reference

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to his own tax liability albeit fully discharged. Thus, in an extreme, though not extravagant case, a company which failed to return an accurate list of employees would be liable to a penalty equivalent to three times its own tax liability, which might run into hundreds of thousands; and not only so, but the secretary of the company (who might be the person in fact responsible for the default) would also be liable for a penalty calculated on his own personal tax assessment—a sum enormously less than the corresponding liability of his employer.

Nor is this by any means all. In the present case the Crown has expressly disclaimed any allegation of fraud against the defendant. Yet had the case been otherwise—that is, had the default of the defendant been treated as dishonest—then prima facie section 48 of this Act would have been applicable. Subsection (1) of that section provides: "Where a person who ought "to be charged with tax, as directed by this Act, is not duly "assessed and charged by reason that he has (*a*) fraudulently "changed his place of residence or fraudulently converted, or "fraudulently released, assigned or conveyed any of his property; "or (*b*) made and delivered any statement or schedule which is "false or fraudulent; or (*c*) fraudulently converted any of his "property, which was chargeable" (in the way there indicated); "or (*d*) been guilty of any falsehood, wilful neglect, fraud, covin, "art or contrivance whatsoever, such person shall, on proof "thereof to the General Commissioners for the division in which "he has been charged, or, if he has not been charged, then for "any division in which he is chargeable, be assessed and charged "treble the amount of the charge which ought to have been "made upon him: Provided that, if any charge has been made, "but that charge is less than the charge which ought to have "been made, such person shall be assessed and charged, over "and above the former charge, treble the amount of the differ- "ence between the charge which was made and the charge which "ought to have been made, such amount to be added to the "assessment"; and subsection (2) contains a provision rendering a third party abetting or aiding such a fraudulent disclosure liable to a penalty of £500.

It is to be noticed that the relevant words in the section differ somewhat from those in section 25 (3); for the words in the former case are ". . . the amount of the charge which ought "*to have been* made upon him." It was the contention of the Crown that these words have, in effect, the same meaning as the language in section 25 (3)—"tax which he ought to be "charged." Nonetheless, the proviso in section 48 makes it clear that, in cases under that section, only what we will for brevity call the excess tax is to be taken into account in assessing the liability. On that view it is, at the least, a startling proposition that the taxpayer's penal liability in cases of fraud is very much less than his liability in the absence of fraud; the

result being that it would be an advantage to the Crown to treat the rogue as an honest man. Dishonesty, it seems, is plainly indicated as the best policy for the taxpayer.

It is convenient here to refer to two other provisions of the statute. The first is paragraph 4 of the Sixth Schedule, applicable again to fraud—in this case in relation to a claim for tax relief. Sub-paragraph (i), so far as relevant, is as follows: "A "person who, in making a claim for or obtaining any relief to "which this Schedule relates, or in obtaining any certificate as "aforesaid (*a*) is guilty of any fraud or contrivance; or (*b*) "fraudulently conceals or untruly declares any income or any "sum which he has charged against or deducted from, or is "entitled to charge against or to deduct from, another person; or "(*c*) fraudulently makes a second claim for the same cause, shall "forfeit the sum of £20 and treble the tax chargeable in respect "of all the sources of his income as if such claim had not been "allowed"; and again there is a sub-paragraph relating to a person abetting.

It will be noticed that once again there is a variation in language—in this case it is "the tax chargeable in respect of "all the sources of his income, . . ." a formula plainly apt (as the Scottish Court of Session has in fact held in *Lord Advocate* v. *McLaren* [1] to cover the total tax liability, without any exception for tax deducted at the source.

Our second reference is to section 49, applicable to a case where an increased assessment has been properly made and there has been any "fraud, covin, art or contrivance" on the taxpayer's part; in which case his penal liability is "treble the "amount of the tax on the amount of the excess"—a phrase which we assume to be intended as synonymous with the third possible construction above mentioned of the relevant words in section 25 (3).

We make no attempt to answer the question why there should be so much variation in the penal consequences of defaults—why fraud in one case (under section 48) should be so much more lightly punished than fraud in another (under the Sixth Schedule), and what is the exact place of section 49 in relation to sections 19 to 24. There is, of course, much force in the Crown's argument that if in section 25 (3) Parliament had intended to limit the penal tax liability to what we have called the excess tax, it could or would naturally have resorted to the language used in section 49 or the qualifying proviso of section 48. On the other hand, the numerous and illogical variations in penalty produce in our view the result that no safe assistance can be got from the language of other sections of the Act in construing the words of section 25 (3).

We do not think it necessary or useful to refer to the corresponding provisions and the corresponding anomalies in the earlier

[1] (1905) 5 T.C. 110.

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legislation—save in one respect. Until the year 1923 and the passing of the Finance Act of that year, which by section 23 (2) introduced what is now paragraph (*a*) of section 25 (3), the penalty which the court had to exact, if proceedings were brought before it instead of the commissioners, was the fixed sum of £50 only. It is obvious, therefore, that the worst of the anomalies to which we have above referred did not arise before 1923; for even if the phrase " treble the tax which he ought to be charged " were construed as the Crown suggest, the commissioners were not bound to exact its full measure. The startling feature of the present legislation is that, however extravagant the result, the court is now bound to forfeit the full penalty and the Crown may to that end invoke section 25 (3) even though the more appropriate section, according to the facts of the case, might appear to be section 48 or section 49—neither of which exacts, even though the case be one involving fraud, anything like so extreme a forfeit. The remedy of the subject is left to the power of the Treasury (or the commissioners) to mitigate the penalty or stop the proceedings under section 500 or section 55. As we have earlier said, we cannot think the result either just, sensible or satisfactory, however well and conscientiously the discretions be exercised.

These then being the consequences of the Crown's contention upon the construction of the subsection, are there other possible interpretations less extravagant in their results?

Diplock J. avoided what he called the absurd and unjust consequences of the Crown's contention by holding that once the defaulting taxpayer had been duly and properly assessed (as was the case with the defendant before the issue of the writ) then it could no longer be said that he " ought to be charged " with the tax for which he had been assessed; in other words that, by the assessment, he had been charged and there was, accordingly, at the relevant date nothing left undone which ought to be done.

We do not think that this can be right. It appears to us that the offence is committed either when the false return is received by the commissioners or when the time for making the return has expired. Subsequent events, whether assessment or payment, are irrelevant. In order to arrive at the correct figure which has to be multiplied by three, assessment is a necessary preliminary, and therefore, if the judge be right, the penalty, apart from the £20, could never be levied because there would never come into existence the basis for it. We add that, in the case in the Irish Supreme Court of *Attorney-General* v. *White*,[2] the judges adopted this view and held accordingly that the proceedings to recover the penalty of £20 plus treble the tax under the corresponding legislation in Ireland were premature where there was no final assessment of the tax.

There remains the judge's interpretation of the relevant words (the third view above indicated), namely, that " the tax which he

[2] Unreported, March 3, 1931.

" ought to be charged " means what we have called the excess tax—that is, the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. Where there has been failure to make any return at all, the " tax which he ought to be charged " will, of course, be the total of his tax liability for the relevant period. But where, as in the present case, the taxpayer's default lay in an understatement of one of his sources of income, then the tax which he ought to be charged will, on this interpretation, mean the tax which he ought to be charged (but was not charged by reason of his default) on the undisclosed income.

It is no doubt true that if you speak of the " sum I ought to " be charged " for an article which you have bought, you may be supposed to be referring to the true price of the article in contrast to the amount of the bill which you have in fact received. But where you have already had a bill (and more particularly when you have paid it) it would, we think, be more natural, if you wished to refer to the true price, to speak of " the sum I ought " *to have been* charged "; and these, be it noted, are the words used in section 48. So in a case arising under section 25, where (as must not uncommonly be the case) the taxpayer has already been charged an assessed sum of tax and paid it and then, later, an undisclosed item of income is revealed, it would surely be more natural if the total tax liability was intended to refer to the tax which " he *should have been* charged."

We do not forget that the word is " charged " not " assessed." On the other hand, the phrase is " ought to be charged " and not " is chargeable." Mr. Pennycuick was disposed to concede that if in ordinary speech you refer to your bills which ought to be paid or the letters which you ought to write, you are in each case referring to those things only which at the time of speaking you have left undone. So, as a matter of English, it seems to us at least a legitimate interpretation of the phrase " tax which he " ought to be charged " to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return: in other words, the tax appropriate to the undisclosed income.

We agree that, if such had been the intention, Parliament might have been expected to use the formula adopted in section 49. We observe, however, that the provisions of section 49 differ materially from those of section 127 of the Act of 1842, which was its original ancestor: in that, as we understand the latter section, the taxpayer was relieved from any forfeit in the absence of any fraud, covin, art, or contrivance, etc. At least it may equally be said that, on the Crown's view, recourse could have been had to the language found in paragraph 4 of Schedule VI; for, with all respect to the Attorney-General and the so-called practice of the Treasury, we find difficulty in apprehending the justification for excluding tax (or certain tax) deducted at the

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source from the penal consequences of section 25 (3). We have referred already to the (as we think, significant though slight) variation in language between section 25 (3) and section 48. But, in any case, as we have earlier stated, we do not think that any sufficiently safe guide to the construction of the relevant subsection can be extracted from the language of other parts of what has been called (in the Income Tax Codification Committee's Report Command Paper 5131) the " flotsam and jetsam " of the penal provisions of the Act.

There is, however, one final matter which seems to us of some significance. It will be observed that, though (according to the Crown's contention) the tax referred to in the subsection means the entire tax liability (with the exception conceded) for the relevant year, there is in the subsection no reference whatever to the year or to any period of assessment. The Attorney-General's answer was that all the relevant sections must be treated as related to statements or returns for a particular tax year. But the answer is not, we think, satisfactory. A case may well be supposed in which an undisclosed item of income received in a particular year is revealed, say, two or three years later, when the taxpayer has long since discharged his liability, calculated on his defective return, for the year in which the undisclosed income was received. If the Crown's contention were correct you would, as we think, at least expect some language specifying the relevant year. We do not refer again to the surtax difficulty. But the point we are making is, we venture to think, more striking if applied to cases of failure to deliver lists of lodgers or of employees; for in those cases the taxpayer penalised will not have failed at any stage to pay all the tax for which he is chargeable. In such cases, which, then, is the relevant year—the year to which the list of lodgers or employees was intended to relate, or the year in which the default in delivering the list occurred? If the interpretation which we are now suggesting be the true interpretation, then the absence of any reference to time or to any year of assessment is natural and appropriate; for the tax referred to is the tax in relation to a specific item or number of items not disclosed at a date or dates when disclosure should have been made.

But over and above all these considerations we take, we confess strongly, the view that the interpretation now put forward most closely conforms to sense and justice. If an amount of tax has been evaded, then upon disclosure the taxpayer is bound to pay it and is liable to a penalty of three times the amount of such tax. Where no tax has been evaded by the defaulting party, there is certainly no logic in relating the penalty to the tax liability he has faithfully discharged; and at least if the default persists, new demands may presumably be repeated with penal results on each occasion of default. We do not say that all anomalies are avoided, but we do say that they lose their absurd and extravagant character.

Treating the matter, then, as res integra, we would conclude that the phrase " tax which he ought to be charged " has the limited significance which we have for brevity called " the excess " tax." It remains to consider whether we are constrained to a different conclusion by authority binding upon this court.

There has been no decision of any court directly upon the point which we have to decide. It is said by the Attorney-General that the construction for which he contends has so far always been assumed; and if that is so, then it may fairly be said of those responsible that the way in which the discretions vested in the Treasury have been exercised has been such that the Crown's view has been generally accepted. The assumption was undoubtedly made by Rowlatt J. in *Attorney-General* v. *Johnstone* [3]; but the Attorney-General concedes that he cannot for present purposes further rely upon the dictum of that learned and experienced judge. Support for the Crown's view may also be derived from the textbooks—see, for example, Simon, 2nd ed., 1952, vol. 1, p. 290, para. 417; though a contrary opinion is found in Konstam, 12th ed., 1952, para. 383. We have already referred to the Scottish case *Lord Advocate* v. *McLaren* [4]; but that was concerned with the different language of paragraph 4 of the Sixth Schedule. In this paucity of authority there remains, however, *Attorney-General* v. *Till*,[5] reported in the Court of Appeal and in the House of Lords,[6] and upon this case, and most particularly upon certain language of Cozens-Hardy M.R. and Fletcher Moulton L.J. in this court, the Crown have most strenuously relied.

It is first necessary to observe that *Till's* case [6] arose under section 55 of the Income Tax Act, 1842, when the penalty exigible by the courts was limited to £50. The question, therefore, before the court and the House of Lords in *Till's* case [6] was confined to this—whether Mr. Till was liable to forfeit £50. The relevant facts were that, having married a lady in whose favour the firm of solicitors of which he was the sole member had covenanted to pay an annuity of £200, Mr. Till had omitted in his relevant income tax return to include that annuity. Mr. Till's contention was—and it was the sole issue in the case—that section 55 applied only to cases where the taxpayer had made no return for tax at all and did not, therefore, cover the case where, a return having been made, it later appeared not to have been a true and correct return. The considerable argument, as reported, turned upon the effect of the words " as aforesaid," which are found in section 55. It was, however, one of Mr. Till's main contentions in support of his denial of liability (upon which, as Lord Loreburn observed in the House of Lords, he had the misfortune to persuade not only himself but the Court of Appeal) that a contrary conclusion involved the absurd and extravagant result that the commissioners (though not the court) would be able to impose upon a taxpayer

[3] (1926) 10 T.C. 758.
[4] 5 T.C. 110.
[5] [1909] 1 K.B. 694.
[6] [1910] A.C. 50.

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who had made one omission, however insignificant, in his return, a penalty including treble his entire tax liability for the year. Since that view of the corresponding powers of the commissioners coincided with the consistent interpretation and practice of the Inland Revenue Department, counsel for the Crown were not concerned to challenge it either in the Court of Appeal or the House of Lords; and it was therefore assumed in argument throughout. The Court of Appeal accepted Mr. Till's argument and dismissed the action. In the course of his judgment, Cozens-Hardy M.R. (in support of the view which he took) said [7]: "(4) The Act imposes a penalty on a false or fraudulent state-"ment which is less severe than that which, on the other hypo-"thesis, is imposed upon an honest mistake." Fletcher Moulton L.J. said [8]: "It seems a very startling proposition that the "slightest inaccuracy in a statement should make its delivery a "nullity. It is not in accordance with ordinary legislative usage, "and I am of opinion that if the legislature had intended that "this penal clause should have so far-reaching an effect it would "have used very different language to express its intention. "Moreover, the nature of the penalty raises a presumption that "it relates to an absolute non-delivery and not to errors in the "statement delivered. It will be seen that the amount of the "penalty is 'treble the duty at which such person ought to be "'charged,' or, in other words, treble the duty on the whole "assessment. That the measure of the penalty should be based "on the duty on the whole assessment may be necessary and "proper where there is a total failure to make any return what-"ever, but all justification for this course disappears when a "return has been made and the only complaint is that it contains "an inaccuracy."

If the matter had rested with the Court of Appeal decision, it might fairly be said that the acceptance by two of the judges of the Crown's present contention formed part of their rationes decidendi; though the decision would have been fatal to the Crown in the present case upon other grounds. But the decision of the Court of Appeal was reversed in the House of Lords. It is true that none of the noble Lords expressed any dissent from the views expressed in the Court of Appeal on the words "tax at which he ought to be charged"—and Lord Atkinson certainly may be said expressly to have endorsed them when he said [9]: "With all respect to the Court of Appeal, it would "appear to me that, finding themselves confronted with this "contention, they allowed themselves to be too much influenced "by the quite natural repugnance which one must necessarily "feel against adopting a construction of these enactments which "would render the subject liable to those very heavy penalties "if, whilst honestly endeavouring to furnish a correct statement

[7] [1909] 1 K.B. 694, 700.
[8] Ibid. 702.
[9] [1910] A.C. 50, 54.

" according to his lights, he made some mistake or was guilty " of some error in estimating what his gains and profits amounted " to."

It is, however, plain that such views could by no possibility be regarded as constituting a ground for the decision of the House. The validity of those views was, as we have said, assumed throughout; and their only relevance in the House was whether, assuming their validity, they sufficed to defeat the Crown's claim. In the circumstances, these views cannot, in our judgment, have any binding authority. At best they are dicta, deserving due weight as such.

This view of the present effect in the circumstances of the opinion expressed by Cozens-Hardy M.R. and Fletcher Moulton L.J. (above quoted) is supported by the case in this court of *In re Hodson's Settlement.*[10] In that case Farwell J. at first instance had felt himself bound by the decision of this court in an earlier case, *Attorney-General* v. *Lloyds Bank Ltd.*,[11] in the course of which this court had held that a still earlier case in the House of Lords of *Adamson* v. *Attorney-General*[12] had laid down certain principles which, when applied to the deed with which the court was concerned (as the court construed it) in the *Lloyds Bank* case,[13] produced a result which he, Farwell J., thought it his duty to follow in *Hodson's* case.[14] But in the case last mentioned, this court pointed out that the construction of the relevant deed in the *Lloyds Bank* case[15] which this court had accepted had been shown by later cases in the House of Lords to have been incorrect: " and that means," as Clauson L.J. observed in reading the judgment of the court,[16] " that the " principles enunciated in the judgments in this court, though " entitled no doubt to the most serious consideration, have been " formulated in regard not to the correct, but to a hypothetical, " and in fact erroneous, view of the meaning and effect of the " material deed. In our judgment this circumstance leaves it " open to this court to refuse to accept the stated principles as " necessarily correct."

So in the present case it is equally open to the court not to accept as necessarily correct the views expressed in *Till's* case[17] of the construction of the formula " the tax which he ought to " be charged " which were applied to support the erroneous conclusion of the effect of section 55 of the Act of 1842. And in assessing the weight of these views it is essential to bear in mind that the question of construction with which we are concerned was not an issue in the case; not only so, but it was never argued at any stage, the interpretation which was assumed being adopted by both sides—for different reasons—as that most suited to their respective interests.

[10] [1939] Ch. 343.
[11] (1935) 151 L.T. 268.
[12] [1933] A.C. 257.
[13] 151 L.T. 268.
[14] [1939] Ch. 343.
[15] 151 L.T. 268.
[16] [1939] Ch. 343, 358.
[17] [1909] 1 K.B. 694.

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There is, therefore, in our judgment, no authority which requires us to reject the interpretation of the relevant language of section 25 (3) which, independently of authority, we regard as the right one. The result is that the contention which the Crown has put forward on the appeal must, in our judgment, be rejected. But since we have been unable to accept the construction most favourable to the defendant on which the judge founded his judgment, we think the order made by him should be varied by substituting for the sum of £20 the sum of £62 15s. As we understand that the Crown has agreed in any event to pay the costs of the appeal, there will be an order to that effect also.

Appeal dismissed with costs for defendant.
Order of Diplock J. varied.
Leave to appeal to House of Lords, on terms that Crown pay defendant's costs, as between solicitor and client in the House.

Solicitors: *Solicitor of Inland Revenue.*

E. D.

[COURT OF APPEAL.]

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May 8.
Lord Evershed M.R., Willmer L.J. and Cassels J.
May 12, 13, 14.
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ARMSTRONG *v.* SHEPPARD & SHORT LTD.

[Plaint No. 3385.]

Trespass—Oral licence—Licensor unaware of his ownership—Revocation of licence to construct sewer—Rights of licensee—Injunction—Damages.

Injunction—Trespass—Trivial damage—Fraud to court.

Licence—Revocation—Gratuitous licence to construct sewer on licensor's land—Licensor unaware land his—Power to revoke licence.

Fraud—Fraud to court (discretion to refuse order)—Injunction—Trespass to land—False denial of oral permission.

The plaintiff owned a small strip of land at the rear of his premises on which the defendants had entered and constructed a sewer for the discharge of sewage and effluent. The plaintiff claimed damages for trespass and an injunction to restrain the discharge of effluent through the sewer. He swore that he had never had any conversation with the defendants about the matter. The county court judge found, as a fact, first, that the plaintiff had orally informed the defendants that he did not object to the construction of the sewer and, secondly, that the plaintiff, when he so stated, was not aware that he was the owner of the strip of land or that he had a right to object to the construction of the sewer. The judge awarded to the plaintiff 20s. damages for the trespass up to the date

of the hearing, but refused to grant an injunction. The plaintiff appealed and the defendants cross-appealed:—

Held, dismissing the appeal (Lord Evershed M.R., Willmer L.J. and Cassels J.) (1) that a proprietor of land was not debarred from asserting his legal right against one who was shown to have infringed it on the ground of acquiescence, unless it was clear that at the time he acquiesced he was aware of his proprietary right and, accordingly, that there was no equity which barred the plaintiff from asserting his legal title.

Ramsden v. *Dyson* (1866) L.R. 1 H.L. 129 and *Willmott* v. *Barber* (1880) 15 Ch.D. 96 applied.

(2) That if a man, having a proprietary right, proved an infringement of it, prima facie, he was entitled to an injunction, but that was not an unqualified right and grounds for denying an injunction were (a) that the wrong done, in the circumstances, was trivial, and (b) that he not only misled the defendants but attempted to mislead the court, and that, on the facts, the plaintiff had not proved any damage and should not be granted an injunction.

Imperial Gas Light and Coke Co. (*Directors*) v. *Broadbent* (1859) 7 H.L.Cas. 600 applied.

Held, dismissing the cross-appeal (Lord Evershed M.R., Ormerod and Willmer L.JJ.): (1) that if A gives authority to B for the doing of an act on his land, and the act is done and completed, then whatever be the description of the authority, it is generally too late for A to complain and, accordingly, that the plaintiff could not complain of the sewer which had been constructed on his land.

Wood v. *Leadbitter* (1845) 13 M. & W. 838; *Winter Garden Theatre* (*London*) *Ltd.* v. *Millenium Productions Ltd.* [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331; *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 considered.

(2) That a right to pass water through another's land was an interest in land and was incapable of being granted by parol.

(3) That an oral licence to pass water though another's land to be irrevocable during the licensor's tenure of the land must have the necessary qualities of a contract and be binding on the parties, and be supported by consideration, and that there being no consideration for the licence granted by the plaintiff to the defendants, the plaintiff was entitled to revoke the licence and, on the facts, the licence had been revoked.

APPEAL and CROSS-APPEAL from Judge Hargreaves sitting at Willesden County Court.

The appeal was heard by Lord Evershed M.R., Willmer L.J. and Cassels J., and the cross-appeal was heard by Lord Evershed M.R., Ormerod and Willmer L.JJ.

The plaintiff, Henry Albert Armstrong, was the registered proprietor with an absolute title of No. 2 Priory Close, Wembley. Included in his title at the rear of the premises was a strip of land used as a pathway. The defendants, Sheppard & Short Ltd., entered on the pathway and constructed on it a sewer and a manhole which they used for passing sewage and effluent from their own premises.

In these proceedings the plaintiff claimed damages for the entry on his land and the construction of the manhole and an injunction to restrain the defendants passing sewage and effluent

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through the sewer. The defendants relied on an oral licence granted by the plaintiff to the defendants to construct the sewer and manhole.

The county court judge found, as a fact, that the defendants had informed the plaintiff of the work which they proposed to do and that he had acquiesced in their doing it, but that, when the plaintiff did so acquiesce, he was not aware that he was the owner of the strip of land in question. The judge held that no actual damage to the plaintiff's land had been proved. He held that there was a trespass and awarded to the plaintiff 20s. nominal damages but he refused an injunction. The judgment of the county court judge is fully stated in that of Lord Evershed M.R.

The plaintiff appealed on the ground that the damages awarded were insufficient and that the judge was wrong in holding that to grant an injunction would be oppressive. The defendants cross-appealed claiming that on the facts found they were entitled to judgment.

Gidley Scott for the plaintiff.
E. Anthony Machin for the defendants.

The following cases were referred to in argument which are not referred to in the judgments: *Cowper* v. *Laidler*[1]; *Shelfer* v. *City of London Electric Lighting Board*[2]; *Goodson* v. *Richardson*[3]; *Canadian Pacific Railway Co.* v. *The King.*[4]

LORD EVERSHED M.R. This appeal and cross-appeal have taken an unusual course, owing to the necessary change in the constitution of the court after the hearing of the appeal. I hope that the result has not increased the difficulties or the costs of the parties.

The case has certainly not been without interest or without difficulty. The facts (and I am now dealing with the appeal) are, briefly, these: the plaintiff is the owner and occupier of certain premises known as 2 Priory Close, Harrow Road, Wembley. The plaintiff has charged his interest by way of mortgage; and the significance of that fact is that the documents of title, which he might have held at the relevant time, were, naturally enough, in the possession of the chargee.

The registered plan shows that the plaintiff's house is at the extreme end of Priory Close—that is, where Priory Close goes into Priory Avenue. At the back of the plaintiff's house is a pathway, or roadway, made up, not being a public highway. That roadway goes at the back of a number of houses, and leads to premises now owned and occupied by the defendants, Sheppard & Short Ltd. But the little strip of that pathway which (so to say) matches the plaintiff's house and garden is at the end of that passage nearest to Priory Avenue.

[1] [1903] 2 Ch. 337.
[2] [1895] 1 Ch. 287.
[3] (1874) 9 Ch.App. 221.
[4] [1931] A.C. 414.

At the end of 1957 the defendants conceived the idea that it would be to their advantage to construct a drain, or sewer, from their premises, leading to the public sewer in Priory Avenue. The drain was not required to carry any great quantity of foul water. The defendants were concerned only with, I believe, one water closet and one urinal; but they also wished to carry away the storm water, which would collect on their building, in the same manner to the sewer in Priory Avenue. They constructed, accordingly, a manhole and made the necessary excavations for the sewer; and they also constructed the sewer. The manhole is in fact situated on the little strip, which belonged—and belongs—to the plaintiff, being the strip at the extreme end of the passageway nearest to Priory Avenue. The work was concluded by the end of 1957; thereafter, the defendants passed the foul and storm water down this drain into the public sewer in Priory Avenue.

On August 20, 1958, the plaintiff, through his solicitors, wrote to the solicitors for the defendants a letter which was as follows: "Our client [the plaintiff] further instructs us that he has at "no time been approched by your clients for permission or been "advised of their intention, and has given no permission or "licence of any kind. We write on behalf of our client to require "that the sewer and manhole be removed forthwith from his "premises, the premises be made good, and our client com-"pensated in damages for the trespass. Alternatively, our client "will have no alternative but to take such steps as may be "necessary to stop the unauthorised flow of effluent across his "land."

The reply denied the assertion that no permission of any kind had been given. But unfortunately that was not satisfactory to the plaintiff; and the present proceedings were begun in October of 1958. The particulars of claim alleged that the plaintiff was at all material times the registered proprietor of 2 Priory Close; that on or about December 6 the defendant wrongfully entered and excavated part of his land and constructed a sewer and manhole; and thirdly that since January 1958 the defendants have discharged or caused or permitted to be discharged effluent through the sewer under the land. The plaintiff claimed damages for trespass (but limited to the sum of £400); and he also claimed an injunction against the further discharge of effluent through or under the plaintiff's land.

The matter came on for trial in December 1958, a year after the entry complained of. It is quite plain from the evidence given by the plaintiff that he continued to assert that he had never given any assent or permission to or for what the defendants had done. According to the judge's note: "I have never "given consent for the manhole and I had no knowledge it was "to be built. I did notice it being done on two or three occasions. "On the first the construction of it was well on the way. I

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" did nothing at all about it. I was not approached by anyone " for consent." I must say in clear and unqualified terms that that evidence was false, according to the judge's finding. The judge held, after hearing the evidence—and in particular the evidence of the representative for the defendants, one Sheppard —that there had been clear permission or assent given to what was being done. Sheppard described the interview with a little detail. He said that the plaintiff pointed out that he was in the business himself of a sanitary engineer, which took him all over the country, and he fully understood the defendants' difficulty. It must, however, be conceded that the defendants were somewhat rash over this matter. They had first made a mistake, apparently, in supposing that one Neilson was the owner of the whole of the relevant property. No doubt that mistake put them in a difficulty. They had to see, and according to the evidence saw, a number of house-owners whose properties back on to this strip; but they were content—rashly, as I have ventured to say—to leave it on the footing that they supposed that they had been properly authorised, by all the persons interested, to construct the sewer and to pass this effluent down it. The judge found that they were justified in supposing that, so far as the plaintiff was concerned, he knew what his rights and position were and had deliberately consented to what the defendants were doing. The plaintiff, however, though baulked in his attempt to establish that he had never spoken to anybody about it, did also give evidence of the fact that, at the time when this was going on and when (as eventually was found) he did give his assent to the defendants, he was unaware that he had any proprietary right in respect of this strip—he did not in fact, apparently, use it himself—and therefore he must be taken to have been unaware that he had any interest or concern which was involved when his permission was asked or that he could refuse his consent or qualify it.

The part of the judge's judgment dealing with that is as follows: " I accept the defendant's evidence that there was a " telephone conversation between him and the plaintiff, but I " accept the defendant's evidence that he understood the plaintiff " to have given him permission to go ahead with the work of " constructing the sewer, but I also accept the plaintiff's evidence " that he did not give the defendant such permission. My " reason for both conclusions is the same, that the plaintiff, not " having seen the deeds of his property for some time and forget- " ting the contents of the deeds and the exact boundary of the " plan, did not realise when he spoke to the defendant that he, the " plaintiff, was the owner of any part of the said pathway; this " being so he would naturally not give permission to the defen- " dant, because he did not know he had the right to do so, neither " however would he object, because he would not know he had the " right to object either. Consequently, I feel safe in taking the

" view that the plaintiff is right in saying that he never actually " gave permission for the sewer to be constructed, but that the " defendant is correct in saying that the plaintiff made it clear, " whatever words he used, that he was not objecting to it."

To some extent the distinction is one more of words than of substance. But it is clear, I think, that what the judge meant was that the plaintiff did not give permission, in the sense that he did not purport, qua owner, to give authority or a licence to the defendants to do something on his land: on the other hand, the judge found that the plaintiff did not make it quite clear—and that the defendants were perfectly well justified in so assuming—that he was raising no kind of objection to the proposed course of construction. In those circumstances, the judge at the trial declined to grant any injunction, either to remove the manhole or to restrain the effluent being sent down. He also held that the damage suffered from the trespass which, on the view that the judge took, he thought must technically have been committed, was purely nominal. He therefore said: " Taking the " view, as I do, that it is reasonable for the plaintiff to desire that " his position should be clarified, I award him costs on Scale II."

By the notice of appeal the plaintiff contended that the judge should have granted an injunction—that is to say, an injunction (as I understand it) in the terms of his claim, to restrain the discharge of the effluent down the sewer; and the short basis of the case made for an injunction was this: A proprietor who establishes a proprietary right is ex debito justitiae entitled to an injunction, unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. In this case (said Mr. Scott) it is of the essence of the judge's finding that the plaintiff did not know that he had the proprietary right which would be affected by the suggested licence and, therefore, no such equity is raised against him which will deprive him of his prima facie right to an injunction. Further, the appellant-plaintiff said that 20s., which was derisory damages, was quite inadequate by way of compensation for the interference with the plaintiff's proprietary right.

We heard the argument upon that appeal, the court being constituted by myself, Willmer L.J. and Cassels J.; and the argument upon that appeal was concluded. Cassels J. was unable to sit further, and so the court was reconstituted: and Ormerod L.J. joined Willmer L.J. and myself for the purpose of hearing the cross-appeal—the substance of the cross-appeal being that, in the circumstances and for reasons which will be dealt with when I deal with the cross-appeal, the judge should have dismissed the plaintiff's action altogether. Owing to this change in the composition of the court, it is necessary in this case to distinguish clearly between the appeal and the cross-appeal; and in order to remove possible doubts I thought it might help if I wrote a statement of the points raised and submitted it to the counsel in the case for approval. They were good enough to say

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that they did approve it; and it may be worth while my incorporating in this judgment the statement which I made. It is as follows:

"On the appeal Mr. Scott contended (a) that the judge "should have granted the injunction prayed, and (b) that the "damages awarded (that is, nominal damages of 20s.) were too "low. On the appeal the court [myself, Willmer L.J. and Cassels "J.] have intimated their rejection of the appeal, but have "treated the damages awarded as referable to the entry and "excavation or (at most) to the alleged trespass up to the date "of the hearing.

"On the cross-appeal Mr. Machin contends that the action "should have been dismissed on the ground that the 'approval' "given by the plaintiff, as found by the judge, prevents him "complaining that the acts of entry and excavation (and any "other acts covered by the award of 20s. damages—see above) "were trespasses: and he [the plaintiff] further contends that "such 'approval' also prevents him (personally) complaining of "any use of the pipes laid by the defendants for the (obvious) "purpose for which they were laid. Mr. Machin concedes that, "unless he is right on his wider contention, the plaintiff may "bring fresh proceedings founded on trespass or may himself "interfere with the manhole and pipes. Mr. Machin further "concedes (for present purposes) that the plaintiff's 'approval' "does not extend in effect to the plaintiff's successors in title.

"The question, therefore, to be debated on the cross-appeal "is whether, on the facts proved or found, the effect of the "plaintiff's 'approval' is to prevent him personally complaining "(on the ground of trespass) of the defendants' acts in entering "on and excavating the land and installing the pipes and man-"hole and also in using the manhole and pipes in the ordinary "course for the purposes for which they were installed."

For the present purposes, the most important sentence is: that it has been accepted by the court that the damages awarded in the action must be treated as referable, and referable only, to the entry and excavation or (at most) to any alleged trespass (by discharge of effluent) up to the date of the summons, or the date of the hearing.

I now, therefore, come back to give the reasons for the conclusion which I have earlier indicated (as that note shows) that the appeal fails. Mr. Scott's proposition in general must, I think, be accepted. First, it is true to say that a proprietor will not be debarred from asserting his legal right, against one who is shown to have infringed it, on the ground of acquiescence, unless it is also clear that, at the time he did so acquiesce, the proprietor was aware of his proprietary rights. There is substantial authority for that view, such as the well-known case of *Ramsden* v. *Dyson*[1] and the judgment of Fry J. in *Willmott* v. *Barber*.[2]

[1] (1866) L.R. 1 H.L.Cas. 129. [2] (1880) 15 Ch.D. 96.

It is, therefore, in the present case, well said by Mr. Scott that the absence of an essential knowledge, as found by the judge, in December 1957, prevents the erection against him of an equity which would bar the plaintiff from asserting for any purpose his legal title. Secondly, it is true to say that if a man, having a proprietary right, proves an infringement of that right, prima facie he is entitled to an injunction: but that needs some qualification. It is not a matter of unqualified right; and one ground for denying an injunction would be that the wrong done is, in the circumstances, trivial. That proposition is founded on the well-known case of *Imperial Gas Light & Coke Co.* (*Directors*) v. *Broadbent*[3]: but I can summarise it by reading from Kerr on Injunctions, 6th ed., p. 30: "After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial."

The judge was here dealing with the claim as I have formulated it; and he came to the conclusion that the circumstances of this case were special, and, as his judgment shows, that the damage was trivial. For the latter statement he was supported by the plaintiff himself, who said in evidence that he had suffered no inconvenience himself whatever from what had been done. But there were other good grounds, and formidable grounds (as I think), for refusing the plaintiff an injunction. That he misled the defendants is beyond a peradventure. It is no less clear that he attempted to mislead the court. He asserted—contrary to the fact—that he had never had any conversation with the defendants about the matter at all; and in his evidence in chief he so swore, untruly. It is not, therefore, at all surprising that the judge came to the conclusion that he should grant no equitable relief; and in my judgment, on the facts of this case, he was well entitled to take that view. Nor, on the evidence, does it seem to me that the plaintiff can complain of the award of 20s. damages. He proved none. He said that he had suffered no inconvenience whatever; and it is only necessary to have some comprehension of the circumstances and facts to realise that he could not have suffered the slightest inconvenience—all the more since, as he says, he never uses this pathway at all.

But there is one matter which clearly was not dealt with. Passing the effluent down the sewer, as distinct from the work of construction, does involve (and I am now approaching a point which must be dealt with more fully on the cross-appeal) something (as I think) which is in the nature of a proprietary interest, in the nature of an easement—a right to pass effluent under somebody's land; and if it is a right in respect of which the

[3] (1859) 7 H.L.Cas. 600.

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plaintiff's land must become (so to speak) a servient tenement, then I think a case might well have been put for saying (under Lord Cairns' Act) that there should be an award of monetary compensation referable to the qualification which would thereby be imposed upon the title of the plaintiff as absolute owner. But it is quite clear that the judge was not invited to consider Lord Cairns' Act. As I have said, the damage (as has been agreed before us) must be treated as having been limited to the technical trespasses, such as they were—that is to say, assuming that the cross-appeal did not succeed—and excavations and discharge up to the hearing.

The result, therefore, is that the appeal fails. Mr. Scott has not persuaded me that he is entitled to an injunction, and he has not persuaded me that there is anything wholly wrong with the award of damages as compensation for the alleged trespasses up to the date of the hearing. It follows, therefore, that the appeal should be dismissed: and I have been authorised by Cassels J. to say that he agrees with the conclusion which I have stated, and with my reasons.

WILLMER L.J. I also agree that the appeal should be dismissed, for the reasons stated by my Lord; and I do not desire to add anything further on the appeal.

LORD EVERSHED M.R. I now proceed to deal with the cross-appeal. I have indicated that its purpose was that the action should have been dismissed. The form of the notice given was: "... the respondent desires to contend that the judgment "should in any event be reversed ... so far as it directs that "there should be judgment for the plaintiff for £1 with costs. "... And ... the respondent proposes to ask the Court of "Appeal to enter judgment for the defendants"—that is to say, that the action should be dismissed altogether.

I shall treat as incorporated also in this judgment the memorandum which I gave to counsel and with which they agreed, because it states what was the point which Mr. Machin has put with great care before us, having indeed obviously devoted much industry to it. His point was shortly this—and I hope I express it properly. He said: "I am only concerned to resist an action "for common law trespass: if, therefore, I can establish that "the subject-matter of which the plaintiff complains was not "without lawful justification, that is an answer to the plaintiff's "action; and I say that that of which the plaintiff complains "had lawful justification, for the plaintiff himself approved it: "he approved the entry on his land for the purpose of excavating "that land and inserting a sewer and a manhole, and particu-"larly since the plaintiff appeared himself to be in the same "line of business he certainly must have supposed that the pipe "was not put into the land merely for the fun of it but was put "there in order that effluent of some kind could be passed

"through it." He goes further and says that in truth the plaintiff would know exactly what the whole purpose of the operation was: it therefore cannot be said by the plaintiff that the entry and excavation, and the natural consequences and intended consequences of it, were, and are, without justification: and that that is an answer to an action for trespass. Mr. Machin has not contended that, if he is right, he can do other than answer an action brought by the plaintiff. If and when the plaintiff were to sell his property he would not suggest that the buyer would be affected by the permission, authority—whatever the right word is—which the plaintiff gave. But he does say that the plaintiff, having authorised what the defendants did, and having therefore authorised the obvious and intended consequences, cannot complain at common law.

There is much attraction in the argument, particularly on the facts found; and it is not easy to put out of one's mind that the plaintiff said that he never knew anything about it at all. In support of the argument Mr. Machin has taken us through a series of cases, beginning with that of *Webb* v. *Paternoster*.[4] We looked at that case and at later cases which I will just mention: *Wood* v. *Lake*[5]; *Winter* v. *Brockwell*[6]; *Tayler* v. *Waters*[7]; *Hewlins* v. *Shippam*[8]; *Wallis* v. *Harrison*[9]; *Wood* v. *Manley*[10]; down to the well-known and classic case of *Wood* v. *Leadbitter*[11]; and finally at the recent case of *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.*[12]; and at a dictum of Denning L.J. in *Bendall* v. *McWhirter*.[13]

It is, I think, true to say (and these cases establish it) that if A gives authority to B for the doing of an act on A's land, and the act is done and completed, then, whatever be the strict description of the authority, whether it be called a permission or a licence, it is, generally speaking at any rate, too late for A, who gave the authority, to complain of it. And that will go to this extent—that a man may by such means extinguish a proprietary right: for example (to quote an instance from the cases), if I, having an easement of light, permit another to come and build a wall up against my window, so as to extinguish the easement, if the wall is built and completed, that may well be the end of it, and I cannot complain of the infringement of my ancient light or require the wall to be taken down.

The effect of these cases was for this purpose sufficiently well stated in Gale on Easements, 11th ed., p. 67. After a very full discussion of the cases to which Mr. Machin referred us, it is stated: "The result of the common law authorities above referred "to was thus in effect stated by Mr. Gale: 'A man may in some

[4] (1619) Palmer 71.
[5] (1763) Sayer 3.
[6] (1807) 8 East 308.
[7] (1817) 7 Taunt. 374.
[8] (1826) 5 B. & C. 221.
[9] (1838) 4 M. & W. 538.
[10] (1839) 11 A. & E. 34.
[11] (1845) 13 M. & W. 838.
[12] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.
[13] [1952] 2 Q.B. 466, 479; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

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" ' cases by parol licence relinquish a right which he has acquired " ' in addition to the ordinary rights of property and thus restore " ' his own and his neighbour's property to their original and " ' natural condition.' " That is obviously a reference to another case, to which Mr. Machin drew our attention, of *Liggins* v. *Inge*.[14] In that case, a man approved a neighbour's so altering an embankment to a watercourse that the water, which had formerly flowed to the plaintiff's mill, was diverted to the defendant's property. The actual doing of the work was no trespass, for the bank was wholly on the defendant's property: but the point is that once the work had been done, then the consequence followed that a previously enjoyed right of receiving water had been pro tanto lost—just as, if you allow another to build against your window, you may lose an ancient right of light. But I observe that in these cases (so far as I can see) it is always assumed that the plaintiff giving the licence knew what his real rights were.

I continue to read from Gale: " ' But he cannot by such " ' means impose any burden on land in derogation of such " ' ordinary rights of property.' Thus, a parol licence given by " B, the owner of land (the servient tenement), to A, the owner " of a neighbouring house (the dominant tenement), to turn a " spout of water from the house on to the land, will be revocable. " On the other hand, supposing in such a case the house to " contain ancient windows, a parol licence given by A to B to " build a wall on B's land in front of A's ancient windows will " be irrevocable once the wall has been built. It would seem, " however, that, in order that a parol licence should so operate, " the act licensed should be executed, and the necessary conse- " quence of such execution should be per se the extinguishment " of the right to light. For the cases do not appear to furnish " any authority for saying that where the extinguishment of an " easement would depend upon a repetition of the licensed acts, " a parol licence would be sufficient to effect it. Indeed, where " the acts from their nature lie in repetition such licence could " not be executed." And I would add that that statement finds later support, I think, in the speeches of Lord Simon and Lord Porter (to which Mr. Scott referred us) in the *Winter Garden* case.[15]

If that is a right summary, it follows that Mr. Machin is entitled to say that the plaintiff cannot complain of the alleged trespass consisting of the defendants' acts of entry upon his land in December, 1957, making holes in it and putting a sewer and a manhole in it; and I agree with him that, in an action of common law trespass, it does not in the circumstances here matter that the plaintiff was unaware of his proprietary rights when he gave permission: the thing is done: and it has had the lawful justification (in so far as this case is concerned) that it

[14] (1831) 7 Bing. 682. [15] [1948] A.C. 173.

was done with the approval of the man who now tries to complain about it. It follows from that conclusion (as Mr. Scott conceded) that Mr. Scott's client cannot complain of the presence in the land now of the physical things, the manhole and pipes: indeed, they belong (as Mr. Machin concedes) in law to the plaintiff, there having been no agreement or arrangement made which would alter the ordinary consequence that that which is put into a man's land becomes part of that man's property.

But that only goes to deal with the matter of the original entry and the physical things, the manhole and sewer. What of the passage of water—effluent—which is the subject of paragraph 3 of the particulars of claim? For unless Mr. Machin can satisfy us that he can also find an answer to the allegation of trespass by means of the discharge of effluent, then he cannot succeed, as it seems to me, in disposing of the award of 20s. damages and the consequences as regards costs in the action. He cannot, in other words, invite us to set aside the judge's judgment and dismiss the action.

In my judgment, Mr. Machin cannot succeed on this part of his case. It seems to me, after this review of the authorities, that two propositions stand forth. First, if the subject-matter which is alleged to have been granted is an interest in land, then it cannot be done by parol only. Of course, a licence coupled with a grant, if it is effectively done, will no doubt be irrevocable. But there is nothing in the authorities that Mr. Machin cited to support the view that a right to pass water through another's land—which is, as I conceive, a proprietary right—is capable of grant by parol. But, secondly, such a permission to pass effluent down a man's land no doubt might be, as a matter of contract, properly covered as between one individual and another; and indeed it is upon that part of it that perhaps Mr. Machin concentrated: for he said that he was only concerned to show that the plaintiff in this case, by the permission which he gave, and albeit that he did not know what his interest was, himself had given an irrevocable licence during his own tenure to the defendants. In my judgment, the answer to that argument is that a licence of that kind, if it is to be irrevocable during the plaintiff's tenure, must have the necessary qualities of a contract, binding upon the parties: it must be supported by consideration, and must in other respects be the subject of a contract. There was, I think, clearly no consideration for the alleged irrevocable licence to pass effluent under the plaintiff's land—and, indeed, Mr. Machin has not so contended. He has not, in truth, contended that the licence he invokes rests in contract at all: he has said that it was a mere gratuitous licence, but that, in the circumstances, it was, during the plaintiff's tenure, irrevocable. In my judgment, that is not well founded.

Mr. Machin then fell back upon this—that assuming that it was a gratuitous licence and was revocable, then at any rate by

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well-established principle the licensee does not become necessarily a trespasser the moment the licensor says "The licence "is at an end": the alleged trespasser is allowed a reasonable time to remove or make other arrangements to discontinue the act which thereby would become a trespass. I read as part of my judgment on the appeal the letter of the plaintiff's solicitors dated August 20, 1958. For present purposes it is clear that it would constitute a revocation of the licence. It is true that it is not expressed in that way. Nor does it refer to any limit of time at the end of which the effluent must cease to be discharged. But Mr. Scott satisfied me that that is not necessary in determining a revocable licence. In truth, I have no doubt that there was time, between August 20 and the proceedings in October, and certainly by the time the hearing came on, for the defendants, if they had been so minded, to make some other arrangement.

It follows, therefore, that upon this narrow point—as it really is—to which this cross-appeal is directed, Mr. Machin cannot go far enough to show that there was no common law wrong which the judge could compensate by an award of 20s. damages. It follows (in other words) that the cross-appeal, like the appeal, must also fail.

ORMEROD L.J. I agree, and I have nothing to add.

WILLMER L.J. I also agree that the cross-appeal should be dismissed.

Appeal dismissed with costs.
Cross-appeal dismissed with costs.

Solicitors: *W. J. Fraser & Son; J. Tickle & Co.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

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May 7, 8; *June* 5.
Lord Parker C.J., Donovan and Salmon JJ.

REGINA *v.* BARNSLEY LICENSING JUSTICES. *Ex parte* BARNSLEY AND DISTRICT LICENSED VICTUALLERS' ASSOCIATION AND ANOTHER.

Justices—Bias—Licensing—Pecuniary interest—Application for off-licence by co-operative society—Justices members of co-operative society—Whether pecuniary interest conclusive of bias—Licensing Act, 1953 (1 *& 2 Eliz.* 2, *c.* 46), *s.* 48 (4) (5).

An application for a spirits off-licence at a drug department was granted to a co-operative society by seven licensing justices, six of whom were members of the co-operative society. On a motion for an order of certiorari to quash the decision on the ground that

the justices had a financial interest in the matter under consideration and therefore were disqualified under section 48 of the Licensing Act, 1953 [1]:—

Held, (1) that at common law a direct pecuniary interest, however small, raised a conclusive presumption of bias on the part of a justice disqualifying him from acting in the matter under inquiry.

Reg. v. *Rand* (1866) L.R. 1 Q.B. 230; *Rex* v. *Sunderland Justices* [1901] 2 K.B. 357; 17 T.L.R. 551 applied.

(2) (Salmon J. dissenting), that although the justices, who were members of the society were disqualified from acting by virtue of section 48 (4) of the Act of 1953, the effect of section 48 (5) was to oust the common law rule and to make an applicant for certiorari prove a real likelihood of bias whether by reason of pecuniary interest or otherwise, and in the present case the financial interest of the justices was not so substantial as to give rise to that likelihood; accordingly, the application failed.

Rex v. *Tempest* (1902) 86 L.T. 585; 18 T.L.R. 433; *Rex* v. *Kilkenny Justices* (1908) 42 I.L.T. 135, and *Reg.* v. *Handsley* (1881) 8 Q.B.D. 383 applied.

Per Salmon J. Section 48 (5) saved any act which would otherwise be invalid by reason only of a disqualification under the statute; it did not save any act done by a justice disqualified at common law.

APPLICATION for an order of certiorari.

The applicants, the Barnsley and District Licensed Victuallers' Association and the Barnsley and District Off-Licence Holders' Protection Association, applied for certiorari to quash a decision of the Barnsley County Borough Licensing Justices granting to Robert Murray of the Barnsley British Co-operative Society Ltd. his application for a spirits off-licence at the Central Drug Department, Wellington Street, Barnsley.

The grounds of the application were that one or more of the licensing justices who made the decision was a member of the Barnsley British Co-operative Society Ltd., and (a) had a financial interest therein and was thereby disqualified by section 48 of the Licensing Act, 1953; (b) was thereby disqualified by bias.

H. C. Beaumont for the applicants.

John McLusky for the respondents, the Barnsley British Co-operative Society Ltd.

The following cases were cited in argument, in addition to those referred to in the judgment: *Dimes* v. *Grand Junction Canal (Proprietors)* [2]; *Reg.* v. *Farrant* [3]; *Rex* v. *Stafford Justices* [4]; *Reg.* v. *Kent Justices* [5]; *Rex* v. *Williams, ex parte Phillips*.[6]

Cur. adv. vult.

[1] Licensing Act, 1953, s. 48: "(4) No justice shall act for any purpose under this Act in a case that concerns any premises in the profits of which he is interested . . . (5) No act done by any justice disqualified by this section shall be invalid by reason only of that disqualification. . . ."

[2] (1852) 3 H.L.C. 794.

[3] (1888) 20 Q.B.D. 58.

[4] [1940] 2 K.B. 33; 56 T.L.R. 623.

[5] (1880) 44 J.P. 298.

[6] [1914] 1 K.B. 608.

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June 5. Lord Parker C.J. The following is the judgment of Donovan J. and myself.

Mr. Beaumont moves in this case for an order of certiorari to bring up and quash a decision of the licensing justices for Barnsley given on March 5, 1959, whereby they granted an application by the Barnsley British Co-operative Society (hereinafter called " the society ") for a spirits off-licence at their central drug department in Barnsley. The society already holds a wine licence for the same premises.

There were two hearings in this matter. At the first on February 12 the justices apparently heard evidence and adjourned. Of the seven justices who then sat, five were members of the society and two were not. The spouses of these two justices were, however, members. At the second hearing when the application was granted seven justices sat, of whom six had sat on February 12. Of the total of seven justices, six were members and one was not. The husband of this one justice was, however, a member. The membership of the society is apparently so large and comprehensive that there is only one borough justice in Barnsley who (or whose near relative) is not a member, and that justice is a Member of Parliament.

The ground upon which the court is asked to quash the grant of a licence is that of bias on the part of the justices. It is not said that they acted dishonestly in any way or that they were in fact biased, but that their membership of the society (or the membership of their spouses), which attracts financial benefits, constitutes bias in law. We are told that for the year ended November 18, 1958, the total turnover of the society was some £12,000,000. Of this, £46,000 only represented the proceeds of the sale of wine, i.e., 0·36 per cent. of the total turnover. It is estimated that the new spirit licence will increase the trade by no more than £3,000 per annum. The justices concerned have small interests in the society by way of shares and loan deposits. The highest income that any one of them derived from these combined sources in the year ended November 1958 was £23.

The position of justices having a financial interest in concerns which brew or distil or sell intoxicating liquor has been the subject of specific provisions in various licensing Acts passed during the last century. (See section 60 of the Licensing Act, 1872, section 40 of the Licensing Consolidation Act, 1910, and now section 48 of the Licensing Act, 1953.) One may summarise the effect of the first four subsections of section 48 as follows: subsection (1) disqualifies a justice from acting for any purpose under the Act in the county or borough in question, or from being a member of the licensing committee for that county or borough, who is, individually or in partnership, a brewer or distiller or retailer of intoxicating liquor in that county or borough. Subsection (2) disqualifies a justice from being a member of the licensing committee or the confirming or compensation authority for that

county or borough if he is a shareholder or stockholder in a company which brews or distils or retails intoxicating liquor in that county or borough, unless before appointment or reappointment he discloses his interest to the appointing justices. In fact, all the members of the licensing committee had duly disclosed their interests before their appointment. Subsection (3) provides that a person who has a beneficial holding of such shares or stock as aforesaid shall not be appointed or reappointed a member of such committee or authority as aforesaid, unless the justices appointing him or reappointing him are satisfied that the extent to which the company carries on the business of brewing, distilling or retailing intoxicating liquor is so small in relation to its whole business that the interest of the person concerned affords no reasonable ground for suggesting that he is not a proper person to be a member of the committee or authority.

Section 48 (4), which deals with a case where a justice is interested in specific premises, provides: "No justice shall act "for any purpose under this Act in a case that concerns any "premises in the profits of which he is interested, or of which he "is wholly or partly the owner, lessee, or occupier, or for the "owner, lessee, or occupier of which he is manager or agent: "provided that a justice shall not be disqualified under this "provision by reason of his having vested in him a legal interest "only, and not a beneficial interest, in the premises concerned or "the profits of them."

Accordingly, whatever may be the position under subsections (2) and (3), a person having such a beneficial interest in the premises as subsection (4) prescribes may not act for any purpose under the Act in a case which concerns those premises. In its context in subsection (4) the reference to profits of the premises is clearly, we think, an elliptical way of describing profits arising from any trade in making or selling intoxicating liquor carried on from the premises. Accordingly, the justices in the present case who were members of the society were, in our view, disqualified from acting under subsection (4).

Pausing there, it is said, and this we think is undoubtedly true, that certiorari would lie. As was said by Blackburn J. in *Reg.* v. *Rand* [1]: "There is no doubt that any direct pecuniary "interest, however small, in the subject of inquiry, does dis-"qualify a person from acting as a judge in the matter." Indeed, this is a rule of law and not a matter merely giving rise to a presumption of bias. Thus, in *Rex* v. *Sunderland Justices*,[2] Vaughan Williams L.J. said: "If he (that is, a justice) has "personally a pecuniary interest or an interest capable of being "measured pecuniarily, the law raises a conclusive presumption "of bias. For reasons of policy, which hardly require explanation, "it is not thought convenient, where there is such an interest, to

[1] (1866) L.R. 1 Q.B. 230, 232.

[2] [1901] 2 K.B. 357, 371; 17 T.L.R. 551.

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"go into the question whether he in fact acted partially or "impartially. A bias is presumed from the mere fact of the "existence of the interest."

The matter, however, does not rest there because section 48 (5), so far as it is relevant, provides that: "No act done by any "justice disqualified by this section shall be invalid by reason "only of that disqualification. . . ." Mr. Beaumont, for the applicants, contends that this subsection in no way affects the grounds on which certiorari will lie. It is only, he submits, a provision to ensure that unless and until the decision granting the licence is set aside, it shall remain and be treated as valid. Mr. McLusky, for the respondents, on the other hand, contends that its effect is to oust the remedy by way of certiorari on the ground of pecuniary interest, be that interest large or small. Only in the event of the likelihood of bias arising, otherwise than from pecuniary interest, will certiorari lie.

In our judgment neither of these submissions is correct. All the subsection does is, we think, to oust the rule of law enunciated in *Rex* v. *Rand* [3] and to make an applicant for certiorari prove a real likelihood of bias, whether by reason of pecuniary interest or otherwise. Indeed, this view has already been taken by this court in considering the corresponding provision in section 60 of the Licensing Act, 1872. Thus, in *Rex* v. *Tempest*, Lord Alverstone C.J. said [4]: "Then remains the further point, which is not with-"out difficulty. The fourth magistrate who was present at the "confirming sessions appears to have a share in Allsopps, and "it is not disputed he comes within the opening words of "section 60. The point we have to consider is whether the "licence is bad because he adjudicated upon it notwithstanding "the provisions of that section. The true meaning of the proviso "at the end of that section is not without difficulty. The words "are: 'No act done by any justice disqualified by this section "'shall, by reason only of such disqualification, be invalid.' It "was argued by Mr. Hextall that comparing that with the "analogous provision in section 38, it meant to say that no "objection should be taken to the sale of liquor in that case, "acting under the licence, and if the question had arisen solely "under section 38, I think that there would be some ground for "that argument. But when you look at the actual language of "section 60, which creates the status of disqualification, it says "that: 'No act done by any justice disqualified by this section "'shall by reason only of such disqualification be invalid.' In "my opinion it is impossible to put such a limited construction as "that contended for. I think the words of the Act here occurring "in the proviso to a section creating a disqualification against "the doing of the act and creating a penalty, cannot be construed "so narrowly; that is to say, that the act was not intended

[3] L.R. 1 Q.B. 230.

[4] (1902) 86 L.T. 585; 18 T.L.R. 433.

" to be protected if that was the only disqualification. I would " further point out that this proviso would be no protection where " a case of actual bias was raised—where it is said that the " interest of the brewer is such that he would be biased. In that " case, of course, the section would not be wanted, but it is quite " plain to my mind that the section saying ' by reason only of " ' such disqualification ' means thereby what I may call the " technical disqualification created by the Act. But if any brewer " was to sit and the case made was that he was biased in fact, " or likely to be biased in fact, different considerations would " arise. Under all the circumstances I think neither of the objec- " tions are successful, and the rule must be discharged." Darling and Channell JJ. agreed.

The judgment of Palles C.B. in *Rex* v. *Kilkenny Justices*,[5] is to the same effect. See also the judgment of the court (Field and Cave JJ.) in *Reg.* v. *Handsley*[6] on a somewhat similar provision, in which the following passage occurs: " Feeling ourselves thus " at liberty to exercise our own judgment in the matter, we are " of opinion that in cases like the present where such a section " as section 502 of this local Act exists, it is not enough to show " merely that an adjudicating justice is a member of the town " council, and, as such, has a pecuniary interest in the result of " the complaint or information . . . but that in order to disqualify " the justice it must be established that he has such a substantial " interest in the result of the hearing as to make it likely that " he has a real bias in the matter."

Accordingly, it seems to us that certiorari cannot issue in this case unless there is proved a real likelihood of bias whether arising from a substantial pecuniary interest or otherwise. Here there is no suggestion of the likelihood of bias arising otherwise than from pecuniary interest. Apart from the small interest payable on any shares or deposits, the justices who were members of the society could, it is said, look forward to buying their spirits more cheaply than in an ordinary retail shop if they so wished. What happens, of course, is that at the end of the accounting period a member of a co-operative society receives out of the profits of the society a dividend calculated not upon shareholding, but upon total purchases. The effect is thus to reduce the cost of those purchases.

Can it then be said that this financial interest is so substantial as to give rise to a real likelihood of bias? In our judgment it cannot. The total increase in trade which is anticipated to arise is, as stated above, only £3,000 per annum on a total turnover of £12,000,000. It is true that if the justices made purchases of spirits they would get the eventual rebates on those purchases. But here we do not know whether or to what extent any justice was a drinker of spirits. Finally, and this we think is conclusive, the co-operative society in fact have another branch only 250 yards away from the premises in question which already has a spirit

[5] (1908) 42 I.L.T. 134.

[6] (1881) 8 Q.B.D. 383, 386, 387.

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licence. All the justices, therefore, were already in a position to get a rebate on purchases of spirits. Indeed, the application for certiorari has been rested on the view, which we have held to be wrong, that bias is to be conclusively presumed from the existence of the justices' pecuniary interest, and from nothing else. It was not contended that there was any risk of bias because of the size of their interest or because of any other ground. In the course of argument, however, Mr. Beaumont did accept a suggestion, which fell from Salmon J., that the opportunity to buy spirits at what, in effect, is a discount, might import a real risk of bias. With this we have already dealt.

Before leaving this part of the case, it should be mentioned that Mr. Beaumont relied upon the principle that the right to apply for certiorari on the ground of lack of jurisdiction can only be taken away by express words. In the present case, however, it is not a case of the statute purporting to oust the remedy, but of the statute investing a justice with jurisdiction which he would not otherwise have had.

There remains a point taken by Mr. McLusky for the respondents. The solicitor for the applicants, who opposed the application before the justices, has stated that before the application he thought it possible that some members of the bench were members of the society, so much so that he informally approached the clerk to the justices beforehand, who told him that such membership would not disqualify the justices from sitting. After the application was granted, the said solicitor deposes that from inquiries he made he is satisfied that the chairman of the bench was a member of the society and that, to the best of his knowledge, other members of the licensing committee were also members. Mr. McLusky argues that it was the duty of the said solicitor to confirm his suspicions at the hearing by asking the justices which of them was a member of the society, and, if he so wished, to make formal objection then. Since he failed to do so, he ought not to be allowed to take objection now.

It is true there is ample authority for the proposition that if an advocate has knowledge that a particular justice is or may be disqualified from sitting on a particular application, he should take the objection then and there and not, so to speak, keep it up his sleeve for future use, if necessary, in this court. It is not possible to say that this is such a case. No attack on the bona fides of the solicitor in question is here made; indeed, a tribute has been paid by the respondents to his integrity. Whatever he may have thought, it cannot be said that he had knowledge. Nor is there, so far as the court knows, a public register of members that he could consult. " Means of knowledge " does not include for this purpose the opportunity to put fishing questions to each member of the bench, which he might or might not answer. And, indeed, it would be an invidious task to force upon an advocate. In our view there is no substance in this alternative argument for the respondents. Accordingly, we would refuse the application.

SALMON J. I have the misfortune to differ from my Lords in the conclusions which they have reached in this case. At the beginning of this year the Barnsley British Co-operative Society Ltd. was minded to extend its business by the sale of spirits at its central drug department in Wellington Street, Barnsley. To this end an application was made on its behalf for a spirits off-licence for those premises. At a meeting of the licensing justices for the county borough of Barnsley held on March 5, 1959, this application was granted. Seven justices sat at this meeting. Six of them were shareholders in, and members of, the society, and thereby admittedly disqualified from acting. The husband of the remaining justice was a shareholder in, and member of, the society. It will thus be seen that there was not even a quorum of qualified justices, as required by section 4 of Part I of the First Schedule to the Licensing Act, 1953. The chairman of the meeting was Alderman A. E. McVie. In July 1958 he had presented himself for election to the board of directors of the society. There were then two vacancies on the board. Alderman McVie was third amongst the nine unsuccessful candidates. None of the justices disclosed his interest to the present applicants at or before the meeting of March 5, 1959. The application was opposed by the present applicants, the Barnsley and District Licensed Victuallers' Association, and the Barnsley and District Off-Licence Holders' Protection Association. They submitted that there were adequate existing facilities for the sale and purchase of intoxicating liquor in the neighbourhood of the society's central drug department. There were in fact fourteen fully licensed or full off-licensed premises within 250 yards (including one of the society's off-licensed premises), and two further full off-licensed premises within 475 yards of these premises. The objectors no doubt pressed their objection because they regarded the society as a particularly serious trade competitor. Intoxicating liquor, in common with everything else in which the society trades, is sold by the society to its members in effect at a discount below ordinary retail list prices. This discount is not deducted at the time of each individual sale but is paid to the member annually on the total amount of his purchases. It is true that the payment is described as a dividend and that the member could not receive it, nor indeed be a member of the society, unless he were a shareholder. The amount of the payment, however, is in no way referable to the size of the member's shareholding; it is calculated solely as a percentage of the member's purchases from the society. It is, in reality, whatever it may be called, a discount. The current rate of discount is $7\frac{1}{2}$ per cent.

The present applicants argue in this court that the decision of the justices should be quashed on the ground of bias. In order for them to succeed it is not necessary for them to go as far as proving actual bias. On the other hand, the authorities plainly establish that it would not be enough for them to show only a bare possibility or a mere suspicion of bias. In order

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successfully to impugn the decision of the justices, a real likelihood of bias must be established. Quite apart from the common law presumption of bias from any pecuniary interest, with which I will deal presently, how is this onus to be discharged? In my judgment, by establishing that there are real grounds on which ordinary right thinking people might reasonably conclude that the decision may well have been biased. In such circumstances justice would not manifestly be seen to be done. The doctrine that justice must not only be done but manifestly be seen to be done was enunciated by Lord Hewart C.J. in *Rex* v. *Sussex Justices, ex parte McCarthy*,[7] but its roots are deep in legal history. As this court has pointed out in *Reg.* v. *Camborne Justices, ex parte Pearce*,[8] the doctrine has all too frequently been invoked in attempts to quash convictions or invalidate orders upon the flimsiest pretexts of bias. The fact, however, that the doctrine has sometimes had dubious champions does not in any way detract from its validity or diminish its importance, which is fundamental.

The present applicants now know that the justices by granting the licence obtained the advantage of being able to buy a bottle of gin at about half a crown and a bottle of whisky at about two shillings and nine-pence below the retail list prices at the society's central drug department. It may be argued that the sum involved is small, but to any ordinary mortal the advantage is a very real one. The fact that it can also be enjoyed at the society's other premises 250 yards away does not in my judgment by any means destroy its significance. It is true that it is not certain whether or to what extent any justice is a drinker of spirits; nor could such a matter be inquired into. In my view one may reasonably draw the inference that, at any rate, some of the justices may well drink spirits. There is certainly no reason to assume that they are all teetotallers. Further, the present applicants might reasonably conclude that Alderman McVie's future prospects of election to the society's board of directors would not be enhanced if a justices' meeting, of which he was chairman, refused the society's application for an off-licence. Would any reasonable business man believe that any meeting of which he was chairman could give a completely fair and unbiased hearing to what was, in effect, an application by the society to extend its business in Barnsley? Moreover, the present applicants know that not one or two of the justices, but six out of seven, were members of the society and may reasonably believe that an espirit de corps exists amongst members of the society, not usually to be found amongst shareholders in the ordinary joint stock company. I find it impossible to hold that there are no real grounds on which ordinary right thinking persons could reasonably conclude that the justices may well

[7] [1924] 1 K.B. 256; 40 T.L.R. 80.

[8] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850.

have had a bias in favour of granting the licence. If I pose to myself the exact question propounded by Vaughan Williams L.J. in *Rex* v. *Sunderland Justices*,[9] and approved by Lord Atkinson in *Frome United Breweries* v. *Bath Justices*[10]: "Can it be said "here that there was nothing more than a mere possibility or "suspicion that these justices would be biased? We must judge "of this matter as a reasonable man would judge of any matter "in the conduct of his own business. Can one doubt that a "reasonable man as a matter of business would under the cir-"cumstances of this case infallibly draw the inference that the "justices . . . would have a real bias in favour of granting the "licence?" I, for my part, am wholly unable to give anything but a negative answer to that question. In the words of Lord Sumner in the *Bath Justices* case,[11] in my view "there existed "in the justices . . . such a likelihood of bias as the parties "interested in (opposing the licence) could not justly be called "upon to risk."

I agree, for the reasons stated by my Lords, that in the circumstances of this case there is no substance in the argument that the present applicants are now precluded from alleging a likelihood of bias because they did not take the point before the justices.

Taking the view that I do, I doubt whether any question arises under section 48 of the Licensing Act, 1953. Subsections (1) to (4) of that section impose certain disqualifications. Subsection (5) provides that no act done by any justice disqualified by the section shall be invalid "by reason only" of that statutory disqualification. As pointed out by this court in *Rex* v. *Tempest*,[12] the proviso to section 60 of the Licensing Act, 1872, which is reproduced in subsection (5), gives no protection in case of bias whether from pecuniary interest or any other cause; it merely avoids the technical disqualifications imposed by the statute; where there is a case of bias it is unnecessary to look at the statute.

There is no doubt that at common law direct pecuniary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. This is no mere technicality but a most salutary rule founded in experience and common sense. As a matter of policy, it is obviously undesirable for any court to embark on the invidious task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal. Any pecuniary interest, however small, is fatal. In such a case the law assumes bias (see *Reg.* v. *Rand*, per Blackburn J.[13]; *Rex* v. *Sunderland Justices*, per Vaughan Williams L.J.[14]). The justices, as shareholders, had a pecuniary interest, although a very small one,

[9] [1901] 2 K.B. 357, 373.
[10] [1926] A.C. 586, 608; 42 T.L.R. 571.
[11] [1926] A.C. 586, 615.
[12] 86 L.T. 585.
[13] L.R. 1 Q.B. 230, 232.
[14] [1901] 2 K.B. 357, 371.

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in the subject-matter of the proceeding. It is argued by the present applicants that on that ground alone, and quite apart from the general circumstances with which I have already dealt, the decision should be quashed. On the other hand, the present respondents contend that the combined effect of subsections (4) to (5) of section 48 is to oust the common law presumption of bias, at any rate, in all cases where the licensing justices' pecuniary interest in the subject-matter of the proceeding is very small. I must confess that I would be reluctant to read these subsections as making any such wide inroad into the common law, unless compelled to do so either by authority or by unambiguous language in the subsections themselves. The point in my view is free from direct authority. Neither subsection (5), nor any of the former statutory provisions it reproduces, has ever before been invoked in a case where the justices or any of them had a direct pecuniary interest in the subject-matter of their decision. *Rex* v. *Tempest*[15] in my judgment does not touch this point. In that case one justice was technically disqualified under the Act only because he was a shareholder in a brewery company (present subsection (2)). That company, however, had no connection of any kind with the applicants or opponents to the licence. Nor was it suggested that the proposed licensed premises would compete with the company. The justice, accordingly, had no pecuniary interest in the subject-matter of the inquiry and no question touching the common law rule arose. In *Reg.* v. *Meyer*,[16] Blackburn J. points out that the legislature has in many cases removed the disqualification imposed by the common law—see, for example, Justices Jurisdiction Act, 1742, s. 1, Justices of the Peace Act, 1867, s. 2, and the Public Health Act, 1875, s. 258. These and all similar enactments, however, expressly empower the justices to act, for example, in matters relating to rates notwithstanding the fact that the justices have a pecuniary interest in the matter as ratepayers, or expressly remove the disqualification to which a justice would otherwise be subject, for example, as a member of a town council having, as such, a pecuniary interest in the result of a complaint or information. In cases of this type the justices are in a different position from justices who have a pecuniary interest in any matter as shareholders, and no investigation could ever become necessary into the importance of their pecuniary interest as ratepayers or town councillors (*Reg.* v. *Handsley*[17]). Section 48 of the Licensing Act, 1948, is different from all the relevant sections in the class of statutes to which I have referred, in that it is not an empowering section and does not purport to remove any disqualification. Indeed, subsections (1) to (3) impose a number

[15] 86 L.T. 585.
[16] (1875) 1 Q.B.D. 173.
[17] 8 Q.B.D. 383.

of technical disqualifications going beyond the common law, and subsection (4), far from removing the common law disqualification, expressly disqualifies any justice from acting in any matter in which he is financially interested, and thereby adopts the common law rule. What then is the meaning of subsection (5): "No act done by any justice disqualified by this section "shall be invalid by reason only of that disqualification"? In my view the words "that disqualification" refer only to the disqualification under the statute. Since section 48 is not an empowering section or one which removes any disqualification, it leaves the common law disqualification untouched, and this disqualification runs parallel with the statutory disqualification. Accordingly, subsection (5) in my judgment saves any act which would otherwise be invalid by reason only of a disqualification under the statute, but it does not save an act done by a justice disqualified at common law. This view seems to me to derive some support also from Lord Alverstone's judgment in *Rex* v. *Tempest*.[18] It may be asked what purpose could the legislature have had in including subsection (4) in section 48 if it was not intended to absorb the common law disqualification and excuse it under subsection (5). In my view subsection (4) was included because under subsection (6) of section 48 a fine may be imposed on a justice only if he acts for a purpose for which he is disqualified under the statute. Accordingly, unless subsection (4) were included in the section, a justice could be fined for a mere technical disqualification under subsections (1) to (3), but not for the disqualification of pecuniary interest, which would be absurd.

I have, accordingly, come to the conclusion that the justices' pecuniary interest as shareholders is fatal, and for that reason also this application should succeed. I am fortified in this view by the reflection that if it is correct, the statute will not in any case impose upon the courts the task which, according to the policy of the common law, should never be undertaken by any court, namely, the task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal.

I would only add that I am not unmindful of the practical difficulties stressed by Mr. McLusky which on the particular facts of this case would be involved in the conclusions I have reached, for all the Barnsley justices (or their near relatives) save one, are members of the society. These difficulties are, however, in my view, of little importance in comparison with the principle involved. In any event the difficulties would undoubtedly exist in any summary proceedings other than licensing matters relating to the society. Such proceedings could not be dealt with by the

[18] 86 L.T. 585.

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Barnsley bench as at present constituted, for in such a case an irrebuttable presumption of bias would undoubtedly arise. I would allow the application.

Application refused.
No application for costs.

Solicitors: *Corbin, Greener & Cook, for J. Donald Driver, Barnsley; Batchelor, Fry, Coulson & Co. for W. Winter, Barnsley.*

J. D. P.

[PRIVY COUNCIL.]

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BARON UNO CARL SAMUEL AKERHIELM AND ANOTHER . . . . . Appellants;

AND

ROLF DE MARE AND OTHERS . . . . Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Company — Shares — Issue — Misrepresentation — Statements in circular letter—Honest belief in untrue representations—Capital "subscribed"—Allotment of fully-paid shares in respect of formation expenses and acquisition of patent rights—"Subscribed"—Whether payment in cash essential.

Fraud—Honest belief in truth of statement—Sense in which it is understood by person making it—Construction by court—Test of honest belief.

Court of Appeal—Fact, question of—Appeal from lower court—Fraud—Acquittal by Supreme Court of Kenya—To be displaced on appeal only on clearest grounds.

Eastern Africa—Company—Shares—Sale—Alleged fraudulent misrepresentation.

In a circular letter signed by the appellants which, the respondents alleged, induced them to subscribe for shares in a private company formed in Kenya for the purpose of manufacturing "cold "process" tiles, it was stated, inter alia, "(*b*) We have procured "the patent rights for most countries in Africa, India and "Pakistan," and "(*c*) About one-third of the capital has already "been subscribed in Denmark." The company having gone into liquidation and the whole of the shareholders' money been lost, the respondents brought this action against the appellants alleging that representations (*b*) and (*c*) were fraudulent misrepresentations and claiming damages. The trial judge held that both representations were untrue, but that the appellants honestly believed them to be true at the time when they were made, and, applying *Derry* v. *Peek* (infra), dismissed the action.

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† *Present*: Lord Keith of Avonholm, Lord Jenkins, the Rt. Hon. L. M. D. de Silva.

On appeal, the Court of Appeal for Eastern Africa hesitated to hold that representation (*b*) was false, and declined to hold that it was made fraudulently; they found that representation (*c*) was untrue, but reversed the trial judge's finding that the appellants honestly believed it to be true, and awarded damages:—

Held, (1) that, assuming, without deciding, that representation (*b*) was not wholly true, there was no sufficient reason for disturbing the concurrent findings of the courts below in favour of the appellants on that point.

(2) The word "subscribed" in the circular letter did not mean that one-third of the capital had already been subscribed in cash; consistently with the representation, formation expenses of the company and the acquisition of patent rights could be met by allotting fully-paid shares.

(3) That, in the circumstances, the Court of Appeal were not justified in reversing the trial judge's view, formed after seeing and hearing the first appellant give evidence, that he did honestly believe representation (*c*) to be true.

Benmax v. *Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326 considered.

(4) Even assuming that the Court of Appeal were justified in substituting their own conclusion for that of the trial judge on the question of honest belief, they had adopted a wrong method of approach in that they construed the language of representation (*c*) as they thought it should be construed according to the ordinary meaning of the words, and held that, on the facts known to the appellants, it was impossible that either of them could ever have believed the representation as so construed to be true. The question was not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made.

Derry v. *Peek* (1889) 14 App.Cas. 337; 5 T.L.R. 625; *Angus* v. *Clifford* [1891] 2 Ch. 449; 7 T.L.R. 447, and *Lees* v. *Tod* (1882) 9 Rettie 807, 854 applied.

Arnison v. *Smith* (1889) 41 Ch.D. 348; 5 T.L.R. 413, so far as inconsistent with the above authorities, disapproved.

(5) Where a defendant has been acquitted of fraud in a court of first instance the decision should not be displaced on appeal except on the clearest grounds.

Principle in *Glasier* v. *Rolls* (1889) 42 Ch.D. 436 at 437; 5 T.L.R. 691 applied.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 8 of 1957) from a judgment of the Court of Appeal for Eastern Africa (July 4, 1956) reversing a judgment of the Supreme Court of Kenya (May 18, 1955).

The following facts are taken from the judgment of the Judicial Committee: In this case the present respondents (hereinafter called the plaintiffs) brought an action in the Supreme Court of Kenya against the present appellants (hereinafter called the defendants) and one Eric Von Huth (who died after action brought) claiming damages in respect of certain alleged false and fraudulent misrepresentations contained in a circular letter dated February 24, 1948, and signed by the defendants and Von Huth, whereby the plaintiffs alleged themselves to have been induced

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to subscribe for shares in Dantile Ltd. (a company incorporated in Kenya on March 20, 1948) and by so subscribing to have suffered damage.

The plaintiff Rolf de Mare subscribed in cash for 500 ordinary shares of the company of 20s. each. The plaintiff Guy Magnus Alexander Faugust subscribed for 1,500 ordinary shares and 250 preference shares of 20s. each, and made over 500 of his ordinary shares by way of gift to his wife, the plaintiff Barbro Wilhelmina Elisabeth Faugust, who did not herself subscribe for any shares.

The company was formed with a view to the manufacture and sale in Kenya and elsewhere of tiles for use in bathrooms, etc., of a type known as " cold process tiles " as distinct from the conventional baked or heat-treated type of tile. There appeared to be no doubt that at the date of the circular letter " cold " process " tiles were being successfully made and marketed in Denmark by way of substitute for the conventional type of tile, which since the war had been difficult or impossible to obtain, and that a method of making " cold process tiles " was the subject of protection under a patent application in Denmark, the benefit of which was vested in a Danish company called Muritas A/S.

Unfortunately the company was not a success, its failure being mainly attributable to the reappearance on the market within a short time after its formation of adequate quantities of the conventional type of tile, and the consequent cessation of the demand which had previously existed for " cold process " tiles, which were in truth no more than a war-time or post-war substitute for the normal article. In August 1950 a Mr. Erik Seex (who gave evidence at the trial) was appointed as an Inspector to investigate the affairs of the company under the Kenya Companies Ordinance. His report led to the prosecution of the defendants and Von Huth for certain offences (not involving dishonesty) under the Ordinance. Later the company went into liquidation and it was found that the whole of the shareholders' money had been lost. In such circumstances it was natural that persons in the plaintiffs' position should look back with a somewhat jealous eye at any statements in regard to the company's position and prospects made to them at the time when they subscribed for its shares.

The statements in the circular letter alleged by the plaintiffs in their plaint to constitute the false and fraudulent misrepresentations on which they relied were three in number, viz.: (*a*) " The tile has been produced and sold successfully in Den- " mark "; (*b*) " We have procured the patent rights for most " countries in Africa, India and Pakistan "; and (*c*) " About one- " third of the capital has already been subscribed in Denmark."

At the trial before Corrie J. representation (*a*) was admitted to be true. There thus remained to be dealt with by the judge representation (*b*) as to the patent rights, and representation (*c*)

as to "about one-third of the capital" having "already been "subscribed in Denmark." The judge held that those representations were both untrue but that the defendants honestly believed them both to be true at the time when they were made. Accordingly, directing himself correctly as to the law applicable to those findings by reference to the principles stated in *Derry* v. *Peek*,[1] he held that the plaintiffs had failed to make good their charges of fraudulent misrepresentation and by his judgment dated May 18, 1955, dismissed the action.

From that judgment the plaintiffs appealed to the Court of Appeal for Eastern Africa. In a judgment delivered by Briggs J.A., and concurred in by Sinclair V.P. and Bacon J.A. that court as to representation (*b*) hesitated to hold that it was false and declined to hold that it was made fraudulently; and as to representation (*c*) concurred with Corrie J.'s finding that it was untrue, but reversed his finding to the effect that the defendants honestly believed it to be true. Accordingly, by the judgment of the Court of Appeal dated July 4, 1956, the appeal was allowed, and judgment was directed to be entered for the plaintiffs for damages assessed at the full amounts paid up on the shares subscribed for by them, on the footing that at the date of their allotment such shares were valueless.

The defendants now appealed from that judgment.

1959. April 7, 8, 9, 13, 14, 15. *H. A. P. Fisher* for the appellants.

Roger Willis for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Armstrong* v. *Strain*[2]; *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*[3]; *Ng.* v. *The Queen*[4]; *Powell* v. *Streatham Manor Nursing Home*[5]; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[6]; *Banwari Lal* v. *Mahesh*[7]; *Hornal* v. *Neuberger Products Ltd.*[8]; *Twycross* v. *Grant*[9]; *Mersey Docks and Harbour Board* v. *Procter*[10]; *Governments Stock and Other Securities Investment Co. Ltd.* v. *Christopher*[11]; *Lek* v. *Mathews*[12]; *Broome* v. *Speak*[13]; *In re Wragg Ltd.*[14]; *In re China Steamship and Labuan Coal Co.*[15]

[1] (1889) 14 App.Cas. 337; 5 T.L.R. 625.
[2] [1951] 1 T.L.R. 856; [1952] 1 K.B. 232; [1952] 1 T.L.R. 82; [1952] 1 All E.R. 139.
[3] [1946] A.C. 508; 62 T.L.R. 549.
[4] [1958] A.C. 173; [1958] 2 W.L.R. 599.
[5] [1935] A.C. 243; 51 T.L.R. 289.
[6] [1942] A.C. 154, 192; 57 T.L.R. 485; [1941] 2 All E.R. 165.
[7] (1918) L.R. 45 I.A. 284.
[8] [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970.
[9] (1877) 2 C.P.D. 469.
[10] [1923] A.C. 253; 39 T.L.R. 275.
[11] [1956] 1 W.L.R. 237; [1956] 1 All E.R. 490.
[12] (1927) 29 Ll.L.Rep. 141.
[13] [1903] 1 Ch. 586; 19 T.L.R. 187; affd. sub nom. *Shepheard* v. *Broome* [1904] A.C. 342; 20 T.L.R. 540.
[14] [1897] 1 Ch. 796; 13 T.L.R. 302.
[15] (1869) L.R. 4 Ch.App. 772.

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June 1. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued:

The appeal has been fully and elaborately argued, but the essential issues fall within a relatively small compass, and may be thus summarised:

The first question is whether the Court of Appeal were warranted in reopening Corrie J.'s finding to the effect that the defendants honestly believed representation (*c*) to be true; and, if so, whether the Court of Appeal, treating the matter as at large, were justified in concluding as they did that the defendants did not honestly so believe. A distinction is here to be observed between the first defendant, Baron Akerhielm, who gave evidence at the trial, and the second defendant Mr. Ole Beyer who did not.

The second branch of this first question only arises if the defendants fail to secure a negative answer to the first.

The second question is whether the circumstances of the case are, as the plaintiffs contend, such as to warrant their Lordships in reopening the concurrent findings of the trial judge and the Court of Appeal to the effect that the defendants honestly believed representation (*b*) to be true; and, if so, whether a finding to the effect that they did not honestly so believe would be justified on the facts.

If the defendants succeed on the first question in either of its branches, then the appeal must be allowed unless the plaintiffs succeed on both branches of the second question. All else failing, it is still open to the defendants to contend that the representations complained of were true or that they were immaterial and did not induce the plaintiffs' purchases of shares.

Finally, the defendants contend that even if the decision of the Court of Appeal is held to have been right in other respects the damages awarded by that court are excessive.

[Having stated the facts and referred to the relevant documents his Lordship said that, assuming, without deciding, that representation (*b*) was not wholly true, their Lordships might say at once that they saw no sufficient reason for disturbing the concurrent findings of Corrie J. and the Court of Appeal in favour of the defendants on that point.]

On the question whether representation (*c*) was true or false, the plaintiffs' main argument was to the effect that the word "subscribed" in the circular letter meant "subscribed in cash" and in support of this proposition they relied on *Arnison* v. *Smith*.[1] The learned trial judge rejected this contention, saying that it was clear that the "Capital already Subscribed" included shares issued for considerations other than cash.

Briggs J.A. in the Court of Appeal agreed that representation (*c*) did not mean that one-third of the capital had already been subscribed in cash, so that it could not be held false on the

[1] (1899) 41 Ch.D. 348; 5 T.L.R. 413.

ground that the 70,000s. of capital referred to in the "speci- "fication of capital required," or some part of it, was in fact to be issued for consideration other than cash, but also agreed that it could not be said that the whole of this 70,000s. of capital was in fact to be subscribed "in Denmark." Representation (*c*) was thus held false on the narrow ground that while the representation as to the amount of capital already subscribed was correct the representation that this amount had already been subscribed "in Denmark" was untrue.

Their Lordships agree on both points. It seems to them impossible to maintain that the defendants and Von Huth could not, consistently with the representation, pay (for example) the formation expenses by allotting fully paid shares of the appropriate nominal amount to the persons to whom the expenses were payable instead of issuing shares to a like nominal amount for cash and paying the cash so raised to those persons, or by allotting fully paid shares to the appropriate nominal amounts to Muritas A/S or Von Huth in respect of the patent rights. On the other hand, their Lordships cannot regard the words "subscribed in Denmark" as apt, according to their ordinary meaning, to include shares allotted as fully paid to persons resident in Kenya for services rendered in Denmark in connection with the formation of the company.

The only witness called on the defendants' side was the Baron, and accordingly the question whether the defendants honestly believed representations (*b*) and (*c*) or either of them to be true depended before the trial judge not only on the content of the Baron's evidence but also in great measure on the view formed by the trial judge of the Baron's credibility as a witness and honesty as a man, after seeing and hearing him give his evidence.

Their Lordships would observe, first, that there was no cross-examination of the Baron as to the honesty of his belief in the truth of representation (*c*) that "about one-third of the capital" had "already been subscribed in Denmark," or the sense in which according to his evidence in chief he understood that statement; and, secondly, that on a perusal of the Baron's evidence as a whole it is in their Lordships' judgment impossible to hold that there was no evidence upon which the trial judge and the Court of Appeal could find, as they did concurrently find, that the Baron honestly believed representation (*b*) as to the patent rights to be true, whether or not objectively considered it was wholly true.

The Court of Appeal, considering themselves as free on the grounds they stated to go behind the judge's conclusion that the defendants honestly believed representation (*c*) to be true, based though it was (so far at all events as the Baron was concerned) essentially on his acceptance of the Baron as an

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honest man and a witness of truth after hearing and seeing the Baron give his evidence, proceeded without these advantages to form their own opinion upon this vital issue.

In their Lordships' view the Court of Appeal erred in taking this course. Their Lordships are of opinion that neither the trial judge's comment on the plaintiffs' omission to call Hollister [the solicitor to the company when it had been formed] nor the fact that Hollister was not called by the defendants afforded sufficient ground to justify the Court of Appeal in reversing the trial judge's view, formed after seeing and hearing the Baron give his evidence, that the Baron did honestly believe representation (*c*) to be true.

On the assumption that contrary to their Lordships' opinion the Court of Appeal were justified in substituting their own conclusion for that of the judge on the question of honest belief, the conclusion so substituted appears to their Lordships to be open to the criticism that the Court of Appeal construed the language of representation (*c*) as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believe it in that sense to be true. But that is not this case. It cannot be said that representation (*c*) could not have been understood by any reasonable person in the sense attributed to it by the Baron in his evidence, or that it was impossible that he should honestly have understood it in that sense, and honestly believed it in that sense to be true. He gave evidence to the effect that he did understand representation (*c*) in that sense, and did honestly understand it in that sense to be true, and was not cross-examined on either of those points. (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see *Derry* v. *Peek* [2]; *Angus* v. *Clifford* [3]; *Lees* v.

[2] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

[3] [1891] 2 Ch. 449; 7 T.L.R. 447.

Tod,[4] which authorities must, in their Lordships' view, be preferred to *Arnison* v. *Smith*[5] so far as inconsistent with them.)

But this aspect of the matter need be pursued no further. Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of a judge at first instance when the decision under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom*[6]; *Watt or Thomas* v. *Thomas*[7]; *Yuill* v. *Yuill*[8]; *Benmax* v. *Austin Motor Co. Ltd.*[9]). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier* v. *Rolls*[10]).

For all these reasons their Lordships are of opinion that the Baron should succeed in this appeal.

The case against the second defendant, Ole Beyer, is, as the judge pointed out, on a different footing, in that he did not give evidence. He is, however, entitled to rely on the evidence of the Baron and its acceptance as establishing the Baron's honest belief in the truth of representation (*c*). He is also entitled to rely on the fact that Hollister was consulted. It is improbable that if the Baron was honest Beyer was fraudulent in the common enterprise in which they were both engaged. The Baron signed the circular honestly believing its contents to be true, and the reasonable inference is that Beyer signed it in the same frame of mind. It is improbable that if Beyer had any fraudulent intent in this matter he any more than the Baron would have employed a solicitor, unless, indeed, he had it in mind to deceive the solicitor as well as the recipients of the circular. Moreover, according to the Baron's evidence, the figures were supplied by Von Huth. In all the circumstances their Lordships see no sufficient reason for differing from the judge in his conclusion that the case against Beyer had not been made out.

Accordingly, their Lordships are of opinion that in his case also the appeal should succeed.

For the reasons above stated their Lordships will humbly advise Her Majesty that this appeal should be allowed, the

[4] (1882) 9 Rettie 807, 854.
[5] (1889) 41 Ch.D. 348; 5 T.L.R. 413.
[6] [1927] A.C. 37; 42 T.L.R. 741.
[7] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.
[8] [1945] P. 15, 19; 61 T.L.R. 176; [1945] 1 All E.R. 183.
[9] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.
[10] (1889) 42 Ch.D. 436, 457; 5 T.L.R. 691.

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judgment of the Court of Appeal for Eastern Africa set aside and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs of this appeal and the appeal to the Court of Appeal for Eastern Africa.

Solicitors: *Clifford-Turner & Co.; Gordon Dadds & Co.*

C. C.

[CHANCERY DIVISION.]

1959
May 14.
Danckwerts J.

In re PILKINGTON'S WILL TRUSTS. PILKINGTON AND OTHERS *v.* PILKINGTON AND ANOTHER.

[1959 P. No. 987.]

Trust and Trustee — Power of advancement — Exercise of power — Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement—Avoidance of death duties—Whether advancement for benefit of object of power—Whether rule against perpetuities infringed—Whether valid exercise of power of advancement—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

Perpetuity Rule—Power of advancement—Power used for resettlement —Application of perpetuity rule.

Power of Appointment — Power of advancement — Distinction — Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold his residuary estate upon trust in equal shares for all his nephews and nieces living at his death who should attain 21 years or being female marry under that age, the trustees to apply the income of the shares for the maintainance, education, support or benefit and to accumulate the balance until they attained 25 years, or being female married under that age; subject thereto the income was to be held upon protective trusts for the benefit of the beneficiaries with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after their deaths on trust as to capital and future income for such of their children as they should appoint. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925.[1] The testator died on February 8, 1935. One of

[Reported by MARGARET THOMAS, Barrister-at-Law.]

[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advance- "ment or benefit, in such manner as "they may, in their absolute discre- "tion, think fit, of any person "entitled to the capital of the trust "property . . . Provided that—(*a*) "the money so paid or applied for the "advancement or benefit of any "person shall not exceed altogether

his nephews, who had attained 25 years of age, was married and had three infant children. His second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely.

On a summons to determine whether the trustees might lawfully so exercise the power of advancement:—

Held, (1) that a power of advancement might legitimately be exercised if it was in the form of providing benefits for the objects of the power coupled with a settlement of money advanced in such a way that the wife, children or remoter issue of the objects would become beneficiaries under the settlement, and that the saving of death duties was a benefit to the objects of the power.

In re Ropner's Settlement Trusts [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n applied.

(2) That since the exercise of a power of advancement, unlike the exercise of a limited power of appointment, took the property concerned out of the original settlement, and the proposed exercise of the power would, in effect, result in a resettlement on new trusts, the relevant period for the application of the rule against perpetuities was to be determined by reference to the proposed settlement; accordingly, the trustees might properly exercise the power in the manner proposed.

Dictum of Upjohn J. in *In re Wills' Will Trusts* [1959] 1 Ch. 1, 12; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472 considered.

ADJOURNED SUMMONS.

By his will dated December 14, 1934, a testator, William Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington by their named wives, living at his death who should attain the age of 21 years or being female marry under that age; there was a provision substituting for a beneficiary dying in the lifetime of the testator his or her children. The share of each beneficiary was, so far as is here material, settled in the following manner: until the beneficiary attained the age of 25 years or being female married under that age, the trustees were to apply the income of the share for the maintenance, education, support or benefit of the beneficiary and to accumulate the balance; subject to this the trustees were to hold the income of the share upon express protective trusts for the benefit of the beneficiary during his or her life with a provision that his or her consent to any exercise of any applicable power of advancement should not

"in amount one-half of the presumptive or vested share or interest" "of that person in the trust property . . ."

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cause a forfeiture of the interest. The trustees were empowered during the period of 21 years from the testator's death to withhold any part of the income from the beneficiaries and to accumulate it. After their death the capital and future income of the share of each beneficiary was to be held in trust for such of their children or remoter issue as they should appoint with a trust in default of appointment. If the trusts of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925. The testator died on February 8, 1935, and his will was duly proved by his executors.

The first defendant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, had attained 25 years and was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second defendant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925, by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund with power to apply all or part of the accumulations as if they were income of the current year; if she should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard

Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925, was made applicable.

By this summons the trustees of the will sought a declaration whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925, in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital in the interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

B. L. Bathurst Q.C. and *James Cunliffe* for the trustees.
John Pennycuick Q.C. and *Eric Griffith* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in the course of argument: *Roper-Curzon* v. *Roper-Curzon* [2]; *In re Meux* [3]; *In re Vestey's Settlement* [4]; *In re Gossett's Settlement* [5]; *In re Fox.* [6]

DANCKWERTS J. stated the facts and continued: It is suggested that the trustees in execution of the power of advancement should raise a sum of £7,590 and pay that over to the trustees of the proposed settlement to be held upon trust. That is much less than the total share of Richard Godfrey Pilkington and his issue as appointed under the testator's will: but the question has been raised whether that would be a legitimate exercise of the power of advancement: in particular whether it would infringe the rule against perpetuities, or whether it would amount, by reason of the power of advancement contained in the proposed settlement and various other things, to a delegation which is prohibited. If the provisions of the proposed settlement are to be read into the testator's will, they might offend against the rule against perpetuities, which applies to a person who is not a life in being at the date of the testator's will. The point about delegation seems to me one which is slightly different, but depends possibly on the same principles.

[2] (1871) L.R. 11 Eq. 452.
[3] [1958] Ch. 154; [1957] 3 W.L.R. 377; [1957] 2 All E.R. 630.
[4] [1951] Ch. 209; [1950] 2 All E.R. 891.
[5] (1854) 19 Beav. 529.
[6] [1904] 1 Ch. 480.

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It has been submitted at the last moment in the course of the argument that a proposed settlement of this kind would amount to an application of the sum advanced for non-objects of the power of advancement, that is to say, Penelope's children. There is a certain amount of authority in regard to that to which I have been referred. I do not propose to go through the cases in detail but they do establish quite plainly that it is a proper exercise of a power of advancement for the benefit of a named person if the advancement is made upon terms which are for the benefit of that person, or for the purposes of a settlement by that person, or in the form of a settlement for that person's benefit. In the present case there are benefits to be found because of the question of the payment of death duties in certain events, and that is the kind of reasoning which was accepted as perfectly legitimate in *In re Ropner's Settlement Trusts*.[1]

The latest case on the subject is *In re Wills' Will Trusts*,[2] in which Upjohn J. made certain observations which have given me some difficulty. The point which has really troubled me in this case is whether there is anything in the decision in *In re Wills' Will Trusts*[3] which requires me to come to the conclusion that it is not proper to do what it is proposed should be done in the present case. I think it is a correct argument that the power of advancement is not the same as the power of appointment. It is plain on principle that, when a power of advancement is exercised, the fund is taken right out of the trust estate and devoted to the benefit of some person who holds it clear of the limiting trusts of the settlement under which the power of advancement is exercised. It is different in this respect from a limited power of appointment which is merely a power to mark out the trusts of the settlement or will and, therefore, operates when the power of appointment is exercised so that a trust which is appointed by somebody else is read into the settlement or will. In such a case, far from the property being taken out of the settlement or will, the trusts in question are incorporated in the settlement or will. Therefore, in the case of the exercise of a power of appointment which is not a general but a limited power, the rule against perpetuities cannot be applied in relation to the date of the proposed exercise of the power of appointment, whether it is made by settlement or will.

That seems to me the whole point in the present case. I should have thought that, quite plainly, the exercise of the power of advancement was something which took the money so advanced out of the settlement and either resulted in the money being handed over to the object of the power of advancement, or, as the cases show, in it being resettled on new trusts, which necessarily

[1] [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332n.

[2] [1959] 1 Ch. 1; [1958] 3 W.L.R. 101; [1958] 2 All E.R. 472.

[3] [1959] 1 Ch. 1.

have nothing to do with the trusts of the original settlement at all but are created as a result of the exercise of the power of advancement and nothing else.

As regards the suggestion that the power of advancement cannot incorporate provisions in favour of persons who are not actually one of the objects of the original settlement, it seems to me, as Mr. Pennycuick said, to be common form that, when a settlement is made of a fund which is advanced to the beneficiary under such powers, the settlement may include trusts in favour, not only of the beneficiary himself, but his wife, or, it may be, his widow, and issue, and, consequently, I do not think in the present case, if I am right on my general point, that the trust in favour of Penelope is bad. That seems to me, on principle, the correct answer to be given to the point which is raised. If I am right in the view which I have taken that a power of advancement is essentially different from a power of appointment, that also seems to me to dispose of the point about delegation.

In the course of his judgment in *In re Wills' Will Trusts* [4] Upjohn J., after saying that in several other cases the court had not had the benefit of certain arguments which had been put before him, continued [5]: "Nevertheless, so far as this court is "concerned, these authorities do establish the proposition that "trustees exercising a power of advancement may make settle-"ments upon objects of the power if the particular circumstances "of the case warrant that course as being for the benefit of the "object of the power." Those remarks about the object of the power were relied upon by Mr. Bathurst in the course of his argument that the present proposed settlement was inadmissible because Penelope's children were unborn, but I do not think that the mind of Upjohn J. was directed to that point, but that he was referring generally to the question that there can be a settlement in the course of the exercise of the power of advancement. Upjohn J. continued [6]: "What the authorities typified by *In re* "*May* [7] and *In re Mewburn* [8] establish to my mind is that any "settlement made by way of advancement upon an object of "the power by trustees must not conflict with the principle "delegatus non potest delegare. Thus, unless upon its proper "construction the power of advancement permits delegation of "powers and discretions, a settlement created in exercise of the "power of advancement cannot in general delegate any powers "or discretions, at any rate in relation to beneficial interests, to "any trustees or other persons, and in so far as the settlement "purports to do so it is pro tanto invalid. I say that without "prejudice to the propriety of including an ordinary power of "advancement in such a settlement: see *In re Morris*." [9]"

[4] [1959] 1 Ch. 1.
[5] Ibid. 12.
[6] Ibid.
[7] [1926] 1 Ch. 136.
[8] [1934] Ch. 112.
[9] [1951] W.N. 412; [1951] 2 All E.R. 528.

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PILKINGTON'S WILL TRUSTS, *In re.*

Danckwerts J.

In *In re Morris* [9] it was held by the Court of Appeal that the inclusion of a general simple power of advancement in what is called the standard form was not objectionable, and in the present case, so far as the power of advancement which is proposed is concerned, it merely refers to a statutory power. That is by the way.

What puzzles me about this passage in the judgment of Upjohn J. is his reference to *In re May's Settlement* [10] and *In re Mewburn's Settlement* [11] as authorities for the proposition which he put forward; it is quite plain that they are both cases on the exercise of powers of appointment which, as I have already indicated, are different from the exercise of powers of advancement, and, therefore, it seems to me that the cases to which he refers were not, strictly speaking, relevant to the remarks which he subsequently made. I am not quite sure what he had in his mind, and I feel that in the somewhat different circumstances of the present case I should not adopt that passage in his judgment. I think it may be that the distinction between powers of advancement and powers of appointment was not really in his mind at that time, and, consequently, I do not feel bound to regard what he said as ruling out a conclusion in the present case in favour of the other proposition which is being put forward. Consequently, I have come to the conclusion, on principle, that the exercise of the power of advancement is not objectionable if it is in the form of providing benefits for the objects of the power which are coupled with a settlement of the moneys so raised and allocated in such a way that the children or remoter issue of the objects would become beneficiaries under the settlement. Again, it seems to me that it is not objectionable to reach the conclusion that such a settlement with discretionary powers, particularly if they are of a reasonable kind, is quite proper.

A further conclusion is this: that in effect it is a resettlement of the money which is taken right out of the original settlement in the will. For the purposes of the rule against perpetuities, the relevant period and the relevant purposes for the application of the rule are those contained in the proposed settlement. It is not so tied up with the original will that the proposed provision is obnoxious to the rule against perpetuities. I will declare that the trustees have a right to exercise the power of advancement in the manner proposed.

Declaration accordingly.

Solicitors: *Alsop, Stevens & Co., Liverpool.*

[9] [1951] W.N. 412; [1951] 2 All E.R. 528.

[10] [1926] 1 Ch. 136.

[11] [1934] Ch. 112.

[PROBATE, ETC., DIVISION.]

JOHN CARLBOM & CO. LTD. *v.* ZAFIRO (OWNERS). THE ZAFIRO.

1959
April 27, 28;
May 6.

Hewson J.

[1958 J. 540.]

Company—Winding up—Execution—Arrest of vessel—Action in rem—Voluntary liquidation—Whether creditor for necessaries can become secured creditor by arresting company's vessel after notice of meeting to propose voluntary winding up—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 325.

Admiralty—Arrest of vessel—Action in rem—Necessaries claim—Whether arrest "execution"—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 228, 325.

Ships' Names—Zafiro.

Between the months of November, 1957, and January, 1958, the plaintiff made necessary disbursements on account of the vessels *Oro* and *Zafiro*, both of which were owned by the defendant company. On January 17, 1958, the defendant company published in the London Gazette a notice that an extraordinary general meeting of their creditors would be held on February 14, 1958, for the purpose, if thought fit, of proposing a resolution for voluntary winding-up and of nominating a liquidator, and on January 22, 1958, notice of this meeting was sent to the plaintiffs. On February 3, 1958, the plaintiffs issued a writ in rem against the *Zafiro* and arrested that vessel on the same day. On February 14, 1958, the creditors of the defendant company passed a resolution that the company should be wound up and appointed a liquidator, notice of whose appointment was sent to the plaintiffs on February 17. On March 10, 1958, Karminski J. ordered the *Zafiro* to be appraised and sold, and she was sold on March 25, the proceeds of sale being paid into court.

In the first motion, the plaintiffs moved for judgment in default of defence against the defendants and/or the proceeds of sale, and for payment out of the sum due to them.

In the second motion, the defendants moved for an order that the action be stayed on the ground that since the issue of the writ the resolution for the voluntary winding up of the defendant company had been passed, and that before the issue of the writ the plaintiffs had been given notice of the meeting at which such resolution was to be proposed. The defendants further sought an order that the proceeds of sale of the *Zafiro* be paid out to them after the satisfaction of the claim of the owners of another vessel, who had previously obtained judgment against the *Zafiro* in a collision action:—

Held, (1) that the arrest of a vessel was not an "execution" within the meaning of section 325 of the Companies Act, 1948,[1] and, accordingly, the plaintiffs were entitled to the benefit of the

[1] Companies Act, 1948, s. 325: "(1) Where a creditor has issued "execution against the goods . . . of "a company or has attached any "debt due to the company, and the "company is subsequently wound up, "he shall not be entitled to retain "the benefit of the execution or "attachment against the liquidator "in the winding up of the company "unless he has completed the execu- "tion or attachment before the com- "mencement of the winding up: "Provided that—(*a*) where any credi- "tor has had notice of a meeting "having been called at which a "resolution for voluntary winding "up is to be proposed, the date on

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arrest of the *Zafiro* as against the liquidator in spite of the prior notice of the meeting at which a resolution for the winding up of the defendant company was to be proposed.

(2) That by arresting the *Zafiro* the plaintiffs had become secured creditors.

(3) That the general practice of the court was to stay all actions against a company after the commencement of the voluntary winding up of the company, save in special circumstances. This being an action for necessary disbursements, in which the writ was issued and the vessel arrested, though after notice of the meeting, before the resolution was passed, the arrest of the vessel constituted, however, such a special circumstance.

In re Australian Direct Steam Navigation Co. (1875) L.R. 20 Eq. 325; *Harrison* v. *Mortgage Insurance Corporation* (1893) 10 T.L.R. 141; *Anglo-Baltic and Mediterranean Bank* v. *Barber* [1924] 2 K.B. 410; *The Cella* (1888) 13 P.D. 82 applied.

TWO MOTIONS.

Between the months of November 1957 and January 1958 the plaintiffs made necessary disbursements to the value of £239 16s. on account of two vessels, the *Oro* and the *Zafiro*, both of which were owned by the defendants, the B. & G. Shipping Co. Ltd.

On January 6, 1958, a collision occurred between the *Zafiro* and the steamship *Pinewood* whilst the latter was moored in Immingham Dock. The owners of the *Pinewood* commenced an action for damages against the *Zafiro* and obtained judgment therein.

Meanwhile, on January 17, 1958, the defendant company published in the London Gazette a notice that an extraordinary general meeting of their creditors would be held on February 14, 1958, for the purpose, if they thought fit, of proposing a resolution for voluntary winding up and of nominating a liquidator, and on January 22, 1958, notice of this meeting was sent by post to the company's creditors, including the plaintiffs.

On February 3, 1958, the plaintiffs issued a writ in rem in the present action against the *Zafiro* for the necessary disbursements made by them in respect of both the *Zafiro* and the *Oro*, and on the same day they arrested the *Zafiro* in London under the provisions of sections 1 and 3 of the Administration of Justice Act, 1956. On February 10, 1958, appearance to the writ was entered on behalf of the defendants.

On February 14, 1958, the creditors of the defendant company passed a resolution that the company should be wound up, and appointed a liquidator, notice of whose appointment was sent to the plaintiffs on February 17.

"which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding up . . . (c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit.

"(2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale . . . (3) In this section the expression 'goods' includes all chattels personal, and the expression 'sheriff' includes any officer charged with the execution of a writ or other process."

On March 3, 1958, the plaintiffs delivered their statement of claim to the defendants, and on March 10, at the instance of the liquidator, who regarded the *Zafiro* under arrest with three of her crew on board as a wasting asset, Karminski J. ordered that the *Zafiro* be appraised and sold by the Admiralty Marshal. The *Zafiro* was in fact sold for more than £5,000 on March 25, 1958, and the proceeds of sale were paid into court.

In the first motion, the plaintiffs asked for judgment in default of defence against the defendants and/or the proceeds of sale for their claim or as might be found on reference; and they also asked for payment out of this amount.

In the second motion, the defendants asked that the present action be stayed on the ground that since the date of the issue of the writ the resolution for the voluntary winding up of their company had been passed, and that before the writ was issued the plaintiffs had been given notice that a meeting was to be called at which such resolution was to be proposed. They further asked that the proceeds of sale of the *Zafiro* be paid out to them after the satisfaction of the claim of the owners of the *Pinewood* in the collision action.

Gerald Darling for the plaintiffs.
H. V. Brandon for the defendants.

The following cases were cited in argument, in addition to those referred to in the judgment: *In re Rio Grande do Sul S.S. Co.*[2]; *In re Ford, Ex parte The Trustee* [3]; *Dapueto* v. *Wyllie, The Pieve Superiore* [4]; *Westbury* v. *Twigg & Co. Ltd.*[5]

Cur. adv. vult.

May 6. HEWSON J. delivered the following judgment, in which he stated the facts and continued: Mr. Brandon, for the defendants, submitted that if the plaintiffs had begun their action before the notice of the proposed meeting, the plaintiffs would have acquired the status of secured creditors, but that having begun their action, by issue of a writ in rem for the arrest of the ship, after they had received such notice, they should not be regarded as secured creditors so as to get priority over other creditors. On the contrary, they should be in the same position as other unsecured creditors and take their share of the available fund rateably with them. As this is a limited company, presumably owning property other than the *Zafiro*, it is possible that the total fund available for distribution will considerably exceed the fund arising out of the sale of the *Zafiro*.

In support of Mr. Brandon's argument I was referred to various sections of the Companies Act, 1948.

[2] (1877) 5 Ch.D. 282.
[3] [1900] 2 Q.B. 211; 16 T.L.R. 399; 48 W.R. 688; 7 Mans. 281.
[4] (1874) L.R. 5 P.C. 482; 22 W.R. 777; 2 Asp.M.L.C. 319.
[5] [1892] 1 Q.B. 77; 40 W.R. 208.

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Section 211 provides: "The winding up of a company may "be either—(*a*) by the court; or (*b*) voluntary; or (*c*) subject to "the supervision of the court"; and subsection (2) says: "The "provisions of this Act with respect to winding up apply, unless "the contrary appears, to the winding up of a company in any of "those modes."

Section 226, which applies to companies being wound up by an order of the court, gives a discretion to the court, on the application of the company or any creditor or contributory, to stay proceedings at any time between the presentation of a winding-up petition and before a winding-up order is made.

It was argued by the defendants that the presentation of a petition is analogous to notice of creditors' meeting in the case of a voluntary winding up, to which procedure I shall shortly refer.

Neither counsel argued that section 228 (to which I shall next refer) had any bearing on the present case, the present case being one of a voluntary winding up by the creditors. Section 228 provides that in the case of a compulsory winding-up order in respect of any company registered in England "any attachment, "sequestration, distress or execution put in force against the "estate or effects of the company after the commencement of "the winding up shall be void."

I was referred in the course of argument to *In re Australian Direct Steam Navigation Co.*,[1] where it was held that the arrest of a ship in the Admiralty Division was a sequestration within the meaning of section 163 of the Companies Act, 1862. That section is almost similar in wording to section 228 of the 1948 Act, except that the earlier Act was not confined to a company registered in England. In *In re Australian Direct Steam Navigation Co.*[2] Jessel M.R. held that the term "sequestration" had no particular technical meaning, but simply meant the detention of property by a court of justice for the purpose of answering a demand which is made, which is exactly what the arrest of a ship is. If such an arrest was made after the winding-up order it was void under section 163 of the earlier Act.

I was then referred to section 229 of the Companies Act, 1948, which provides: "Where, before the presentation of a petition "for the winding up of a company by the court, a resolution has "been passed by the company for voluntary winding up, the "winding up of the company shall be deemed to have commenced "at the time of the passing of the resolution." Further in that section one sees this: "In any other case, the winding up . . . "by the court shall be deemed to commence at the time of the "presentation of the petition for the winding up."

Section 231 provides that in cases where there is a winding up by order of the court all actions are stayed except by leave of the court.

[1] (1875) L.R. 20 Eq. 325. [2] Ibid. 326, 327.

Then I was referred to certain sections dealing with voluntary winding up: section 278, which provides for voluntary winding up in various circumstances; section 283, which provides that voluntary winding up may be either a members' voluntary winding up or a creditors' voluntary winding up; and sections 292 to 300 inclusive, which contain provisions which apply to creditors' voluntary winding up, under which provisions the defendant company in this case was wound up and a liquidator appointed.

Section 280 provides that a voluntary winding up is deemed to commence at the time of the passing of the resolution.

Sections 301 to 310 contain provisions which apply to every voluntary winding up, and in particular I was referred to sections 302 and 307. Section 302 provides that, subject to certain preferential payments, the property of a company shall, on its winding up, be applied rateably in satisfaction of its liabilities; and, as I understand it, "preferential payments" there referred to includes secured creditors. Section 307 provides, inter alia, that the liquidator "may apply to the court to determine any question "arising in the winding up," and that "the court, if satisfied "that the determination of the question . . . will be just and "beneficial, may accede wholly or partially to the application on "such terms and conditions as it thinks fit or may make such other "order on the application as it thinks just." Mr. Brandon submitted that under this section the court has a discretionary power to stay an execution on the company's property, and with that submission I agree.

I now turn to section 325. [His Lordship read the section and continued:] It is not suggested that a ship is not a chattel personal, and Mr. Brandon argued that the Admiralty Marshal in the Admiralty Court is equivalent to a sheriff and that arrest by the Marshal comes under the heading "other process."

The last section to which I was referred was section 326, which sets out the duties of a sheriff regarding goods taken in execution. It provides that where goods "are taken in execu-"tion, and, before the sale thereof . . . notice is served on the "sheriff . . . that a resolution for voluntary winding up has been "passed, the sheriff shall, on being so required, deliver the "goods . . . to the liquidator"; and the section goes on to provide in subsection (3) that the rights of "the liquidator may "be set aside by the court in favour of the creditor . . . as the "court thinks fit." I am told by the defendants' counsel that the provisions of sections 325 and 326 came into force for the first time in 1929, except the subsections giving the court discretion, which appeared for the first time in the Act of 1948.

The defendants' main points, as I understood them, were these: first, that the general practice of the court was to stay all actions against a company after the commencement of the winding up and it could only be departed from in exceptional circumstances; secondly, that where a creditor has notice of the meeting

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at which the resolution for voluntary winding up is to be proposed he cannot have the benefit of execution against any of the company's goods unless execution is completed before such notice.

As to the first proposition, I was referred to several cases, two of which I am going to mention. The first one was *Harrison* v. *Mortgage Insurance Corporation*.[3] That was a case before a Divisional Court in which Wills J., after being referred to a number of cases establishing that it was a general rule to stay actions when a company was being wound up, whether voluntary or otherwise, agreed that it was so, and continued[4]: "If it was "quite clear that no creditor would be injured by the plaintiff "then obtaining execution, the action need not necessarily be "stayed, but in this case the rough probabilities appeared to be "the other way. The plaintiff could not be treated as a secured "creditor; there was not enough ground to say that he was such "at any place or time." Wright J. said[4]: "If the winding up "were for the benefit of the company and not in order to secure "equality to all the creditors, the matter would be different. "But if it were for the benefit of all the creditors prima facie "there ought to be a stay."

The second case to which I was referred was *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.*,[5] where Scrutton L.J. said[6] that "it is only in very special circumstances . . . that "the court will depart from its general practice of staying execu-"tion when the company is in voluntary liquidation, for the "reason that the execution, if allowed, would necessarily inter-"fere with the distribution of the assets pari passu." Atkin L.J., saying much the same thing, also referred[7] to the well-established practice and enumerated some exceptions to it—for example, if there had been some fraud or sharp practice—and he went on to say that there were possibly some other exceptions.

I accept that principle, with respect, remarking in passing that in neither of these cases, or in any case to which I was referred on this point, was the court considering, as one of the elements, the arrest of the vessel to secure a statutory lien.

The question was posed by counsel for the defendants (who, I should remark, admitted that he was in effect instructed by the liquidator) as to what extent a writ in rem and arrest of a vessel by a necessaries man constitute a special reason which prevents the application of the general rule. He admitted that if the issue of the writ and arrest had preceded the notice of the meeting, to which I have referred, then such special circumstances would have existed. But in this case the notice was served on January 22, 1958, and the writ was not issued, nor was the arrest made, until February 3, 1958. I agree with Mr. Brandon's submission that if the issue of the writ and arrest had preceded the

[3] (1893) 10 T.L.R. 141.
[4] Ibid. 142.
[5] [1924] 2 K.B. 410.
[6] Ibid. 418.
[7] Ibid. 419, 420.

notice I, at all events, would have exercised my discretion in favour of the necessaries man. I agree with that submission, for this reason, that, by arresting without having notice of the meeting he would have made himself a secured creditor under a statutory lien.

I was referred to *The Cella* [8] by both counsel. The facts in *The Cella* [8] were somewhat different from the case that I have to consider. The claim in *The Cella* [8] arose in the following way: The master of the ship, the *Cella*, gave a bill upon his owners for necessaries supplied to the ship by the plaintiff at Halifax, Nova Scotia, in January 1885. That bill was accepted, but it was later dishonoured. In June of the same year, whilst the *Cella* was under arrest at the instance of the master for wages and disbursements, the plaintiff, that is, the necessaries man, began an action in rem against the ship; but a week later the mortgagee, one Wood, intervened. An agreement was made and embodied in an order of the court that the ship should be released, the mortgagee having undertaken to pay the plaintiff what he, the plaintiff, could, if the arrest continued, recover from the ship after satisfying all prior incumbrances. After a while the prior incumbrances were paid off and Wood was ordered to pay the balance into court, the balance being sufficient to cover the amount of the plaintiff's claim. Then on August 8, 1885, the owning company of the *Cella* was ordered to be wound up, and on August 13, 1885, the plaintiff brought his action against the owners on the bill, which had been dishonoured, and recovered judgment on the amount, which was never paid. In October of the same year the plaintiff brought an action against the master on the bill, and obtained judgment, of which he recovered only a small amount; and it was during this month of October that the liquidator of the company was appointed.

It will be seen that the order for winding up was made two months after the ship had been released against the mortgagee's undertaking. The plaintiff, by motion, applied for payment out. The liquidator opposed it because, among other reasons, he said the plaintiff was not a secured creditor, having no maritime lien, and had not obtained the leave of the Chancery Division to sue as he was obliged to do under the Companies Act of 1862, s. 87. That section provided: "When an order has been made for the "winding up of a company under this Act no suit, action or "other proceeding shall be proceeded with or commenced against "the company except with the leave of the court and subject to "such terms as the court may impose."

The Cella [8] was first heard by Hannen P., and he held that at the time the undertaking was given, which was in June 1885, the plaintiff had a lien on the ship by virtue of the proceedings he had taken, that is, his action in rem. He had not a maritime lien; but he had a security for his money which arose at the

[8] (1888) 13 P.D. 82.

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commencement of the action in rem. In any event, the action was against Wood, the mortgagee, and not the ship or the company, and the President dismissed the liquidator's objections.

The case went to appeal, and Lord Esher M.R. said this [9]: "The judge is to enforce the writ, and to determine the rights "of the parties at the time the writ is served. That is so, as "it seems to me, in every action. But in every action we may "have bankruptcy and I know not what intervening, so that "when judgment is given it cannot be effectually carried out. "But if the money be in court, or the court has possession of "the res, it can give effect to its judgment as if it had been "delivered the moment after it took possession of the res. It "is contrary to the principle of these cases and to justice that "the rights of the parties should depend not upon any acts of "theirs, but upon the amount of business which the court has "to do. Therefore the judgment in regard to a thing or to "money which is in the hands of the court, must be taken to "have been delivered the moment the thing or the money came "into the possession of the court." Then the Master of the Rolls went on, referring to Admiralty cases, which he said "are "undoubtedly based on the same rule as the two bankruptcy "cases, and they show that though there may be no maritime "lien, yet the moment that the arrest takes place, the ship is "held by the court as a security for whatever may be adjudged "by it to be due to the claimant." Fry L.J. says much the same thing,[10] and I will read only one sentence: "The arrest "enables the court to keep the property as security to answer "the judgment, and unaffected by chance events which may "happen between the arrest and the judgment."

Mr. Brandon submitted that *The Cella* [11] was binding on this court where the facts are the same and subject to the effect of subsequent statutes. He sought to distinguish the facts, and he also said that since *The Cella* [11] was decided in 1888, the legislature had cut down the rights of creditors to levy execution. Well, the facts are different in that, among other things, in *The Cella* [11] the writ and arrest were two months before the winding-up order, whereas in the present case the writ was issued twelve days after the notice of the proposed meeting. As I see it, *The Cella* [11]—I do not think it is contested—is still good law, that arrest in such cases creates a statutory lien, making the holder a secured creditor.

There is intervening legislation, and in particular there is section 325 of the Companies Act, 1948, to which I have already referred; but I am going to refer to certain parts of it again because what that section says is that where a creditor has issued execution and the company is subsequently wound up, he, that is, the creditor, shall not be entitled to retain the benefit of the

[9] (1888) 13 P.D. 82, 87.
[10] Ibid. 82, 88.
[11] Ibid. 82.

execution against the liquidator unless he has completed the execution before the commencement of the winding up, which in this case would be on receipt of the notice of the proposed meeting to consider the matter. The application of this section to the present case depends upon whether the arrest of the ship is to be regarded as any part of the execution. If it is, then the plaintiffs fail, unless under proviso (*c*) of section 325 I exercise discretion in their favour.

In the course of argument as to the meaning of the word "execution," I was referred, among other things, to Halsbury's Laws of England, 3rd. ed., Vol. 16, p. 2, where it says: "The "word execution in its widest sense signifies the enforcement "of or giving effect to the judgments or orders of courts of "justice. In a narrower sense, it means the enforcement of "those judgments or orders by a public officer under" various writs. I am not reading it all. I accept that definition, with respect, fortified, as I am, by certain passages in the Annual Practice (1959), where, on p. 991, is set out R.S.C., Ord. 42, r. 1, part of which reads as follows: "Where any person is by "any judgment or order directed to pay any money, or to deliver "up or transfer any property real or personal to another, it "shall not be necessary to make any demand thereof, but the "person so directed shall be bound to obey such judgment or "order upon being duly served with the same without demand." So it will be seen, therefore, that either the judgment or the order is for payment of money. The same order, rule 8, refers to the various writs of execution which give effect to those orders, but it will be seen that the execution follows either a judgment or an order for the payment of money. The arrest of a ship in an action in rem is the means whereby, among other things, a necessaries man obtains security for a debt of a special character without a judgment or order for payment of money. It is a right given to him by the legislature, a right the scope of which, in my view, has recently been extended by the Administration of Justice Act, 1956, s. 1 (1) (*m*),[12] and, while I am mentioning this Act, possibly also by (*p*).[12]

The special character of the debt, in my view, is that it is incurred by giving credit to the owners of vessels for the use of those vessels. It is to be regarded in this way: it is the advancing of goods on credit to a ship which, in the ordinary course of business, moves away from the port of supply, to which it may or may not return. The goods have been supplied for the

[12] Administration of Justice Act, 1956, s. 1: "(1) The Admiralty "jurisdiction of the High Court shall "be as follows . . . jurisdiction to "hear and determine any of the fol- "lowing questions or claims . . . "(*m*) any claim in respect of goods "or materials supplied to a ship for "her operation or maintenance; . . . "(*p*) any claim by a master, shipper, "charterer or agent in respect of dis- "bursements made on account of a "ship; . . ."

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necessary use of the ship and for the purpose of the ship prosecuting its adventures, and, as I say, the ship may never return to that port again.

Mr. Brandon very strongly argued that an arrest such as this could be regarded as an anticipatory execution. As I see it, arrest is the means, given by law, whereby security is obtained for a debt of a special character, and, by so arresting, the necessaries man becomes a secured creditor. It seems to me (and I accept what Mr. Brandon says) that the wording of some of the sections I have referred to in the Companies Act is very inapt when applied to certain Admiralty matters; but I see no reason why I should extend the meaning of the word "execution" to include a writ in rem in the circumstances that we have to consider in this case. Execution, in my view, succeeds, and does not precede, judgment, whereas in arrest there is no existing judgment upon which to execute.

In *In re Australian Direct Steam Navigation Co.*,[13] to which I have already referred, it was held that the arrest in such circumstances was a sequestration. If it is that, it is not an execution because both of those words appear in section 228, which section both counsel have accepted as not applying to voluntary winding-up proceedings. They are used separately in that section and convey to me that they do not mean the same thing, and that "sequestration" is different from "execution." In section 325 of the same Act "execution" is the only one of those two words that is mentioned.

I have no doubt that under section 228 even a maritime lien (which, of course, is superior to a statutory lien) gives way to a court order for compulsory winding up if the arrest in respect of the maritime lien succeeds the order unless the court gives leave. It is difficult sometimes to speculate upon the reasons, but, quite apart from the fact that the general principle of the court is to enable unsecured creditors to obtain their portion rateably to what is owed to them, it may also be that one Division of this court is not to be set up in competition with the other, and where a court has ordered a company to be wound up it is not seemly to set another Division of the court in opposition to it. I have no doubt that section 228 of the Act does not apply to this case, and, from what I have said, in my judgment neither does section 325. Should I be wrong about that, I would still be left to exercise a discretion.

Mr. Brandon, in arguing on that limb of the case, put the position in three ways, and I am going to alter the order of his points. He said that if the vessel was arrested before the receipt of the notice of the meeting he would accede to the exercise of the court's discretion in favour of the necessaries man. I have already dealt with that and I accept it. Then—it was not his second point, but I am putting it secondly—if the arrest was

[13] (1875) L.R. 20 Eq. 325.

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after the resolution was passed he submitted that the court should refuse to exercise discretion in favour of the necessaries man. Then, thirdly: if, as in this present case, the arrest came between the receipt of notice of the meeting and the passing of the resolution, the court should still refuse to exercise discretion in favour of the necessaries man and stay his action.

While I am not called upon to express any opinion on the second submission, I do not accede to the third submission, which covers the circumstances of this present case. The proposed meeting might never have taken place. It seems to me to be something quite different from a court order to wind up or a resolution to wind up, and I have to try and hold the balance. Necessaries men are given a right to secure the risks they take in catering for shipping, and if they exercise their rights without undue delay their rights to become secured creditors should be respected and enforced.

In my judgment I find that the plaintiffs in this action rightly, by the action they took, became secured creditors.

Mr. Brandon said that if I find the plaintiffs in this action to be secured creditors, as I do, he would not oppose payment out. I have had evidence to satisfy me that this debt of £239 16s. was incurred, and there has been no defence filed to it. I therefore give judgment in default for that amount and I order the payment out of that amount to the plaintiffs.

As to the remainder, I order the payment out of that amount to the company in liquidation.

Judgment accordingly.

Solicitors: *Edward & Childs; Bentleys, Stokes & Lowless.*

A. S-R.

[HOUSE OF LORDS.]

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May 4, 5, 6; *June* 18.

LYLE & SCOTT LTD. . . . . APPELLANTS;

AND

SCOTT'S TRUSTEES . . . . . RESPONDENTS.

SAME . . . . . APPELLANTS;

AND

BRITISH INVESTMENT TRUST LTD. . . RESPONDENTS.

Company—Shares—Transfer—Restrictions in articles of association—Pre-emptive right of other members—Shareholder "desirous of "transferring" shares—Meaning of "transfer"—Contract by shareholder for sale of shares to third party—Violation of article—Company's right to enforce pre-emptive provisions.

* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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By article 9 of the articles of association of a private company "no registered shareholder of more than one per centum of the "issued ordinary share capital of the company shall, without the "consent of the directors, be entitled to transfer any ordinary "share for a nominal consideration or by way of security and no "transfer of ordinary shares by such a shareholder shall take place "for an onerous consideration so long as any other ordinary share-"holder is willing to purchase the same at a price which shall be "ascertained by agreement between the intending transferor and "the directors and, failing agreement, at a price to be fixed by "the auditor of the company. . . . Any such ordinary shareholder "who is desirous of transferring his ordinary shares shall inform "the secretary in writing of the number of ordinary shares which "he desires to transfer. . . ."

By article 7 the directors might in their absolute discretion, without assigning any reason, decline to register any transfer of any share.

The registered holders of ordinary shares in the company (being more than one per cent of the issued ordinary share capital) entered into an agreement with a third party under which they received and retained £3 for each £1 share binding themselves (inter alia) to vote as he desired, so as to put him as fully in control of the company as they could without registering transfers of the shares. The company sought declarator that these shareholders were bound to implement the terms of article 9 and decree ordaining them forthwith to do so:—

Held, that the admitted actings of the shareholders were such that it could be inferred that they were "desirous of transferring" their shares within the meaning of article 9. A shareholder who has agreed to sell his shares and has received and retains the price must be deemed to be desirous of transferring them; otherwise the purpose of the article would be defeated; accordingly, the shareholders were bound to implement article 9.

Decision of the First Division of the Court of Session, 1958 S.C. 230 reversed.

APPEALS from the First Division of the Court of Session.

The appellants in both appeals were Lyle & Scott Ltd., a limited company, and the respondents in the first appeal were Mrs. Norah A. Scott, James Wright and Guy Hepburn Armstrong, trustees and executors of the late John P. Scott. The appellants in this action sought (1) "declarator that the "[respondents] in respect that they are holders of ordinary "shares of Lyle & Scott Ltd. amounting to more than one per "cent. of the issued ordinary share capital of the said company "and are desirous of transferring the said ordinary shares for "an onerous consideration, are bound to implement the terms "of article 9 of the articles of association of the said company "and that by informing the secretary of the said company in "writing of the number of ordinary shares which they desire "to transfer" and (2) decree against the respondents ordaining them "forthwith to implement the terms of the said "article 9 by informing the said secretary in writing of the "number of ordinary shares which they desire to transfer." There were also certain conclusions for interdict which were subsequently departed from and with which this appeal was not

concerned. Each party tabled a plea to the relevancy of the other's averments and, following a debate on these pleas, the Lord Ordinary (Lord Strachan) by interlocutor dated October 30, 1957, dismissed the action quoad the abovementioned conclusions. The appellants reclaimed against this interlocutor and by interlocutor dated February 14, 1958, the First Division unanimously refused the appellants' motion for review and adhered to the Lord Ordinary's interlocutor. The appellants now submitted these interlocutors for review and the respondents submitted that the interlocutors were well founded and should be affirmed by the House of Lords.

In the second appeal the respondents were British Investment Trust Ltd. and were selected as representing a group of eight investment trusts against each of whom the appellants raised actions in identical terms concluding for declarator and specific implement.

The facts are fully stated in their Lordships' opinions.

Sir E. Milner Holland Q.C. (of the English Bar), *I. M. Robertson Q.C.* (of the Scottish Bar), *Philip Sykes* (of the English Bar) and *Henry Keith* (of both Bars) for the appellant company.

Ian Shearer Q.C. and *Peter Maxwell* (both of the Scottish Bar) and *William Bagnall* (of the English Bar) for the first respondents.

W. R. Grieve Q.C. and *John Dick* (both of the Scottish Bar) for the second respondents.

The following authorities, besides those cited in their Lordships' opinions, were referred to in argument: *Rayfield* v. *Hands* [1]; *Shepherd's Trustees* v. *Shepherd* [2]; *Pender* v. *Lushington* [3]; *Hunter* v. *Hunter* [4] and *Homfray* v. *Fothergill.* [5]

Their Lordships took time for consideration.

June 18. VISCOUNT SIMONDS. My Lords, the respondents, whom I will call "Scott's trustees," are, and were in November, 1956, the registered holders of a number of ordinary shares of the appellant company. The precise number has not been disclosed: it is sufficient to say that it is more than one per cent. of the issued ordinary share capital. That being so, their power to dispose of the shares is limited by certain of the articles of association of the company. I must refer to them in some detail.

Article 7 provides that the directors may in their absolute discretion and without assigning any reason therefor decline to

[1] [1958] 2 W.L.R. 851; [1958] 2 All E.R. 194.
[2] 1950 S.C.(H.L.) 60; sub nom. *Moodie* v. *W. & J. Shepherd (Bookbinders) Ltd.* [1949] 2 All E.R. 1044.
[3] (1877) 6 Ch.D. 70.
[4] [1936] A.C. 222.
[5] (1866) L.R. 1 Eq. 567.

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register any transfer of any share whether or not it is a fully paid share. This article must be borne in mind in construing the succeeding articles. Article 8 provides that subject to the provisions of articles 7 and 12 ordinary shares may be dealt with by an ordinary shareholder by way of transfer or bequest to, or conveyance to trustees for behoof of certain relations with or without any consideration being paid. Article 9 is that upon which this appeal turns and I must set it out in extenso: "Subject to the provisions of clauses 7, 8 and 12 no registered "holder of more than one per centum of the issued ordinary share "capital of the company shall, without the consent of the direc- "tors, be entitled to transfer any ordinary share for a nominal "consideration or by way of security, and no transfer of ordinary "shares by such a shareholder shall take place for an onerous "consideration so long as any other ordinary shareholder is "willing to purchase the same at a price, which shall be ascer- "tained by agreement between the intending transferor and the "directors and, failing agreement, at a price to be fixed by the "auditors of the company for the time being. Any such ordinary "shareholder who is desirous of transferring his ordinary shares "shall inform the secretary in writing of the number of ordinary "shares which he desires to transfer, and the price shall immedi- "ately be fixed as aforesaid. Thereafter the secretary shall "intimate the same to all the other holders of ordinary shares "simultaneously by written notice containing particulars of the "intending transfer. Thereafter each ordinary shareholder receiv- "ing such notice shall be entitled, within fourteen days from "the date of the notice, to intimate in writing to the secretary "that he offers to purchase some or all of the shares mentioned "in the intimation made to him; otherwise he shall not be a "party to the offer. On the expiry of the foresaid fourteen days' "notice, the secretary shall report the result to the directors "who shall divide and appropriate the shares specified in the "notice among the offerers in proportion to the number of "ordinary shares held by them respectively or as near thereto "as possible, provided that no offerer shall have apportioned to "him a greater number of shares than he has offered to purchase. "If any difficulty shall arise in apportioning the said shares or "any of them, the directors may appropriate the shares in respect "of which such difficulty arises among the offerers in such "manner as they think fit or otherwise in their sole discretion. "If after intimation by the secretary to the ordinary shareholders "in manner aforesaid the number of shares offered to be pur- "chased by them shall be less than the number of shares, which "the intending transferor gave notice of his desire to transfer, "or if offering ordinary shareholders shall fail to complete their "purchase of such shares as shall be appropriated to them "within one month after the date of such appropriation, the "intending transferor may transfer the shares undisposed of to "any person, whether a member of the company or not, as he

"thinks proper, provided that he shall not take for them less "than the price to be ascertained as aforesaid without first offer- "ing them in manner aforesaid to the other ordinary shareholders "at such lower price." Articles 10, 11 and 12 also deal with transfer or transmission of shares but I think that there is nothing in them relevant to this appeal.

In these circumstances in November, 1956, Scott's trustees and all other shareholders of the company were approached by a firm of solicitors acting on behalf of a principal, who, though his name was then undisclosed, later proved to be a Mr. Hugh Fraser, with a written offer to purchase their shares. The offer was expressed to be subject to certain terms and conditions, of which the first was that the offer was conditional upon acceptance by the holders of 75 per cent. of the ordinary shares then in issue or such lesser proportion as their clients might in their absolute discretion accept as sufficient, and the second that the price for each ordinary share should be £2 10s. and should be inclusive of any ordinary dividend declared subsequent to the date thereof and that the price for each preference share should be 20s. with a similar provision in regard to dividend. Then there was a condition about holdings of both ordinary and preference shares, and then this condition which I deem of sufficient importance to set out in full: "The price shall be satisfied by payment in "cash on or after December 18, 1956, against delivery of valid "and effective transfers of the said ordinary and/or preference "shares together with the relative share certificates and a general "proxy in favour of our clients' nominee." Certain other conditions were expressed to which I need not refer, and lastly it was provided that: "Acceptances of this offer must be received by "us not later than first post on November 27, 1956, on the "enclosed form of acceptance duly signed by you." By a subsequent letter the price offered for each ordinary share was increased to £3 and the time for acceptance was extended.

By the enclosed form of acceptance, which was signed by Scott's trustees and returned by them, they agreed subject to the terms and conditions of the offer to sell to the client of their correspondents their holdings in the company at the price of 20s. for preference shares and 60s. for ordinary shares. They further agreed that in the event of the offer becoming unconditional according to its terms they authorised them to use the enclosed form of proxy and they also agreed to deliver up their share certificates in respect of all their shares in the company which they had agreed to sell and to sign the relative transfer deeds when called upon to do so in exchange for the price. On or about December 4, 1956, they were informed by the said solicitors that a majority of the shareholders had accepted the offer and that the acceptances were no longer open for rejection.

On or about December 20, 1956, the purchaser, whom I may now refer to as "Mr. Fraser," paid Scott's trustees £3 for each ordinary share and £1 for each preference share held by them

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and they delivered to him or his agent the relative share certificates and a completed form of general proxy.

The appellants, learning of these proposed transactions, called the attention of Scott's trustees to the terms of article 9 by letters of December 5 and 14, 1956, and, finding that their letters were ignored, on December 31, 1956, raised the action against Scott's trustees out of which this appeal arises and at the same time raised similar actions against twelve other shareholders who had accepted Mr. Fraser's offer.

I can pass over the next skirmish between the parties, which took the form of an attempt by certain shareholders, who had sold their shares, to remove three of the directors from the board of the company and substitute others of their or Mr. Fraser's choice. This attempt met the failure that it deserved and so the action proceeded.

It is convenient now to refer to these conclusions of the summons which are still alive, for the appellants have so far failed upon the ground that, though the provisions of article 9 have been breached by Scott's trustees, they have not established their right to the remedy they have claimed.

Conclusions 1 and 2 of the summons are as follows: "1. For "declarator that the defenders, in respect that they are the "holders of ordinary shares of Lyle & Scott Ltd. amounting to "more than one *per centum* of the issued ordinary share capital "of the said company and are desirous of transferring the said "ordinary shares for an onerous consideration, are bound to "implement the terms of article 9 of the articles of association "of the said company and that by informing the secretary of "the said company in writing of the number of ordinary shares "which they desire to transfer. 2. For decree ordaining the "defenders forthwith to implement the terms of the said article "9 by informing the said secretary in writing of the number of "ordinary shares which they desire to transfer."

At the hearing before the Lord Ordinary, as also at that before the First Division, the debate appears to have been divided into two parts. First, it was questioned whether Scott's trustees had been guilty of a breach of the first or prohibitive part of article 9, a question answered in the affirmative by the Lord Ordinary and the learned judges of the First Division who thought fit to answer it. But, secondly, it was asked whether, upon this assumption, the appellants were entitled to the remedy they sought, and here they had no voice in their favour. This was, no doubt, a convenient way of examining the curious problem which arises in this case, but it was perhaps apt to obscure the vital question whether upon the facts which I have set out Scott's trustees are to be deemed to be shareholders desirous of transferring their ordinary shares within article 9. If they were, the appellants would be entitled to their relief, whether or not what Scott's trustees had done was a breach of the first part of the article.

I do not dissent, my Lords, from the opinion expressed by the Lord Ordinary and the Lord President and Lord Russell in the First Division that Scott's trustees had been guilty of a breach of this part of the article. The determination of this question rests on the meaning to be assigned to the word "transfer" where it there occurs. But I do not think it necessary to express a final opinion upon it, for, as I have said, the question is not whether what has been done is a breach of the first part of the article but whether it demonstrates with sufficient clearness that Scott's trustees are persons desirous of transferring their ordinary shares. It appears to me that there is no room for doubt that that is just what they are. Here I can proceed on their admissions. For, since it is the admitted fact that they entered into the agreement for sale of their shares and have received and retain the price, it follows that, whether or not they have yet done all that they ought as vendors to do, they hold the shares as trustees for the purchaser. They are bound to do everything that in them lies to perfect the title of the purchaser. They cannot compel the company to register him as the holder of the shares, but everything else they must do, and it is straining credulity too far to suppose that everything else would not already have been done, if it had not been hoped to gain some tactical advantage by delay. In my opinion, it is not open to a shareholder, who has agreed to do a certain thing and is bound to do it, to deny that he is desirous of doing it. I wish to make it quite clear, for it goes to the root of the matter, that I regard Scott's trustees as desirous of transferring their ordinary shares unless and until their agreement with Mr. Fraser has been abrogated. Of this at least one acid test would be the return by them of the price they have received.

Against this view it was urged that they were not desirous of transferring their shares within the meaning of the article because they had not a general desire but a particular desire to transfer only to Mr. Fraser at a certain price. This makes nonsense of the article, the purpose of which would be wholly defeated if it did not apply to a desire to transfer to a particular person, who might be the person whom the company particularly wished to exclude. Then it was contended that they were not desirous of transferring their shares, because their task had been done and their desire satisfied. I think my Lords, that this ingenious and almost humorous plea ignores that they have elsewhere pleaded and vigorously relied on the fact that the transfer has not been completed. This plea had perhaps not been thought of when they decided not "at the present time" to have deeds of transfer executed.

If, then, Scott's trustees are, as I hold they are, shareholders desirous of transferring their ordinary shares, what follows? It is at this point that I am constrained to differ from the opinions of the learned judges in the courts below. I cannot, for instance, accept the view of the Lord President that there has

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been no overt act which could enable the company to require the defenders to follow out the procedure in the article, nor do I find it easy to reconcile this part of his judgment with his decision that Scott's trustees had infringed the article by transferring or purporting to transfer their shares to Mr. Fraser. What more conspicuous overt act, evincing the desire to transfer, could there be than this? I must agree with Lord Sorn that there may in some cases be difficulty in determining when a shareholder begins to be desirous and when he ceases to be desirous and at what stage he is at liberty to change his mind. I will therefore say something on this aspect of the case. I have already indicated that a shareholder who has agreed to sell his shares and has received the price is to be deemed to be desirous of transferring them. At once, therefore, the machinery of the article is put in motion and he must inform the secretary of the number that he desires to sell, which is ex hypothesi the number he has agreed to sell. The price is then fixed in the manner prescribed by the article and so the matter proceeds. But can he at any stage change his mind, abandon his desire, and stop the machinery? I have already indicated that his desire must be deemed to continue so long as he adheres to his contract of sale. I do not wish to be dogmatic upon a question which may be the subject of other proceedings. But I will add that the onus will be on him to satisfy the company and, if necessary, the court that his desire is spent and his proof must be cogent. If he succeeds in this and if the machinery has not operated so far that a contract has been made with the other shareholders, it appears to me that he can withdraw his offer—for that is what the intimation that he desires to sell amounts to. I do not at all dissent from the view expressed in *Smith* v. *Wilson*[1] that an offer made in pursuance of an article of this kind may be timeously withdrawn, what is timeous depending, of course, on the language of the particular article. He is thus placed in the same position as any other shareholder who wishes to sell his shares in the manner prescribed by the article if he can get a satisfactory price for them. That is the bargain he made when he became a shareholder and he must abide by it. What he cannot be permitted to do is to adhere to his contract and in the same breath assert that he does not desire to transfer his shares. It may well be that he thus places himself in a position of disadvantage vis-à-vis the purchaser with whom he has contracted. But it cannot be denied that he has done so with his eyes open.

I would therefore allow the appeal with costs here and below. The order will be in the form which my noble and learned friend, Lord Reid, has prepared, and will intimate to the House.

My Lords, in the second case, *Lyle & Scott Ltd.* v. *British Investment Trust Ltd.*, the respondents are shareholders of the appellant company and hold more than 1 per cent. of its issued

[1] (1901) 9 S.L.T. 137.

ordinary shares. I cannot in any relevant matter distinguish this case from that of Scott's trustees with which the House is dealing. The same order must, in my opinion, be made.

LORD REID. My Lords, in these two actions the pursuers and appellants are a private company whose articles of association contain provisions restricting the transfer of shares. The company carry on a knitwear and hosiery business in Hawick. In each case the defenders and respondents are shareholders of the company. On November 6, 1956, a firm of solicitors in Edinburgh, acting on behalf of a client then undisclosed but now known to be Mr. Hugh Fraser, sent to all the shareholders letters offering to purchase their shares, the offer being conditional on acceptance by the holders of 75 per cent. of the ordinary shares. The price offered was £2 10s. which was subsequently increased to £3 per share, and this was to be payable against valid and effective transfers and a general proxy in favour of the purchaser's nominee. Both respondents accepted the offer by completing and returning the form of acceptance sent to them and also completing a form of proxy. In the acceptance they agreed to sell their shares, authorised the use of the proxy, and agreed to deliver up their share certificates and to sign transfer deeds when called on in exchange for the price.

On December 31, 1956, the appellants raised actions against the respondents and about ten other shareholders who had accepted the offer. On January 22, 1957, their secretary received notices requisitioning a general meeting of the company for the purpose of removing three of the directors and appointing Mr. Fraser and two others whom he wished to have appointed. Conclusions for interdict were then added and interim interdict was granted to prevent the defenders from voting at the meeting. I need not deal further with this matter because there is now no conclusion for interdict in these cases: we were informed that other proceedings are pending between the parties.

The appellants' case is that by reason of the provisions of the articles the respondents were not entitled to enter into these contracts for the sale of their shares. Article 7 permits the directors in their absolute discretion to decline to register any transfer of any share. Article 8 permits transfer or bequest to or conveyance to trustees for behoof of certain relatives of a shareholder. Article 12 deals with shares held by employees of the company. The article which is important in this case is article 9, which is in these terms: [His Lordship read the article and continued:]

The respondents are each holders of more than 1 per cent. of the ordinary shares, and it is clear from their defences that they have received the price of £3 per share and that they have not attempted to resile from their contracts with Mr. Fraser. The appellants maintain that this necessarily means that they are desirous of transferring their shares within the meaning of this

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article, and that they are therefore bound so to inform the secretary of the company so as to set in motion the provisions of the article under which the other shareholders are entitled to have an opportunity to purchase any share which any shareholder is desirous of transferring. The only conclusions of the summons now in issue are for declarator that the defenders, in respect that they are desirous of transferring their shares, are bound to implement the terms of article 9 and for decree ordaining them forthwith to do so by informing the secretary of the number of ordinary shares which they desire to transfer.

The Lord Ordinary, Lord Strachan, and the First Division have held that the respondents have contravened the provisions of article 9, but that the appellants are not entitled to the remedy which they seek. Before your Lordships the appellants supported the first of these findings but maintained that the second was erroneous. One at least of the respondents maintained that the appellants' averments disclose no breach of article 9: both support the decision of the Court of Session that the remedy which the appellants seek should not be granted.

I have come to the conclusion without difficulty that on their own admissions the respondents are in breach of article 9. The purpose of the article is plain: to prevent sales of shares to strangers so long as other members of the company are willing to buy them at a price prescribed by the article. And this is a perfectly legitimate restriction in a private company. But the respondents argue that, whatever may have been the intention, the terms of the article are such that it has only very limited application. They say that "transfer" and "transferring" only apply to a complete transfer of the ownership of shares by acceptance and registration of deeds of transfer, and that a shareholder who agrees to sell his shares is quite entitled to do so and to receive the price and vote as the purchaser wishes so long as he is not desirous of having a transfer registered.

I see no reason for reading the article in that limited way. Transferring a share involves a series of steps, first an agreement to sell, then the execution of a deed of transfer and finally the registration of the transfer. The word transfer can mean the whole of those steps. Moreover the ordinary meaning of "transfer" is simply to hand over or part with something, and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used. In article 7 it clearly means a deed of transfer. In article 8, which authorises certain dealings "by way of transfer or bequest," it must, I think, refer to the sale or gift of the shares. I have already referred to the obvious purpose of article 9; to give the other shareholders an option to purchase shares which any shareholder desires to part with. To be effective it must come into operation before that shareholder agrees to sell to anyone else, and the last part of the article clearly contemplates this. If the other shareholders do not purchase any or all of the shares

the owner "may transfer the shares undisposed of to any "person . . . provided that he shall not take for them less than "the price to be ascertained as aforesaid, without first offering "them" to the other shareholders at the new price. That appears to me to make it clear that the shareholder "desirous "of transferring" shall so inform the secretary before he makes any agreement to sell to anyone, and that he is only entitled to agree to sell to a stranger such shares as the other shareholders fail to purchase under article 9. I find nothing in the article which is inconsistent, or even difficult to reconcile, with this interpretation of it.

Whether the appellants are entitled to the remedy which they seek depends in the first place on whether the respondents are now "desirous of transferring" their shares. They were certainly desirous of doing so when they made their contracts with Mr. Fraser. It is said that, though they desired to transfer to him at £3, they never desired to transfer to the other shareholders under article 9. But the article does not say desirous of transferring in the manner which it provides. It simply says desirous of transferring and, if it is to be effective in ensuring that the other shareholders have an option to purchase, it must apply whenever a shareholder desires to sell to anyone. Then it is said that the respondents' desire to transfer has never been evinced by any overt act on which the appellants can found. But if the respondents' admitted actions were in breach of their obligations, I do not see that it matters whether or in what sense they were "overt." I would not hold a desire to transfer proved by some equivocal words or acts. But here it is impossible that the respondents could have done what they did unless they desired to transfer: there is no suggestion of any other reason why they should have contracted with Mr. Fraser.

Another argument was that article 9 cannot be used as a compulsitor, that it is an avenue open to a shareholder who desires to sell his shares, but that he cannot be compelled to use it. That is true in a sense. No action can be taken against a shareholder who merely says that he wishes to sell or does something which shows that that is his intention. But, when he goes further and does something which is a breach of his obligations under the article, the position appears to me to be quite different. Unless some action can then be taken to assert the other shareholders' rights under the article there is a wrong without a remedy.

The respondents next maintained that, even if they were desirous of transferring their shares when they made these contracts, they are entitled to say that they are no longer desirous of doing so. They do not deny that they have received and intend to keep the price of the shares. But they say that at present neither they nor the purchaser intend transfers to be made. They appear to be waiting to see whether some change will be made in the appellant company which will result in transfers

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being accepted and registered. But, in my judgment, a person who has agreed to sell with a view to a transfer at some future date cannot be heard to say that he is not desirous of transferring the shares merely because it suits him and the purchaser to delay execution and presentation of the transfers.

One reason for not granting this remedy which appears to have weighed heavily with the learned judges of the Court of Session is that if it is granted the respondents will be unable to avoid a compulsory sale of their shares to other shareholders who are willing to buy them in terms of article 9. If that were so I would find this case much more difficult. It would seem unjust that a shareholder who in bona fide mistakes his rights should be compelled to sell his shares on terms which he cannot control, and I might find it difficult to read such a meaning into an article of this kind. But I think that that is not the meaning of article 9. That article requires a notice to be given by any shareholder who desires to sell his shares, but it does not make such a notice irrevocable. No doubt it becomes irrevocable when the procedure following on it results in a contract between the shareholder giving the notice and another shareholder who has made an offer for the shares, and I need not discuss the question of the exact stage at which such a contract emerges. But until that stage is reached it appears to me that it is open to the shareholder who gives the notice to withdraw it: I see no reason to doubt two decisions of the Court of Session on this matter, *Smith* v. *Wilson* [1] and *Stevenson* v. *Wilson*.[2]

Both these cases arose out of the same transaction. In 1900 Wilson, as trustee in a sequestration, advertised for sale shares of J. M. Smith Ltd. and on January 20 Stevenson agreed to buy the shares. An article of association of the company, known to both, required a shareholder wishing to sell first to offer his shares to the company at a stated price and contained provisions for their sale to the directors or other shareholders. Wilson duly offered the shares under this article but for some reason which does not appear he withdrew this offer before it was accepted. In the first of these two cases the Second Division held that he was entitled to do so. Stevenson then paid the price and presented transfers in his favour which the company refused to register, but apart from that the company raised no objection to Wilson having agreed to sell to Stevenson. Possibly this was because in the circumstances it did not matter to the company that Stevenson should have a beneficial interest in the shares or that Wilson should vote as Stevenson required him to do. Then there was a deadlock because the company refused to pay dividends to Stevenson and Wilson refused to collect them and hand them to Stevenson, and the second of these actions was raised by Stevenson. The Lord Ordinary held that the shares were held by Wilson in trust for Stevenson and he was required

[1] (1901) 9 S.L.T. 137. [2] 1907 S.C. 445.

to produce an account of his intromissions. The First Division adhered and Lord Dunedin said [3]: "... when there is a stipulation in the articles of the company which allows the directors of the company to refuse at their own hand any particular transferee, then A and B, who are contracting, do so with their eyes open, and knowing that it may be the case that B will not be accepted as a transferee. It still becomes the duty of B, if he cannot get the [company] to register him, to find a transferee whom the [company] will register in order to free A, and I think, if he is entirely unable to do that, A can bring the bargain to an end. But I think he could only do so in the ordinary way by annulling the bargain, that is, giving back the money he had got from B and bringing matters to their entirety." As Wilson did not desire to annul the bargain or give the money back he must [4] "fulfil this obligation of quasi-trustee to which the judgment of the Lord Ordinary subjects him."

From these cases two things follow—first, any notice given by the respondents would not be irrevocable, and secondly, the respondents can if they choose annul their bargains with Mr. Fraser. The cases are of no assistance on the question whether a company is entitled to object and take action if a shareholder purports to sell to a stranger in breach of its articles because J. M. Smith Ltd. did not object and this question was not raised.

Under article 9 the respondents are bound to give notices so long as they are desirous of selling their shares, and they must be held to be desirous of selling their shares so long as they maintain and do not annul their contracts with Mr. Fraser. It is in their power to do that, and, once they have done so, they will be entitled to say that they are no longer desirous of transferring their shares. So any decree requiring them to give notice must be so qualified that they are only required to give notice if they are still desirous of transferring their shares. And, even if they have not terminated these contracts before they are required to give notice, they could still do so and withdraw the notices before any contract with the other shareholders had been made. But if either of the respondents does not withdraw the notice then the shares to which it relates will pass to other shareholders who acquire them under article 9 and the respondents will receive the price payable under that article.

In these circumstances, I see no difficulty in granting a decree of the kind sought. It is a decree requiring specific implement, requiring the respondents to do something which they have undertaken to do and which they are still able to do. It is argued that a court should not order a person to do something which he can immediately undo. As a general proposition that may be true, but here the purpose of the decree is to afford a remedy against a continuing breach of an obligation and the step ordered could only be undone after that breach had ceased.

[3] 1907 S.C. 445, 455.

[4] Ibid. 456.

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In view of the respondents' admissions in their defences no proof is necessary, and their counsel did not maintain that proof should be allowed. In my judgment, the interlocutors appealed from should be recalled and the cases should be remitted to the Court of Session with a direction in each case (1) to repel the first plea-in-law for the defenders and to sustain the sixth plea-in-law for the pursuers, (2) to grant decree of declarator that the defenders, being the holders of ordinary shares of Lyle & Scott Ltd. amounting to more than one per centum of the issued ordinary share capital of the said company and having agreed to sell their said shares, have shown themselves to be desirous of transferring their said shares within the meaning of article 9 of the articles of association of the said company and are therefore bound to implement the said article 9 by informing the secretary of the said company in writing of the number of ordinary shares comprised in the said agreement of sale, and (3) to ordain the defenders, standing the said agreement to sell, forthwith to implement the terms of the said article 9 by informing the said secretary in writing of the number of ordinary shares which they have agreed to sell and to proceed as accords.

LORD TUCKER. My Lords, by signing the form of acceptance which had been enclosed in the letter of November 6, 1956, from Messrs. Hill, Dougal & Co. on behalf of Mr. Hugh Fraser, the respondents entered into a contract with Mr. Fraser whereby they agreed to sell all their ordinary shares in Lyle & Scott Ltd. and to deliver up their share certificates and sign the relative transfer deeds when called upon to do so in exchange for the price. They thereby bound themselves to take every step which is required from the holder of a share who desires to transfer to another the legal and equitable title to his share. They have received from Mr. Fraser the agreed purchase price and the contract still subsists. By so doing they have, in my view, beyond question taken an overt act signifying their desire to transfer their shares within the meaning of article 9 of the articles of association of Lyle & Scott Ltd. Such desire must be taken as continuing so long as the contract subsists. The desire to sell having been established, it became imperative for the respondents to inform the secretary of the company in writing of the number of shares they desire to transfer and thereby to bring into operation the procedure contained in the article for offering such shares to all the other ordinary shareholders at the price fixed in accordance therewith.

I cannot accept the respondents' contention that the desire to sell envisaged by the article does not include a desire to sell to some specific person but only applies to a desire to sell to some unascertained purchaser who may be found as a result of notification to the secretary and putting into operation the procedure of the article. This step of informing the secretary was not taken and the respondents were and continue to be in breach of

the article. For the purpose of ascertaining whether or not there has been a breach it is not, in my opinion, necessary to decide the meaning of the word "transfer" in the first nine lines of the article as printed at page 82 of the appendix to the Record nor to consider whether the steps so far taken by the respondents constitute a transfer.

For these reasons I am in agreement with the decision of the First Division of the Court of Session that the appellants have relevantly alleged in their pleading a breach of article 9.

With regard to the remedies sought for the breach, I agree with your Lordships that, subject to the proposed modification of the language of relief set out in conclusions 1 and 2, the appellants are entitled to the relief claimed therein. The Court of Session, in coming to a contrary conclusion, were, I think, much influenced by their view that the respondents could not be deprived of the locus poenitentiae afforded to them under the article of withdrawing their notification of willingness to sell before acceptance. I agree with your Lordships that relief in the terms proposed by my noble and learned friend, Lord Reid, makes it plain that no such consequence can result. I also agree that the only matters of fact in dispute on the pleadings being whether transfers were executed and whether the share certificates were deposited or handed over for inspection and returned and that the determination of these questions being unnecessary for the decision of these appeals, your Lordships can dispose of them without requiring that the cases should go for proof.

LORD KEITH OF AVONHOLM. My Lords, this is my opinion in *Lyle & Scott Ltd.* v. *Scott's Trustees.* This case, I think, can be disposed of on the averments of the parties on record without the necessity of a proof. The case turns upon the meaning and effect of article 9 of the pursuers' articles of association which has already been quoted. It is quite clear from the admissions of the defenders that they have agreed to sell their shares to an unnamed purchaser, and have received payment of the purchase price. The defenders qualify this admission by saying that they have only sold the beneficial interest and have no intention of executing a document of transfer "at the present time." They say they have no intention of invoking article 9. I shall consider the bearing of these qualifications in a moment. The Lord Ordinary has, I consider, accurately stated the position when he says[5]: "The defenders' averments as a whole seem to me to indicate "a sale or transfer of the shares subject to a condition that the "formal steps necessary to complete the transfer should be "postponed for a period which is not stated. If that be a right "reading of the defences, I take leave to suspect that the delay "in completing the transfer was introduced simply in order to "leave open an argument that article 9 did not apply to the "circumstances of these particular transactions."

[5] 1958 S.C. 230, 233–234.

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The defenders in fact relied for their main argument on the submission that article 9 did not apply here at all. Their argument proceeded on a very narrow point. The word "transfer" in the prohibitory words in article 9, "no transfer of ordinary shares "... shall take place for an onerous consideration so long as," etc., meant, they said, "no registration of an instrument of "transfer shall take place." From this, as I understood it, the next stage was reached that the words: "Any such ordinary "shareholder who is desirous of transferring his ordinary shares "shall inform the secretary in writing of the number of ordinary "shares which he desires to transfer," etc., must be read as referring to an ordinary shareholder desiring to register an instrument of transfer. As the defenders were not, at the moment at least, so desirous, article 9 could not be invoked. I am unable to accept such a construction of article 9. For one thing, it is not the vendor who has the instrument of transfer registered but the purchaser. But apart from that it is apparent from a cursory perusal of the articles that the word "transfer" is used in varying senses in different places, depending on the context. For instance, in article 2 (*a*), "no transfer which would increase "such number of members beyond fifty shall be valid" clearly must refer to a registered transfer, but the very next words "and the directors shall refuse to recognise or register any trans-"fer which would so increase such number," refers to an unregistered instrument of transfer. So also under article 7 the directors may in their absolute discretion decline to register any transfer of any share. On the other hand, there are provisions which, in my opinion, use "transfer" in the broad sense of "dispose "of," or "sell." Thus article 9 itself concludes by saying that in certain eventualities "the intending transferor may trans-"fer the shares undisposed of to any person." That, of course, will cover all the steps necessary to effectuate the title of the purchaser. But it must start with an agreement to sell for a price. It is not the intending transferor who completes the transaction but the purchaser, and the document of transfer requires the signatures of both purchaser and seller. So also in article 12, which provides that an employee shareholder who ceases to be employed by the company, or by a subsidiary company, shall "transfer his ordinary shares to the nominees of the "directors," "transfer" is used, in my opinion, in a broad sense as meaning "disposed of" his shares to the directors' nominees.

Even if the words "no transfer of ordinary shares . . . shall "take place" were to be read as meaning "no transfer of "ordinary shares shall be registered," it does not therefore follow, in my opinion, that under the article a shareholder does not express his desire to transfer his ordinary shares until an instrument of transfer of the shares has been presented for registration. If I may express my view of the article in the most general sense, I think the prohibitory part of the article is the

sanction which prevents a shareholder from carrying through a transfer of shares without complying with the machinery of transfer set out in the second part of the article. And I think a shareholder who has transferred, or pretended to transfer, the beneficial interest in a share to a purchaser for value is merely endeavouring by a subterfuge to escape from the peremptory provisions of the article. A share is of no value to anyone without the benefits it confers. A sale of a share is a sale of the beneficial rights that it confers, and to sell or purport to sell the beneficial rights without the title to the share is, in my opinion, a plain breach of the provisions of article 9. This, I think, is the view which commended itself to Lord Sorn, and I think he is right. What has happened in the present case is that by virtue of the articles the purchaser is unable to take the seller's name off the register and substitute his own. The defenders have done everything apart from executing a formal instrument of transfer that would be necessary to a normal purchase and sale of shares. They have even done more, for they have executed proxies in favour of the purchasers' solicitors. While leaving it open whether there has been any breach of the prohibitory part of article 9, which may be directed rather to the company and its board than to the shareholders, I am clear that there is here a clear breach of the positive part of the article requiring an intending transferor to inform the secretary in writing of the number of shares he wishes to transfer and an invasion of the rights of the shareholders under the article. The admitted actings of the defenders, in my opinion, lead to the inevitable inference that they are desirous of transferring their ordinary shares. The qualifications that the defenders seek to attach to their admissions, videlicet, that they have no intention of invoking article 9, and that neither the purchaser nor the defenders intend that a document of transfer shall be executed or delivered "at the present time," do not, in my opinion, affect the matter one bit. Standing a completed and unrepudiated contract of sale and acceptance of the purchase-money, the defenders cannot be heard to say that they are not desirous to transfer their shares because they choose for some reason or other to hold up completion of the document of transfer or wish to sell only to a particular person.

The Lord Ordinary and their Lordships of the First Division have taken the view that it is not open to compel the defenders to initiate the procedure laid down in the article by giving notice to the secretary of their desire to sell their shares. They seem to have proceeded on the view that it is for the defenders, and the defenders alone, to say whether they will set the machinery of the article in motion by intimating their desire to the secretary. The Lord President would seem to look for some overt act of such desire, such an act as notice to the secretary. The

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decision in *Smith* v. *Wilson*[6] was also thought by their Lordships to be adverse to imposing any compulsitor on the defenders.

In my opinion, the admitted actings of the defenders are overt acts amply sufficient for any court of law to infer a desire on their part to sell their shares. There must reside in the courts some power to enforce observance of the article, unless the rights of the shareholders are to be defeated, and the appropriate step at this stage, in my opinion, is to ordain the defenders to give notice to the secretary of their desire to transfer the number of shares which they have contracted to sell to their purchaser. There is nothing in the decision in *Smith* v. *Wilson*[6] to prevent such a course. In that case Wilson offered, under a clause similar to that in the present case, certain shares to the company concerned. The offer was made on January 31, 1900. The offer was intimated by the board to the other shareholders, and on February 10 a shareholder lodged with the company a sealed offer to buy the shares. Before this the intending seller had withdrawn his offer on February 5. The only point considered was whether Wilson was bound to keep his offer open for fourteen days from the board's notice to the other shareholders, within which a shareholder could lodge his offer to buy. The court held that Wilson was not bound to keep his offer open for that period. It appears from the later case of *Stevenson* v. *Wilson*[7] that Wilson had, on January 30, 1900, entered into a conditional contract with Stevenson, which incorporated the company's articles of association, for sale of the shares which he offered to the company on January 31. But no point was taken on this in *Smith* v. *Wilson*.[8] In *Stevenson* v. *Wilson*,[9] Wilson being still on the register, the Lord Ordinary (Lord Salvesen) granted a declarator (1) that Stevenson had the beneficial right in the shares and (2) that Wilson held them in trust for him so long as Wilson remained on the register and the pursuer (Stevenson) held the beneficial interest. The company was cited as a defender in this litigation but no decree was made against it and the Lord Ordinary held that the declarators granted were not binding on the company and that the company was not bound under its articles to recognise the pursuer's (Stevenson's) beneficial interest. Wilson reclaimed to the First Division, which adhered to the Lord Ordinary's interlocutor. The Lord President (Lord Dunedin) pointed out that a seller of shares was ordinarily entitled to get his name off the register but that under their contract both seller and buyer knew this might be impossible. It still remained, however, the duty of the buyer to find a transferee whom the company would register, and if he could not do so, the seller might bring the contract to an end. In neither of these cases was any of the questions that have been debated in this case considered. Nor could they have been, unless they were raised by the persons competent to do so, the company or the shareholders. I see no

[6] 9 S.L.T. 137.
[7] 1907 S.C. 445.
[8] 9 S.L.T. 137.
[9] 1907 S.C. 445.

reason why in a situation like the present the company cannot bring matters to a head and cut the Gordian knot, as well as protect the rights of their shareholders, by obtaining a decree from the court that will compel the vendor to initiate procedure under the articles.

In re Copal Varnish Co. Ltd.[10] was much relied on by the defenders. I find nothing in it that directly touches the issue here. But there are dicta of Eve J. which appear to me to tell against the defenders. It hardly needs authority that a step in an onerous transfer of shares is a contract of sale, but Eve J. went out of his way to emphasise that fact, and I see little reason to think that he would have said that a contract to sell shares did not evidence a desire to sell the shares. I quote only one passage from his judgment which is much in point here[11]: "So long as prior to the completion of the transaction "an opportunity is given to the directors sitting as a board to "determine whether the proposed transferee is a person whom "they are prepared to admit as a member of the company, the "conditions imposed by the article are, in my opinion, complied "with, and the contract into which the vendor on becoming a "shareholder entered with his co-shareholders is sufficiently "discharged." That case was concerned with the consent of directors under a company's articles to a transfer of shares. But mutatis mutandis it can equally be applied to the contract which the defenders made here with their co-shareholders when they became members of the company and bound themselves to observe the conditions of article 9.

In the circumstances, I think the pursuers' averments and the admissions of the defenders are relevant to infer a desire of the defenders to transfer their ordinary shares for an onerous consideration within the meaning of article 9. In my opinion, the defenders' first plea in law should be repelled, the pursuers' sixth plea in law should be sustained, and an appropriate decree within the conclusions of the summons should be pronounced. I agree with the form of order proposed by my noble and learned friend, Lord Reid.

I would accordingly allow the appeal.

My Lords, in the case of *Lyle & Scott Ltd.* v. *British Investment Trust Ltd.* I can see no material distinction between this case and the case of *Scott's Trustees* in which judgment has just been given. The same result must follow and a similar order be made. I would allow the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree.

Appeal allowed.

Solicitors: *Slaughter & May for Davidson & Syme W.S., Edinburgh; Herbert Smith & Co. for Macpherson & Mackay W.S., Edinburgh; Martin & Co. for Dundas & Wilson W.S., Edinburgh.*

F. C.

[10] [1917] 2 Ch. 349.

[11] Ibid. 355.

[CHANCERY DIVISION.]

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June 5, 8, 9, 10, 11, 12.

Upjohn J.

In re NATIONAL COAL BOARD'S APPLICATION.

[1957 N. No. 1056.]

Mines and Minerals—Coal—Working—Permission to let down surface—Compensation—Persons entitled to compensation—Whether consequential damage included—Whether compensation payable for loss of profit and goodwill—Costs of application—Mines (Working Facilities and Support) Acts, 1923 *and* 1925 (13 *&* 14 *Geo.* 5, *c.* 20 *and* 15 *&* 16 *Geo.* 5, *c.* 91), *ss.* 6 (1) (2) (5), 9 (1) (2)—*Coal-Mining (Subsidence) Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 59), *s.* 6.

On an application by the National Coal Board under the Mines (Working Facilities and Support) Acts, 1923 and 1925,[1] for the right to work certain seams of coal, and in so working, to let down the surface, the only question remaining in issue was the measure of compensation to be paid by the board for the right to let down the surface. The objectors to the application claimed that the compensation should include full consequential damage extending to loss of profit and goodwill. They included owners of the surface lands, many of whom were industrial concerns; local authorities who owned sewers in addition to surface land; persons whose land

[1] Mines (Working Facilities and Support) Act, 1923, s. 6: "(1) Where "a matter is . . . referred to the Com- "mission, the Commission, if satisfied "that the requirements of this Part "of this Act are complied with in the "case of the applicant, and that it is "expedient in the national interest "that the right applied for should be "granted to him, may, by order, "grant the right on such terms and "subject to such conditions, and for "such period, as the Commission may "think fit, and upon such an order "being made, the right specified in "the order shall, subject to the pro- "visions hereinafter contained, vest "in the applicant. (2) Where such a "right is granted, such compensa- "tion or consideration as in default "of agreement may be determined by "the Commission shall be paid or "given by the applicant in respect "of the acquisition of the right to "such persons as the commission "may determine to be entitled there- "to. . . . (5) In determining "whether any right should be "granted or the conditions upon "which any such right should be "granted the Commission shall have "regard to all the circumstances of "the case, and in particular to the "extent to which the retention of "any minerals is required for the "protection of any mines or other "works from flooding, or for any "other mining purpose, and (so far "as relevant) to the royalties, cove- "nants, and conditions reserved by "or contained in the applicant's "existing mining lease or leases (if "any), or customary in mining leases "in the district."

S. 9: "(1) Where a right to work "minerals or an ancillary right is "granted or any restriction on the "working of minerals is imposed "under this Part of this Act, the "Commission may determine the "amount and nature of compensation "or consideration to be paid or given "and the persons to whom it is to be "paid or given, either at the time "when they determine whether the "right should be granted or the "restrictions imposed or at any sub- "sequent time. (2) The compensa- "tion or consideration in respect of "any right, including a right to "enforce restrictions, shall be "assessed by the Commission on the "basis of what would be fair and "reasonable between a willing grantor "and a willing grantee, having "regard to the conditions subject to "which the right is or is to be "granted."

R.S.C., Ord. LIVo, r. 1: "Applica- "tions under any enactment which "are referred to the High Court pur- "suant to section 1 (1) (*a*) of the "Railway and Canal Commission "(Abolition) Act, 1949, shall be made "in the Chancery Division by ex parte "originating summons."

lay partly inside and partly outside the application lands and persons whose land lay wholly outside the application lands and which to a lesser degree but extending over a wider area would be affected by subsidence from the proposed workings. The National Coal Board contended that the compensation should be limited to physical damage, but that even if some measure of consequential damage were payable the board, being a nationalised body with a duty, in the national interest, to produce coal as cheaply as it could, should not have to pay for the loss of profit of private concerns:—

Held, (1) that the right to compensation was an ancillary right which should be treated as a term or condition of the right to work under section 6 (1) of the Act of 1923, and not as compensation therefor under section 6 (2), and that the court had, accordingly, to have regard to all the circumstances of the case pursuant to section 6 (5).

(2) That, in the circumstances, if anything less than full compensation for consequential damage were granted it would amount to expropriation of the valuable right of support; that the court could not properly make such an order unless the obligation was clearly imposed on it by statute, and that it was clear that the Act imposed no such obligation.

(3) That local authorities, unless they were also the owners of the surface land, had no right of support for their sewers, and, therefore, they had no rights for which they could be compensated.

Newcastle-under-Lyme Corporation v. *Wolstanton Ltd.* [1947] Ch. 427; 63 T.L.R. 162; [1947] 1 All E.R. 218 applied.

(4) That persons whose land lay partly in and partly outside the application lands were entitled to compensation limited to land inside the application lands, while persons whose land lay wholly outside the application lands were not entitled to compensation, since their lands were not affected by the order.

(5) That although it may have been thought right in similar applications in the past to make no order as to costs, no such general practice had been established, and in the circumstances of the present case, but without laying down any rule, the National Coal Board should pay the costs of the objectors.

In re Wolstanton Ltd.'s Application [1952] Ch. 519; [1952] 1 All E.R. 678n. not applied.

ADJOURNED SUMMONS.

The National Coal Board by an application dated September 3, 1957, under the Mines (Working Facilities and Support) Acts, 1923 and 1925, asked for the right to work certain seams of coal and by such working to let down the surface of certain lands in or in the vicinity of the City of Stoke-on-Trent, the Borough of Newcastle-under-Lyme and the Rural District of Stone, Staffordshire.

There was also an application to vary in certain respects an order made by the court on February 20, 1952, under the same Act (*In re Wolstanton Ltd.'s Application* [2]). The following statement of facts is taken from the judgment:

The application related to three contiguous areas; the Wolstanton Area; the Deep Pit Area and the Stafford Area. In broad outline the application sought to get liberty to work

[2] [1952] Ch. 519; [1952] 1 All E.R. 678n.

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and to let down the surface in these areas by works proposed at much greater depth than hitherto. The earlier orders relating to the Wolstanton Area related to comparatively shallow seams, but it was now sought to work from depths of over 2,000 ft., down to 4,000 ft., and to employ the most modern methods of extracting coal by driving horizon roads at these depths. Horizon roads were horizontal; they did not follow the strata, and the object was to enable locomotives to haul underground coal extracted very considerable distances—much longer distances than was possible when coal was extracted through a number of private colliery companies.

The reason for the application was that the coal in this coalfield, the North Staffordshire Coalfield, was a very high quality carbonising coal, and, according to the application, the reserves of that type of coal were rapidly diminishing in other coalfields, and it was desired to exploit the high quality coal to be found in the coalfield and to extract something over 119,000,000 tons of coal under the application area.

It was proposed to expend large sums—something over £30,000,000. The plan was essentially a long-term plan and liberty was asked to work for a hundred years from the date of the order.

When the application was made, in the usual way advertisements were directed, which brought no less than 95 objectors. However, that number had diminished, and 64 entered an appearance, most, but not all, of whom had appeared.

Opposition was, however, withdrawn to the proposed method of working, the parties having come to terms on that issue, and the only question remaining in issue was the measure of compensation to be paid by the National Coal Board for the right to let down the surface.

Sir Andrew Clark, Q.C., and *J. C. Leonard* for the National Coal Board.

B. J. M. MacKenna, Q.C., and *D. A. Grant* for the West Midlands Gas Board.

Charles Russell, Q.C., and *John Brunyate; R. D. Stewart Brown, Q.C.*, and *J. S. Daniel; Peter Foster, Q.C.*, and *John Bradburn; G. R. Rougier; Eric Griffith* and *Charles Sparrow* for a number of opposing firms.

John Arnold, Q.C., and *Charles Sparrow* for the Staffordshire County Council.

D. A. Grant for the Staffordshire Potteries Water Board.

George Hesketh for the Central Electricity Generating Board.

Eric Griffith for the Archdeacon of Stoke-on-Trent.

Charles Sparrow for the Trent River Board, the Ministry of Health and the Birmingham Regional Hospital Board.

Michael Browne for the Stoke-on-Trent Corporation.

Henry A. P. Fisher for the British Transport Commission.

Cases other than those cited in the judgment referred to in argument: *Inland Revenue Commissioners* v. *Clay*[3]; *In re Naylor Benzon Mining Co. Ltd.*[4]; *Horn* v. *Sunderland Corporation*[5]; *Minister of Health* v. *Stafford Corporation*[6]; *In re R. W. Sharman Ltd.*[7]

UPJOHN J. stated the facts and continued: The objections ranged round two main points. First, there was great opposition to the proposed method of working: it was proposed to work by the longwall method, which, as is well known, involves the total abstraction of the coal with an inevitable subsidence of the superadjacent surface. The second point, which is the only point with which I am really concerned in this judgment, is the right measure of damages that the National Coal Board should pay when the surface is let down.

With regard to the first main point, that is, as to the method of working and the protection to be afforded to the owners of the surface, there have been lengthy discussions; large numbers of affidavits have been filed, I believe something in the neighbourhood of a hundred, and ultimately, after many concessions, no doubt, on both sides, opposition has been withdrawn to the proposed method of working. I propose therefore to say no more about it than this—that I have seen sufficient of the evidence to satisfy me that it is plainly in the national interest that a right to work this coal and to let down the surface should be granted; and indeed, that is not disputed.

Before I propound the problem which I have to solve, I must say a little about the history of this matter.

These three areas all lie in the Manor of Newcastle-under-Lyme. The lord of the manor has from ancient times been the Crown in the right of the Duchy of Lancaster. The Duchy have for very many years claimed the right to work the subadjacent minerals without paying any compensation for subsidence caused to the surface, and have for many years granted mining leases upon the footing that the person extracting the minerals was entitled to do so without paying any damage for subsidence.

It was held in 1844, in *Hilton* v. *Earl Granville*,[1] that such a custom was unreasonable and therefore void. Undeterred, however, by that decision, the Duchy continued to grant leases upon the same terms as formerly, and apparently no one disputed that.

Just before the war the lessee was the Wolstanton Colliery Co. Their workings caused subsidence to a fire engine station belonging to the Borough of Newcastle-under-Lyme, who naturally were rather incensed and brought an action against the company and against the Duchy of Lancaster. In 1940 the

[3] [1914] 3 K.B. 466; 30 T.L.R. 573.

[4] [1950] Ch. 567; 66 T.L.R. (Pt. 1) 418; [1950] 1 All E.R. 518.

[5] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[6] [1952] Ch. 730; [1952] 2 T.L.R. 302; [1952] 2 All E.R. 386.

[7] [1957] 1 W.L.R. 774; [1957] 1 All E.R. 737.

[1] (1844) 5 Q.B. 701.

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House of Lords in *Wolstanton Ltd. and Attorney-General of Duchy of Lancaster* v. *Newcastle-under-Lyme Corporation*,[2] upheld the view which had been expressed some hundred years before that the alleged custom was void as being unreasonable. Accordingly, an injunction was granted against the Wolstanton Co., without prejudice to their right to make application under the Mines (Working Facilities and Support) Act, 1923.

It was war time and, of course, essential to get this high quality coal, and on December 17, 1943, the Railway and Canal Commission made an order entitling the company to work certain seams. In that order the company offered a very wide clause offering to pay compensation for subsidence, which was in substantially the same terms as the order subsequently made in 1952, and to which I shall refer in greater detail.

In 1952, the National Coal Board, as the successors of the Wolstanton Colliery Company, made another application in *In re Wolstanton Ltd.'s Application*[3] for extended powers to work certain seams in the Wolstanton Area. Neither of these orders affected the Stafford Area of the Deep Pit Area. Danckwerts J. made an order on February 20, 1952, which in the First Schedule contained a clause, clause 13, dealing with the question of compensation for subsidence, and it is in these terms: "13. The "applicants shall (subject to the provisions of paragraph 12 here- "of so far as applicable) pay full compensation for all damage "(including consequential loss and depreciation in value) whether "occurring before or after March 25, 1952 (but not before "December 17, 1943), and resulting from the mining operations "of the applicants or of Wolstanton Ltd. in the Red Mine Iron- "stone Seam or any of the seams mentioned in paragraph 2 hereof "prior to March 25, 1952, and from such operations in any of the "described minerals on or after March 25, 1952, within the area "surrounded by a purple verge on the said plan Number 1 to "property (including gas mains electricity mains or lines water "mains and sewers belonging to any of the objectors or the "Midland Electricity Board) now or hereafter within the said area "and in the case of the lands coloured pink on the said plan "Number 1 notwithstanding the terms of any enfranchisement "deeds."

Some argument has been addressed to me upon the footing that as the order was made in those terms in 1943 and again in 1952, so it should be made in the year 1959. But I am unable to accept that argument. The National Coal Board cannot be prejudiced by earlier orders in that way, and it is fully entitled to come to this court and to say that for the future, when dealing with deeper and different seams, it would be right and proper to have a different order as to compensation put in the order that I shall make.

[2] [1940] A.C. 860; 56 T.L.R. 794; [1940] 3 All E.R. 101.

[3] [1952] Ch. 519; [1952] 1 All E.R. 678n.

The position then today is this: in the Wolstanton Area there is a right to work certain shallow seams on the terms as to compensation for subsidence that I have just read. Apart from that, as the custom alleged is invalid, it is common ground that there is no right to work other seams and to extract other minerals so as to let down the surface; and, as it is well known that the extraction of minerals is bound to cause subsidence, it necessarily means that unless some order is granted, these minerals are sterilised, for an injunction would plainly lie at the instance of any owner of the surface.

The rights now sought, however, are limited as to the damages through subsidence in the way set out in paragraph 5 of the proposed minutes of order. These are the terms proposed by the National Coal Board:

"The applicants shall make good or pay compensation for all "actual damage caused by their working of the described "minerals to the surface of the described lands and to any "existing or future building works and things erected constructed "or growing thereon, including actual damage to any plant "machinery fixtures fittings or chattels in or upon any such "buildings or works, provided that this obligation shall not apply "to any sewers, gas or water mains or electricity cables in respect "of which there is no right of support, in which case the appli- "cants shall only be liable to pay compensation in accordance "with their statutory obligations."

On the one hand—and this is the whole kernel of the point that I have to determine—it is sought by the objectors to have a wide order for compensation for subsidence which would include consequential damage. On the part of the National Coal Board, they are seeking to restrict it to physical damage to the land and buildings, including future buildings, and fixtures and fittings and actual chattels.

The reason for the importance of the difference is that this is, particularly in the Deep Pit Area as appears from any of the plans put in, a highly industrialised area. It is in fact the heart of the Potteries District, and there are on the surface above these lands a large number of industrial concerns, particularly pottery concerns; and the method of making pottery now involves long and heavy kilns.

It is not really in dispute that the result of working might be to cause damage to these kilns, which might upset the production of these companies on the surface; and that might lead to a loss of orders and to a loss of production, with consequential damage to goodwill that that would involve.

I say no more about that, because Sir Andrew Clark, for the National Coal Board, has admitted first, that it is possible that in each case consequential damage of some kind may be suffered; secondly, that such consequential damage might very well be substantial, especially in cases of commercial undertakings if it were to include loss of profits and damage to goodwill; and,

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thirdly, that that sort of consequential damage would not be recoverable under the form of order for which the National Coal Board asks.

The question, therefore, is one of great importance. It is a question, of course, of construction of the Act as to what term as to compensation I should insert. I must, therefore, look at a number of sections of the Act, some of them, however, briefly. Section 1 gives the right to make application to work minerals which are in danger otherwise of being unworked. Section 3 gives power to the court to grant what are called ancillary rights. I need not read the section in detail, but it is plain, having regard to subsection (2), that one of the ancillary rights which may be granted is a right to let down the surface.

Section 4 is in these terms: "(1) Neither the right to work "minerals nor an ancillary right shall be granted under this Act "unless it is shown that it is not reasonably practicable to obtain "the right in question by private arrangement for any of the "following reasons: (*a*) that the persons with power to grant the "right are numerous or have conflicting interests. . . ."

That is plainly satisfied in this case. I need not read (*b*) or (*c*). (*d*) is in these terms: "that the person with power to grant the "right unreasonably refuses to grant it or demands terms which, "having regard to the circumstances, are unreasonable."

Then section 5 provides the machinery for launching applications: an application is made to the Minister of Fuel and Power, who considers the application, and if he thinks that there is a prima facie case, referred it formerly to the Railway and Canal Commission, but now that jurisdiction has been transferred to this Division of the High Court.

Section 6 deals with reference to the commission.

[His Lordship read section 6 (1) (2) (5) and section 9 (1) (2) (3) of the Mines (Working Facilities and Support) Acts, 1923 and 1925.]

Here I am concerned with the grant of an ancillary right. The first question which arises is whether this ought to be treated as a term or condition referred to in section 6 (1), in which case the relevant considerations which I must bear in mind are to be found set out in subsection (5) of that section; or whether this right to compensation on damage should be treated as a compensation clause coming under section 6 (2) to which, of course, section 9 is applicable.

The point is not of great importance, because in either event the court must do what in its discretion it thinks fair and reasonable in all the circumstances of the case. It is true that in 1938 *In re Beckermet Mining Co. Ltd.'s Application*,[4] the Railway and Canal Commission did consider that the clause providing for compensation of subsidence was a clause which fell within section 9, but it is plain the point there was never really argued.

[4] (1938) 54 T.L.R. 377; [1938] 1 All E.R. 389.

Upon the whole, I think that section 6 (2) and section 9 are really dealing with monetary consideration which is to be paid as a term of the order, and that the clause for payment of damage which may or may not arise in the future, cannot be regarded as compensation for the purposes of subsection (2) of section 6. I think it is a condition or a term which falls within section 6 (1), and the relevant considerations I must therefore bear in mind are to be found in subsection (5).

It is true, and there has been evidence before me, that since the constitution of the Railway and Canal Commission, either by that commission or by this court, some 62 orders granting liberty to let down the surface have been made; and it is also true that in only four cases has an order been made giving a right to consequential damage, two of those orders being, of course, the orders made in 1943 and 1952 in this case. But I cannot gain any comfort one way or other from those orders. As is well known, these matters are negotiated, as in this case even while the case is being debated, and the parties come to terms and agreements which satisfy them; and one can get no assistance from looking at extracts—for that is all I have—from orders which satisfied the parties and as to which it is admitted that the point I have to consider was never argued.

The objectors' case is perfectly simple; they say the right to support is a valuable right of property which can be protected by injunction. It is not in dispute that if damage does result, consequential damage can be recoverable by law, that is to say, consequential damage from loss of profits, loss of goodwill, and so on; and they submit that to limit the compensation in the way sought by the National Coal Board is to expropriate without paying full compensation; and therefore it amounts to a partial confiscation of the objectors' property, and a confiscation which in individual cases may in the future turn out to be very serious. They submit that that is contrary to all principles of this court, to make such confiscatory orders, unless the terms of the statute plainly entitle the court to do so.

They point to section 4 (1) (*d*), and they pose this question: supposing there was one objector and one only, and his objection was that he wanted to have compensation for consequential damage; could he be regarded as being unreasonable so as to give this court jurisdiction to make some less order? They suggest—and I agree with them—that the plain answer to that must be that, of course, it would not be unreasonable, for the very simple reason that he is only asking for that to which he is entitled at law; and, indeed, he might not unreasonably ask for a little more for giving up his right to claim an injunction to prevent any subsidence to his property. They say that if that be so in cases under sub-paragraph (*d*), so also it must be the same in an application under sub-paragraph (*a*).

The argument of the National Coal Board is this: they say that the statutes in the past have shown that when it is in the

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national interest, Parliament has thought it right to put some limitation on the compensation to be recovered; and they refer to the provisions in paragraph 6 of the Second Schedule to the Coal Act, 1938. That Act is usually described as the Act which nationalised royalties and vested in the Coal Commission the minerals underlying the surface. It provided in one particular case—that is where there had been no severance, so that the owner of the surface also owned the minerals and enjoyed both in possession—that the compensation due to him should be determined upon the footing that he would be entitled to have compensation for damage arising from the working of that land. That it was said meant physical damage and physical damage only.

I am not going to determine whether that is right or not, for Mr. Arnold, for one of the objectors, was prepared to argue before me that indeed the provision of compensation to be found in that paragraph was wider than had been assumed by the National Coal Board. But, assuming that the view of the National Coal Board is right, it does not seem to me to go any distance to support their submission.

Where a man owns minerals under the land and is notionally going to sell them, he must, of course, grant a right to win, get and carry away, and he must, as a practical measure, also grant a right to let down the surface on some terms.

If, of course, he is content to accept compensation for damage only to the land, he will be able to get a larger royalty. So, as it was put, what he loses on the swings he gains on the roundabouts; and there is nothing I can see in the Act or in that paragraph which entitles me to assume that I ought to limit in any way the compensation which the objectors may justly claim. That paragraph merely deals with the machinery for ascertaining the true and proper compensation.

Then reliance was placed on the Coal-Mining (Subsidence) Act, 1957, which gives a right, in very broad terms, to persons who had no right of support to claim damages or compensation for subsidence in certain cases. But section 6 of that Act made it quite plain that where somebody had a legal right to make a claim, he would not in any way be prejudiced: he merely had to elect whether he would go under the Act which gave him certain rights although he had no right of support, or to rely on his legal rights. That Act again does not support in any way the argument of the National Coal Board.

Then it is said, and said truly, that the National Coal Board is not operating for private gain, but in the national interest. Its duties as they are set out in section 1 (1) (*c*) of the Coal Industry Nationalisation Act, 1946, are: "making supplies of "coal available, of such qualities and sizes, in such quantities "and at such prices, as may seem to them best calculated to "further the public interest in all respects, including the avoid-"ance of any undue or unreasonable preference or advantage."

Under section 1 (4) of that section they are bound to try and see that the revenues of the Board shall be sufficient to meet all their outgoings properly chargeable to revenue account. And so it is said that it would be wrong, when considering the national interest, to place too onerous a burden upon the National Coal Board, because they are under this duty to make coal available to the public reasonably cheaply, and, incidentally, to try and make their revenues meet. It was said in particular that even if some measure of consequential damage should be payable, it would be wrong for the National Coal Board to pay private concerns for loss of profit, because that would be paying profits into the hands of companies which would be available for private shareholders; and therefore any consequential damage should stop short of awarding consequential damage related to profits or gains. I confess I am quite unable to understand that argument, unless it be jealousy of the National Coal Board of paying profits which it has shown itself so far quite unable to make itself.

Then it is said: it would be very difficult to assess damages for loss of profits and goodwill; there would be an unknown and large number of claims, great difficulty in finding out whether they were justified, and in a heavily built-up industrial area like this it might indeed be almost impossible, commercially, at any rate, in the Deep Pit Area, to work the coal at all, and it would in effect be sterilised.

I look upon the matter in this way: first of all, I have to be satisfied under section 6 (1) whether it is in the national interests that a right of mining should be granted. The answer to that I gave at the beginning of this judgment: it is plainly yes. I then have to see on what terms this right, the right to let down, should be granted; and for that I turn to section 6 (5), which provides that I must have regard to all the circumstances of the case, " and (so far as relevant) to the royalties, " covenants, and conditions reserved by or contained in the " applicant's existing mining lease or leases (if any), or customary " in mining leases in the district."

It is, of course, common ground, for the reasons I have already given, that there are no such mining leases, because they were all void, so far as relevant to this application; and I go further, and I say I do not think, even if there had been some mining leases available in the district, that they would have any relevance for the purpose that I have to consider. A mining lease essentially gives a right to get coal, and royalties are to be paid for it; quite different considerations may come into play when you are considering what it is right to insert as compensation for damage due to subsidence. I agree, of course, that in some cases it may be that the surface owner is different from the person granting the mineral right; but in many cases he will not be. I have quite a different case to consider.

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The National Coal Board, as successors to the Coal Commission, own the minerals. All they want is a right to let down, and that is the right for which they have to pay. I cannot see any answer to the objectors' claim. Why should they be expropriated and have part of their valuable rights confiscated without compensation? I do not see how the court could properly make such an order unless the Act clearly imposed upon the court an obligation so to do; and it is quite clear that it imposes no such obligation.

But even if I accede to the argument to regard this question of compensation as all part of the national interest, I cannot see that it is in the national interest that the owners of the surface above the application lands should have their property expropriated for the general benefit of the public at large. It seems to me right that the public at large should pay through the medium of the National Coal Board full and proper compensation for the rights of which the objectors are being deprived.

Accordingly, it seems to me that the order for which the objectors are asking, that is to say, substantially the order of 1952, subject to the amendments which I shall consider in a moment, must be made.

I only desire to add this: if I am wrong and if this is to be regarded as a question of compensation under subsection (2) of section 6, thereby bringing section 9 into play, it is a claim for which the objectors have an a fortiori case, for they would have to consider what would be termed reasonable between a willing grantor and a willing grantee; and why a willing grantor should be prepared to surrender his property, or part of it, without payment, I do not understand.

I pass, then, to certain subsidiary points. The first relates to sewers. The Corporations of Newcastle-under-Lyme and Stoke-on-Trent are the sewerage authorities for their respective areas, and they have a large number of sewers embedded just under the surface of the application lands. It is inevitable that during mining there will be subsidence, and no doubt cracks will appear, damage may be done, and the question is, what provision should be inserted in the order as to that.

In 1947 it was decided by the Court of Appeal in *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.*[5] that public authorities have no rights to support of the sewers vested in them unless they also own the surface of the land.

Therefore, the position down to the Act of 1957 was that these public authorities had no right to support for their sewers, and therefore the National Coal Board could work without paying any compensation; but under the Act of 1957 they were given the right to claim for damages to their sewers, but not for consequential damage. The National Coal Board contend, therefore, that unless they prove in any particular case that they are the

[5] [1947] Ch. 427; 63 T.L.R. 162; [1947] 1 All E.R. 218.

owners of the surface, they should be left to their statutory rights under the Coal-Mining (Subsidence) Act, 1957.

The corporations, however, say that they have given up a good deal in connection with the many public buildings which they own or for which they are responsible, and, to use modern political parlance, the whole thing should be treated as a "packet" agreement, and they should be allowed this extra consequential damage as a term of consenting to the order or at any rate withdrawing their opposition and entering into some agreement.

The short answer to that seems to me that they have not in fact entered into an agreement which deals with the question of these sewers. It seems to me plain that they should have full and fair compensation, no more and no less. It does not seem to me that they have any rights in respect of these sewers for which they are to be compensated, and therefore to that extent I am proposing to put in something to the effect of the last four lines of paragraph 5 of the proposed Minutes of the National Coal Board.

There are one or two other matters which also remain to be considered.

Certain of the objectors own land partly in and partly without the application lands. They submit that they should be entitled to have consequential damage in respect of that part of their factory which is outside the application land as well as that which is within it.

It seems to me that exactly the same principles apply in this case as in those of the sewers. In neither case that I have mentioned was any agreement made. They must, therefore, be compensated fairly and fully—not too little and not too much. In respect of such part of a factory as is outside the application lands, they have no rights and therefore get no compensation.

It remains only to deal with the class of objector who is wholly outside the application lands.

The evidence was that through these deep workings going down ultimately perhaps to 4,000 ft., the subsidence will be less, but it may be over a greater area; one mining expert has estimated that the surface will be affected perhaps up to 520 yards outside the area of the application land.

It is submitted on behalf of a number of these persons, all of whom are completely outside and yet within 520 yards, that some provision should be made for their benefit to ensure that they have some rights as to consequential damage.

But I accept the submission of Sir Andrew Clark on this point. It seems to me that persons who are wholly outside the area have no locus standi under this Act. They may indeed be able to make some bargain, and that was done by one of the objectors, the Michelin Tyre Company, but that is an agreement which is wholly outside the order which I propose to make.

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The National Coal Board is not asking to work any minerals under these persons' lands. Secondly, they are not asking to let down their land. They are only asking for liberty to let down the land within the application lands. If anyone outside that area has a right of support from adjacent lands and can prove their title to that, they can, of course, obtain an injunction against the National Coal Board to prevent them working, it matters not where, so as to disturb their rights. If they have no such right, then they will not get an injunction.

It seems to me that nothing in any order that I make can affect the position at law of those who are wholly outside, because my order does not affect that land at all. It is perfectly true in respect of the order of 1952 in *In re Wolstanton Ltd.'s Application*[6] Danckwerts J., during the course of his judgment, made an order dealing with a school outside the area, but, reading the judgment as a whole, it is plain that he was only dealing with the matter as part of some general agreement which had been reached between the National Coal Board and the Staffordshire County Council, who were the owners of a number of schools in the area; and it is clear that the point which I have had to consider was not before him at all.

There is, therefore, nothing in that authority which either helps or hinders me from coming to the conclusions to which I have come, namely, that they have no locus standi in the matter.

That covers all the matters of principle and I propose to stand this matter over for one month until July 9, by which time I hope that the parties will have been able to agree. One or two agreements have not yet been finalised. I hope they will then come before me with an order on every part of which they are all agreed, consistently, of course, with the judgment I have just delivered. I will now hear arguments about costs.

Argument was then addressed to the court on the question of costs:

June 12. UPJOHN J. I have now to consider the question of the costs of this application, which has been fully argued before me.

It is quite plain, having regard to section 10 (1) (*c*) of the Mines (Working Facilities and Support) Act, 1923, that the Railway and Canal Commission had a full discretion with regard to costs. However, they did in fact adopt a rule of convenience in normal cases as appears from *New Hucknall Colliery Ltd.*[7] where Sankey J., delivering the judgment of the court, said[8]: "I "think we have power to give the costs, but I also agree with "him"—that is Mr. Turner—"that it must be a very excep- "tional case in which we do give costs, and although I do not

[6] [1952] Ch. 519.
[7] (1925) 41 T.L.R. 383.
[8] Ibid.

" wish in any way to be a prophet or in any way to bind either " ourselves or our successors, I too think that the occasions on " which we do give costs will probably be very rare occasions." The judge then went on to say that that was in fact one of those very rare occasions, and he ordered an objector to pay the costs.

The Railway and Canal Commission was abolished in 1949, and the jurisdiction transferred to this court. Order 54o deals with the jurisdiction conferred upon this court. By rule 12 it is provided: " The ordinary practice and rules of the Chancery " Division so far as they are not inconsistent with this order " shall apply to proceedings under this order." So far as costs are concerned, therefore, that directs one straight to Ord. 65, r. 1; and it is plain that this court has a complete discretion as to awarding costs in cases under the Act, and that indeed is not disputed.

A number of orders have been made, but in only one of them so far as I am aware has there been any judicial discretion exercised or decision upon the matter, and that is the National Coal Board's application in 1952 in the *Wolstanton* case [9] which I discussed fully in my main judgment. There it was argued, apparently, by the Coal Board that the practice of the Railway and Canal Commission in not granting costs should be followed; and Danckwerts J. said [10]: " On the question of costs " it was suggested by counsel on behalf of the applicant that " the practice of the Railway and Canal Commission in not " granting costs (as a general rule) be followed, although he " (His Lordship) had full discretion in the matter. Certain " objectors submitted that they ought to be granted costs. The " jurisdiction which he had seemed to him to be sui generis and " was not to be compared with any of the other jurisdictions " of the Chancery Division. The rule normally would be that " costs should not be awarded, and he proposed to abide by that " rule in the present case." I am not quite clear whether the judge was attempting to lay down a rule or not. That matter was discussed in *In re National Coal Board's Application (Second Buwell Application)* [11] before Roxburgh J. on June 22, 1955, when, in the course of what I think was an extemporary judgment, having cited the passage I have just read, the judge said this: " I am not quite sure whether he means that " somebody else had laid down a rule which he proposed to " follow or that he was tentatively suggesting that he was laying " down a rule. But I will not believe that he was intending " formally to lay down a rule. First of all, I am not clear what " jurisdiction he has got to lay down that rule. He has, of " course, every possible jurisdiction to decide the case before " him, but if I remember rightly, though it has not been fully " explored before me, my duties in regard to costs are dealt

[9] [1952] Ch. 519.
[10] [1952] 1 All E.R. 679.
[11] Unreported, June 22, 1955.

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"with by statute." However, in the result it became unnecessary for Roxburgh J. to come to any conclusion upon the matter.

With great respect to Danckwerts J., if he was attempting to lay down any normal rule, he did so per incuriam, and I do not think he would have done so had his attention been drawn to the authorities which have been cited to me. I refer in particular to *The Friedeberg* [12] and *The Young Sid.* [13] I will cite only a passage from the last mentioned case, from the judgment of Sankey L.J. He said [14]: "If those are correct statements "as to the pactice in the Admiralty Court, they do not convey "to my mind that there is a hard and fast rule upon the subject "which can be treated as a rule of practice. If there were I "think it would be wrong. Personally I rather think it is a "list of instances in which the court has or has not given costs "in the particular case, which may serve as a guide to a court "trying subsequent cases, but which is not binding upon such "a court. To begin with, if there were such a hard and fast "rule, it would contravene Ord. LXV, r. 1, as to costs, which "has statutory authority, and which expressly provides that the "costs shall be in the discretion of the court or judge."

A number of orders have been made by this court since the transfer of the jurisdiction in 1949, but as I have said in none of them has the question of costs been argued except in the one case I have mentioned. In my view no doctrine has yet emerged which makes it safe to express any judicial view as to whether ultimately a settled practice will or will not emerge. That can be seen only in the future as and when more cases are decided by this court.

I propose, therefore, to consider this case solely as a matter of discretion on its own particular facts without attempting to lay down any general or normal rule, or anything of that nature.

I am not going to review the facts here at any length. The matter started in this way. In their application the National Coal Board were seeking to let down particularly in the Deep Pit Area without any restriction on method of working, and with no other restrictions as to leaving support or providing for packing at all. As they stated in the application: "They accordingly "request that the rights applied for should be granted subject "to no restrictions other than that they should work the described "minerals in this area in skilful and workmanlike manner by "such methods and to such extent as they consider to be "suitable to the conditions prevailing and necessary to preserve "the unimpeded functioning of manufactories and public utility

[12] (1885) 10 P. 112.
[13] [1929] P. 190; 45 T.L.R. 389.
[14] [1929] P. 201.

" undertakings on the surface." The same request was expressed in relation to other areas.

I confess that such wide and unfettered powers of working and letting down without any restriction was calculated to bring energetic objection from the mildest and most unlitigious of surface owners, and it is not in the least surprising that there was this large number of objectors. Ultimately agreement was reached which in fact made it unnecessary for me to go into the question of working or to hear any of the many witnesses cross-examined. But that the Coal Board had to make valuable concessions is shown by their proposed minutes of order, where they have given an undertaking that the roof shall be supported with not less than 50 per cent. of packing; that the void or waste shall not exceed 10 yards, and: " that the interval to be " allowed to lapse between the termination of the working of any " seam in any area and the commencement of the working of " any overlying or underlying seam in the same area shall be " not less than three years." No doubt there had been substantial argument whether the period should be three years or five years. Not only that, but a number of agreements have been reached which give valuable protection to particular local authorities and large firms and companies engaged in trade on the super-adjacent land, and a number of important matters of law have had to be decided.

I will make it plain at once that in making the order I am going to make I do not in the least do so on the footing or because the National Coal Board has failed on the main point as to fair compensation. That was to the benefit of the board. It was also to the benefit of the public, and will form guidance in future cases unless indeed my judgment is damaged seriously by being " let down " in the Court of Appeal.

Other matters of importance were decided by my judgment. It decided whether outside owners had any locus standi; and the rights of those who have works partly within and partly without the area. In those matters I decided in favour of the National Coal Board. I also decided matters in relation to questions of support for sewers and pipes; all those are matters of importance, particularly to the National Coal Board and to those who have the misfortune to sit above valuable coal seams. But it is particularly to the benefit of the National Coal Board, it seems to me, that the objectors behaviour has been extremely reasonable in this case, and they have not incurred unnecessary expense. All they have done is to protect their rights. In the particular circumstances of this particular case I propose to order the National Coal Board to pay the costs themselves, as between party and party, of the objectors who appear before me.

The only other effective order I shall make today is that the matter will stand over until July 9. But I want to make this

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quite clear; the provision as to costs which will go into the order to be made on that day will operate as of July 9 so that objectors will be entitled to their proper costs incurred between today and July 9.

Order accordingly.
Costs to be paid by the applicants.

Solicitors: *Donald H. Haslam for F. W. Dawson; Sherwood & Co. for Knight & Sons, Newcastle-under-Lyme; Wedlake Letts & Birds; Cunliffe & Mossman; Wedlake Letts & Birds for Kent, Jones & Done, Alsager, Stoke-on-Trent; Sharpe, Pritchard & Co.; Kennedys; Cunliffe & Mossman for Knight & Sons, Newcastle-under-Lyme; Doyle, Devonshire & Co.; Kingsford, Dorman & Co.; William Usher; Gibson & Weldon; M. J. B. Gilmour.*

I. G. R. M.

[HOUSE OF LORDS.]

H. L. (E.)* CHAPPELL & CO. LTD. AND ANOTHER . . APPELLANTS;

1959
April 27, 28, 29;
June 18.

AND

NESTLÉ CO. LTD. AND ANOTHER . . . RESPONDENTS.

Copyright—Infringement—Musical work—Gramophone records—Distribution for cash price to members of public sending chocolate wrappers—Whether sale "by retail"—"Ordinary retail selling price"—Meaning—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *s.* 8—*Copyright Royalty System* (*Records*) *Regulations,* 1957 (*S.I.* 1957, *No.* 866), *para.* 1.

The H. Co. manufactured and sold to the N. Co., who were manufacturers of milk chocolate, a number of gramophone records of a work which was "musical" within the meaning of the Copyright Act, 1956, and the copyright of which belonged to the appellants. The recording was made on a thin film of cellulose acetate adapted for mounting on cardboard discs which were supplied by the N. Co. and bore matter advertising their chocolate, the price charged to the N. Co. being fourpence per record. The N. Co. advertised the records for sale to the public at the price of 1s. 6d. each, but with a stipulation to the effect that intending purchasers must in respect of each record send, in addition, three wrappers from sixpenny packets of their milk chocolate. The company made a profit on each transaction. The wrappers when received were worthless and were thrown away.

By a motion, which was treated by consent as the trial of the action, the appellants sought to restrain the two companies from

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

manufacturing and selling the records on the ground that the transactions involved breaches of copyright in that in the circumstances they were not protected by the provisions of section 8 of the Copyright Act, 1956 [1]:—

Held, (1) that for the purpose of section 8 of the Copyright Act, 1956, the transactions in question were sales by retail.

(2) (Viscount Simonds and Lord Keith of Avonholm dissenting), that part of the consideration for the sale of the records was the acquisition and delivery of the wrappers; that section 8 contemplated that the "ordinary retail selling price" would be a money sum only, constituting the entire consideration for the sale, and that, accordingly, the respondent companies' operations were not within the ambit of the section, and there was, therefore, infringement of the appellants' copyright.

Per Viscount Simonds and Lord Keith of Avonholm. The wrappers formed no part of the selling price, but their production was merely a qualification for purchasing records.

Decision of the Court of Appeal [1958] Ch. 529; [1958] 2 W.L.R. 657; [1958] 2 All E.R. 155 reversed.

APPEAL from the Court of Appeal (Jenkins and Ormerod L.JJ., Romer L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated March 19, 1958, who allowed an appeal from an order of Upjohn J. dated November 14, 1957, restraining the respondents,

[1] Copyright Act, 1956, s. 8: "(1) "The copyright in a musical work is "not infringed by a person (in this "section referred to as 'the manu-"facturer') who makes a record of "the work or of an adaptation thereof "in the United Kingdom, if—(*a*) "records of the work, or, as the case "may be, of a similar adaptation of "the work, have previously been "made in, or imported into, the "United Kingdom for the purposes of "retail sale, and were so made or "imported by, or with the licence of, "the owner of the copyright in the "work; (*b*) before making the record, "the manufacturer gave to the owner "of the copyright the prescribed "notice of his intention to make it; "(*c*) the manufacturer intends to sell "the record by retail, or to supply it "for the purpose of its being sold "by retail by another person, or in-"tends to use it for making other "records which are to be sold or "supplied; and (*d*) in the case of a "record which is sold by retail, the "manufacturer pays to the owner of "the copyright, in the prescribed "manner and at the prescribed time, "a royalty of an amount ascertained "in accordance with the following "provisions of this section. (2) Sub-"ject to the following provisions of "this section, the royalty mentioned "in paragraph (*d*) of the preceding "subsection shall be of an amount "equal to 6¼ per cent. of the ordinary "retail selling price of the record, "calculated in the prescribed manner: "Provided that, if the amount so cal-"culated includes a fraction of a "farthing, that fraction shall be "reckoned as one farthing, and if, "apart from this proviso, the amount "of the royalty would be less than "three-farthings, the amount thereof "shall be three-farthings."

The Copyright Royalty System (Records) Regulations, 1957: "1 (1) "The notice required by subsections "(1) and (5) of section 8 of the Act "shall contain the following par-"ticulars . . . (*f*) the ordinary retail "selling price (as hereinafter defined) "of the records, or, where it is in-"tended to reproduce the work on "more than one type of record, the "ordinary retail selling price of each "type of record the manufacturer in-"tends to make and the amount of "the royalty payable on each record. ". . . 3: The ordinary retail sell-"ing price of any record shall be "calculated at the marked or cata-"logued selling price of single records "to the public, or if there is no such "marked or catalogued selling price, "at the highest price at which single "records are ordinarily to be sold to "the public, exclusive of purchase tax "in either case."

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the Nestlé Co. Ltd. and Hardy Record Manufacturing Co. Ltd., from infringing the copyright in a musical work entitled "Rockin' "Shoes" under the copyright in which an exclusive licence had been granted to the first appellants, Chappell & Co. Ltd., by the second appellants, Winneton Music Corporation. The facts shortly stated were as follows:

The Hardy Record Manufacturing Co. Ltd., the second respondents, made gramophone records consisting of thin films of cellulose acetate. They entered into an agreement with the first respondents, the Nestlé Co. Ltd., who were manufacturers of milk chocolate, to supply them with a number of records of a dance tune called "Rockin' Shoes," the copyright of which was vested in the first appellants, Chappell & Co. Ltd., as sole licensees and in the second appellants, the Winneton Music Corporation, as owners. The price to Nestlé of the records was fourpence; they were mounted on cardboard discs supplied by Nestlé containing advertising matter. Nestlé sold the records to the public at the price of 1s. 6d., subject to a condition that the purchaser must also send three wrappers for their sixpenny milk chocolate bars. These wrappers were of no value in themselves and were thrown away when received. Nestlé made a profit on each sale, but the purpose of the scheme was to advertise and promote the sale of their milk chocolate.

The Hardy company gave notice of their intention to manufacture, in accordance with section 8 (1) (*b*) of the Copyright Act, 1956, stating 1s. 6d. to be the ordinary retail selling price, and offered to pay royalties, which the appellants refused. In the action the appellants (the plaintiffs) alleged that these transactions constituted a breach of copyright, as they did not involve a sale "by retail" within the meaning of the section. An interlocutory motion for an injunction was treated, by consent, as the trial of the action. At the hearing of the motion Upjohn J. gave judgment for the appellants. The Court of Appeal by a majority (Jenkins and Ormerod L.JJ., Romer L.J. dissenting) reversed that decision.

K. E. Shelley Q.C. and *P. Stuart Bevan* for the appellants.
Guy Aldous Q.C. and *John Whitford* for the first respondents.
John Cope for the second respondents.

The following cases were cited in argument: *Turpin* v. *Middlesbrough Assessment Committee* [2]; *Sheldon* v. *Cox* [3]; *Walsh* v. *Secretary of State for India* [4]; *David* v. *De Silva*.[5]

Their Lordships took time for consideration.

[2] [1931] A.C. 470; 47 T.L.R. 308.
[3] (1824) 3 B. & C. 420.
[4] (1863) 10 H.L.Cas. 367.
[5] [1934] A.C. 106; 50 T.L.R. 165.

1959. June 18. VISCOUNT SIMONDS. My Lords, this appeal raises a question of construction of the Copyright Act, 1956, upon which there has been a difference of opinion in the courts below, the Court of Appeal by a majority (Jenkins and Ormerod L.JJ., Romer L.J. dissenting) having reversed the decision of Upjohn J.

The facts are not in dispute and the action was tried without pleadings upon an interlocutory motion which by consent was treated as the trial of the action. The appellants Winneton Music Corporation are the owners, and the appellants Chappell & Co. Ltd. their exclusive licensees, of the copyright in a musical work entitled "Rockin' Shoes." The question is whether the respondents the Nestlé Co. Ltd. and Hardy Record Manufacturing Co. Ltd. (whom I will call "the respondents Nestlé" and "the respondents Hardy") have infringed this copyright. It is common ground that they have done so unless they are protected by section 8 of the Copyright Act, 1956. I will therefore set out that section and then state such further facts as appear to be relevant. Section 8 is as follows:

> "8.—(1) The copyright in a musical work is not infringed by a person (in this section referred to as 'the manufacturer') who makes a record of the work or of an adaptation thereof in the United Kingdom, if—(*a*) records of the work, or, as the case may be, of a similar adaptation of the work, have previously been made in, or imported into, the United Kingdom for the purposes of retail sale, and were so made or imported by, or with the licence of, the owner of the copyright in the work; (*b*) before making the record, the manufacturer gave to the owner of the copyright the prescribed notice of his intention to make it; (*c*) the manufacturer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be so sold or supplied; and (*d*) in the case of a record which is sold by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the following provisions of this section. (2) Subject to the following provisions of this section, the royalty mentioned in paragraph (*d*) of the preceding subsection shall be of an amount equal to six and one-quarter per cent. of the ordinary retail selling price of the record, calculated in the prescribed manner: Provided that, if the amount so calculated includes a fraction of a farthing, that fraction shall be reckoned as one farthing, and if, apart from this proviso, the amount of the royalty would be less than three-farthings, the amount thereof shall be three-farthings."

The Copyright Royalty System (Records) Regulations, 1957, were made under the Act, of which I think it necessary only to

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mention regulation 1 (1) (*f*), which provides that the notice required by subsections (1) and (5) of section 8 shall contain the ordinary retail selling price (as thereinafter defined) of the records or, where it is intended to reproduce the work on more than one type of record, the ordinary selling price of each type of record the manufacturer intends to make and the amount of the royalty payable on each record, and regulation 3, which provides that the ordinary retail selling price of any record shall be calculated at the marked or catalogued selling price of single records to the public or, if there is no such marked or catalogued selling price, at the highest price at which single records are ordinarily sold to the public exclusive of purchase tax in either case.

The respondents Hardy are manufacturers of records, the respondents Nestlé are manufacturers of chocolate. The respondents Hardy make use of a process by which a recording can be produced on a thin film of cellulose acetate at a cost enabling them to sell records at a wholesale price of 4d. each. By this process they have produced film records of the musical work "Rockin' "Shoes" and sold them to the respondents Nestlé mounted upon cards supplied by the latter. A film so mounted is sold by Nestlé to any member of the public who sends to them a postal order for 1s. 6d. with three wrappers from 6d. bars of Nestlé milk chocolate. A typical offer appeared in the "Daily Mirror" of September 11, 1957, in the words—"Here's how to get each new "stars record. Collect three sixpenny wrappers from Nestlé's "milk chocolate. Fill in the coupon and send it with a postal "order for 1s. 6d., the price of the record, and your three wrap-"pers. You may order as many records as you like on this "coupon, but for each record you must send three wrappers and "1s. 6d. P.O., crossed, payable to the Nestlé Company, "Limited." Next to the script that I have cited was a coupon containing the names of a number of musical works including "Rockin' Shoes." All this was part of a full-page advertisement of Nestlé's milk chocolate and no one can doubt that Nestlé's interest in the sale of records was in order to promote the sale of their chocolate but presumably they were not averse from making such profit as they seem to have made from the sale of records also. The film, as I have said, was mounted on a card supplied by Nestlé, whose name appears prominently upon it. On the back were the words—"Remember, all you have to do to get each new "stars record is to send three wrappers from Nestlé's sixpenny "milk chocolate bars together with postal order for 1s. 6d. and "stating which record you want to Nestlé Record Offer P.O. "Box 14 Hayes, Middlesex. Don't forget, three wrappers and "postal order for 1s. 6d."

Before, however, making or permitting a public offer such as I have referred to, it was necessary that the notice prescribed by section 8 of the Act should be served. This duty falls on the manufacturer and accordingly the respondents Hardy entered

into correspondence with the Mechanical Copyright Protection Society Ltd. who were, as I assume, acting on behalf of the appellants. In the first letter which passed between them, dated September 12, 1957, but referring to other musical works than "Rockin' Shoes," Hardy stated "the retail price of the record, "and they are being sold individually not collectively, is one shil- "ling plus three wrappers. Wrappers are valueless and normally "thrown away." In the ensuing correspondence the society objected that the proposal made by Hardy did not constitute a sale by retail and that therefore the proposed records could not be made under the provisions of section 8 of the Act. Hardy nevertheless on July 17, 1957, proceeded in relation to "Rockin' "Shoes" to give a notice which purported to be the statutory notice. In it they said: "The ordinary retail selling price of each "record will be not greater than 8¾d. exclusive of purchase tax "and not greater than 1s. inclusive of purchase tax." By a subsequent letter those figures were amended to 1s. 1½d. and 1s. 6d. respectively. No mention was made of any wrappers. Nestlé then proceeded to put the proposal into effect and sold the record to members of the public who sent a postal order for 1s. 6d. together with three chocolate wrappers. Forthwith the appellants challenged the validity of their claim to be protected by section 8. Upjohn J. supported their contention and granted the appropriate injunction. The Court of Appeal, on the other hand, taking by a majority the view that the respondents had complied with the section, allowed the appeal and dismissed the action.

Faced by this conflict of opinion among learned judges, from any of whom I am reluctant to differ, I feel at liberty to say that I have found unusually great difficulty in reaching my own conclusion.

It appears to me that, in order to comply with the provisions of section 8 and thus obtain its protection, there are three relevant conditions to be satisfied by the manufacturer of an article which would otherwise be an infringement of copyright. By "relevant "conditions" I mean those conditions about which an issue arises in this case. First, there must be a "sale" of the article in question: secondly, the sale must be a "retail" sale: thirdly, it must be possible to predicate of it that there is an "ordinary "retailing selling price" of it, for if there is not, an essential part of the prescribed notice cannot be given.

Upon the first point I cannot feel any doubt. It had not been contended in the course of the case that there was not a sale, until during the debate in your Lordships' House that suggestion was made, and I think that, beyond doubt, anyone, who in answer to the advertisement acquired a record, would say that he had bought it and would be surprised that any doubt should be cast upon what he regarded as an obvious fact. Whether the consideration or the price that he paid was 1s. 6d. only or 1s. 6d. and three wrappers is a matter not for him but for your Lordships to determine.

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Secondly, I think it is clear that the sale is a retail sale. It is a sale to a consuming member of the public and I know of no other factor which distinguishes a retail sale from other sales. Put negatively, it is not a sale wholesale to a purchaser who proposes himself to sell it retail. In considering this second point, I do not ignore the argument that in its context in the section "retail sale" means only what was sometimes called an "ordinary" retail sale, by which, as I understood, was meant a sale in which there was no other element than on the one side an article sold and on the other a payment of money made, and that the transaction was not an "ordinary" retail sale if the purchaser was required to produce three chocolate wrappers in addition to his postal order. This argument is so closely linked with the third condition that there must be an "ordinary retail selling "price" that I will consider the two points together.

I think, my Lords, that upon this last matter some confusion has arisen from treating the word "ordinary" as if it qualified "retail" rather than "price." If there is no retail sale, there can, of course, be no ordinary or other retail selling price. But given a retail sale, there is no difficulty in ascertaining the ordinary selling price upon such a sale. The problem, therefore, and the only problem, is whether there is a retail sale with a retail selling price within the meaning of the section. The contention that it is not is stated in various ways. Upjohn J. in a passage cited with approval by Romer L.J. said [1]: "The vital part of "this transaction is to get in three wrappers and that represents "a great deal of value to Nestlé's, because it is evidence of an "advertising campaign pushing up their sales. That is the value "to them. This bears no resemblance at all to the transaction "to which, in my judgment, the section is pointing, that is, an "ordinary retail sale with an ordinary retail selling price. I think "it is quite wrong to suppose that the retail selling price here is "1s. 6d. The purchaser has to purchase three bars of chocolate "and that is the real value of this transaction to Nestlé's." Romer L.J. himself states the proposition thus: [2] "I cannot "help thinking that the owner of the copyright was entitled, "under section 8, to a royalty assessed upon the full purchase "price of each record sold by retail. Under Nestlé's method "of selling them the copyright owner gets a royalty assessed upon "the cash part only of each sale, and he gets nothing in respect "of the consideration which, although indirect, passes from the "customers and is received by the company." There are here two somewhat different conceptions. First, the transaction is not such an ordinary retail sale as contemplated by the section, because the vendor gets something of value, viz., the evidence of an advertising campaign pushing up the sales: secondly, it is not within the section, because the vendor gets from the purchaser a consideration for the sale of the record which the copyright owner

[1] [1958] Ch. 529, 548. [2] Ibid.

does not share, for it is not included in the retail selling price upon which the royalty is based. In the latter case the wrappers are treated as part of the consideration moving from the purchaser, in the former as evidence of a collateral advantage which has already accrued to the vendor. It is necessary to distinguish these two aspects of the matter. In the contention that the sale is not an ordinary retail sale and therefore not within the section because the vendor gets not only the cash price but also evidence of an advantage already accrued, I see no merit. It is irrelevant what is the vendor's motive for selling a record for 1s. 6d. if that is the selling price. It may be part of an advertising campaign for the sale of other goods: but there is nothing in the Act which impels me to read into the section a qualification that the selling price is to be disregarded and the article denied protection if the vendor's motive in fixing it is anything but to obtain the maximum amount commercially possible. The alternative view is that the production of three chocolate wrappers is part of the price of the record and that, as it is incapable of valuation, the necessary particulars cannot be given and the statutory requirements satisfied. This view is to some extent supported by the fact that in the advertisement and offer, to which I have already referred, the postal order for 1s. 6d. and three wrappers are in one passage included in a single demand. But in the same document the postal order for 1s. 6d. alone is referred to as the price of the record. I cannot draw any safe conclusion from the documents: the question remains open whether the wrappers are part of the selling price.

In my opinion, my Lords, the wrappers are not part of the selling price. They are admittedly themselves valueless and are thrown away and it was for that reason, no doubt, that Upjohn J. was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than that someone, by no means necessarily the purchaser of the record, has in the past bought not from Nestlé's but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure speculation. The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the manufacturers.

I conclude, therefore, that the objection fails, whether it is contended that (in the words of Upjohn J.) the sale "bears "no resemblance at all to the transaction to which the section ". . . is pointing" or that the three wrappers form part of the selling price and are incapable of valuation. Nor is there any need to take what, with respect, I think is a somewhat artificial view of a simple transaction. What can be easier than for a

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manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that? It may be assumed that the manufacturer's motive is his own advantage. It is possible that he achieves his object. But that does not mean that the sale is not a retail sale to which the section applies or that the ordinary retail selling price is not the price at which the record is ordinarily sold, in this case 1s. 6d.

An argument was addressed to the House by counsel on either side which appeared to be based on the difficulties that are likely to ensue if the one contention or the other is accepted. It may be so. It is probable that the draftsman of the Regulations foresaw some of them and did his best to avoid them. But these are not considerations that have weighed with me in interpreting the words of a section which appear to be written in plain English. Nor do I need to have recourse to the principle that since the Act takes away something heretofore of common right, it must be strictly and narrowly construed, nor to the principle that, since section 8 constitutes an exception upon a general grant, it is the exception which is to be narrowly construed. These are maxims to which it is necessary to have recourse as a last resort. In the present case, though I take a different view from your Lordships with great diffidence, I do not find it necessary to do so.

I would dismiss the appeal.

LORD REID. My Lords, the respondents, the Nestlé Co., manufacture chocolate, including wrapped bars of milk chocolate, which are sold to the public at 6d. per bar. As an advertising scheme to promote the sale of their chocolate they published advertisements in September 1957 in which they offered to supply any one of six named gramophone records in return for a postal order for 1s. 6d. and three wrappers. The advertisement produced said: "Save the wrappers from 6d. blocks. They will help you "to get smash hit recordings of skiffle, calypso, swing and ballad "by Britains newest stars all exclusive to Nestlés." Any member of the public could obtain as many records as he wished by sending 1s. 6d. and three wrappers for each record.

One of these records was a reproduction of a dance tune "Rockin' Shoes" of which the copyright belonged to the appellants the Winneton Corporation, the other appellants, Chappell and Co., being sole licensees under the copyright. The appellants maintained that the manufacture and sale of this record was an infringement of their copyright and they seek an injunction and damages. The respondents maintain that they were entitled to supply records in this way without the permission or licence of the appellants because they were authorised to do so by section 8 of the Copyright Act, 1956. The relevant part of that section is as follows:—

"8.—(1) The copyright in a musical work is not infringed

"by a person (in this section referred to as 'the manufacturer') who makes a record of the work or of an adaptation thereof in the United Kingdom, if—(*a*) records of the work, or, as the case may be, of a similar adaptation of the work, have previously been made in, or imported into, the United Kingdom for the purposes of retail sale, and were so made or imported by, or with the licence of, the owner of the copyright in the work; (*b*) before making the record, the manufacturer gave to the owner of the copyright the prescribed notice of his intention to make it; (*c*) the manufacturer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be so sold or supplied; and (*d*) in the case of a record which is sold by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the following provisions of this section. (2) Subject to the following provisions of this section, the royalty mentioned in paragraph (*d*) of the preceding subsection shall be of an amount equal to six and one-quarter per cent. of the ordinary retail selling price of the record, calculated in the prescribed manner: Provided that, if the amount so calculated includes a fraction of a farthing, that fraction shall be reckoned as one farthing, and if, apart from this proviso, the amount of the royalty would be less than three-farthings, the amount thereof shall be three-farthings."

Before dealing with these provisions it may be helpful to state briefly the history behind them and the steps which the respondents took to comply with them. Before 1911 it had been held that the reproduction of copyright musical works by mechanical means such as rolls for player pianos was not an infringement of copyright, and gramophone records had been manufactured on a considerable scale and sold without licence or payment of royalty. By the Copyright Act, 1911, it was enacted that copyright included the sole right to make any record or other contrivance by means of which a work might be mechanically performed. But it was provided by section 19 of the Act that making any such contrivance should not be an infringement if the maker inter alia gave the prescribed notice and paid royalties calculated in accordance with the section in respect of all such contrivances sold by him. The provisions of this section are broadly similar to the provisions of section 8 of the 1956 Act.

The respondents, the Hardy Co., operate a novel process whereby records which play for about $1\frac{3}{4}$ minutes are made on thin films of cellulose acetate. These films can then be suitably mounted and played in the ordinary way on gramophones. The process is inexpensive and the Hardy Co. sold to the Nestlé Co. a large number of these recordings at 4d. each. The Nestlé Co.

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then had them mounted on cardboard mounts which also carried advertisements for their chocolate.

The Hardy Co. informed the Mechanical Copyright Protection Society of the project in June, 1957. They said that the retail price of the records was to be one shilling plus 3 wrappers. This society stated that the proposal did not constitute a sale by retail and in consequence the proposed records could not be made under the provisions of section 8 of the Copyright Act, 1956: they further stated that they could not countenance the reproduction of their members' copyright music on records for the purpose of advertising the products of another company. After some correspondence the Hardy Co. gave a notice purporting to be under the 1956 Act and Regulations made under it. This notice included a paragraph: "F. The ordinary retail selling price of each record "will be not greater than 8¾d. exclusive of purchase tax and not "greater than 1s. inclusive of purchase tax." On July 25, 1957, these figures were altered to 1s. 1½d. exclusive of purchase tax and 1s. 6d. inclusive of purchase tax. The society maintained their views and the appellants now contend that this notice was not a valid notice under section 8 of the Act or the Regulations.

The scheme of section 8 appears to me to be clear. To avoid infringement four conditions must be complied with. Condition (*a*) limits the class of works for the reproduction of which the manufacturer can rely on this section and I need not further consider it: (*b*) requires notice to be given: (*c*) requires that the manufacturer shall intend the records which he makes to be dealt with in one or other of three ways: and (*d*) requires that if the intention is to deal with them in either of the first two of these ways a royalty shall be paid. Then subsection (2) provides for the amount of the royalty. Condition (*b*) refers to the prescribed notice and subsection (2) refers to royalty calculated in the prescribed manner. "Prescribed" means prescribed in Regulations made by the Board of Trade and the Copyright Royalty System (Records) Regulations, 1957, have been so made. On the view which I take of the case it is unnecessary to base my judgment on the terms of these Regulations. One argument submitted for the respondents would, if correct, mean that some of them are ultra vires. My view of the section does not involve any such result in the present case, and it would not be right to speculate whether in some other case some inconsistency might emerge between the provisions of the Act and those of the Regulations.

It appears to me that all four statutory conditions are intended to be complied with before a record is made or anything is done which apart from section 8 would amount to an infringement. Otherwise it could not be known when the record was made and sold by the manufacturer whether making the record was an infringement or not: that would depend on whether the condition was subsequently complied with or not. The respondents constructed a powerful argument on the basis that condition (*d*) only

comes into operation after a record has been sold by retail and that no royalty is payable until then. But I do not so read the section. I think that the Regulations rightly provide that in his notice under (*b*) the manufacturer must state what is to be the ordinary retail selling price of the record and that determines the amount of the royalty. And again I think that the Regulations rightly provide for the manufacturer paying the royalty at a much earlier stage than after sale by retail. The manufacturer pays royalty on records which he intends to be sold by retail. Apart from the last purpose set out in condition (*c*) he is not entitled to make for any other purpose. And if later someone disposes of a record in some other way no part of the royalty can be recovered.

I can now turn to what appears to me to be the crucial question in this case: was the 1s. 6d. an "ordinary retail selling "price" within the meaning of section 8? That involves two questions, what was the nature of the contract between the Nestlé Co. and a person who sent 1s. 6d. plus 3 wrappers in acceptance of their offer, and what is meant by "ordinary retail "selling price" in this context.

To determine the nature of the contract one must find the intention of the parties as shown by what they said and did. The Nestlé Co.'s intention can hardly be in doubt. They were not setting out to trade in gramophone records. They were using these records to increase their sales of chocolate. Their offer was addressed to everyone. It might be accepted by a person who was already a regular buyer of their chocolate; but, much more important to them, it might be accepted by people who might become regular buyers of their chocolate if they could be induced to try it and found they liked it. The inducement was something calculated to look like a bargain, a record at a very cheap price. It is in evidence that the ordinary price for a dance record is 6s. 6d. It is true that the ordinary record gives much longer playing time than the Nestlé records and it may have other advantages. But the reader of the Nestlé offer was not in a position to know that.

It seems to me clear that the main intention of the offer was to induce people interested in this kind of music to buy (or perhaps get others to buy) chocolate which otherwise would not have been bought. It is, of course, true that some wrappers might come from the chocolate which had already been bought or from chocolate which would have been bought without the offer but that does not seem to me to alter the case. Where there is a large number of transactions—the notice mentions 30,000 records—I do not think we should simply consider an isolated case where it would be impossible to say whether there had been a direct benefit from the acquisition of the wrappers or not. The requirement that wrappers should be sent was of great importance to the Nestlé Co.; there would have been no point in their simply offering records for 1s. 6d. each. It seems to me

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quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (*a*) does something of value to the supplier and (*b*) pays money: the consideration is both (*a*) and (*b*). There may have been cases where the acquisition of the wrappers conferred no direct benefit on the Nestlé Co. but there must have been many cases where it did. I do not see why the possibility that in some cases the acquisition of the wrappers did not directly benefit the Nestlé Co. should require us to exclude from consideration the cases where it did. And even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement.

I do not think that it matters greatly whether this kind of contract is called a sale or not. The appellants did not take the point that this transaction was not a sale. But I am bound to say that I have some doubts. If a contract under which a person is bound to do something as well as to pay money is a sale, then either the price includes the obligation as well as the money, or the consideration is the price plus the obligation. And I do not see why it should be different if he has to show that he has done something of value to the seller. It is to my mind illegitimate to argue—this is a sale, the consideration for a sale is the price, price can only include money or something which can be readily converted into an ascertainable sum of money, therefore anything like wrappers which have no money value when delivered cannot be part of the consideration.

The respondents avoid this difficulty by submitting that acquiring and delivering the wrappers was merely a condition which gave a qualification to buy and was not part of the consideration for sale. Of course, a person may limit his offer to persons qualified in a particular way, e.g. members of a club. But where the qualification is the doing of something of value to the seller, and where the qualification only suffices for one sale and must be re-acquired before another sale, I find it hard to regard the repeated acquisitions of the qualification as anything other than parts of the consideration for the sales. The purchaser of records had to send 3 wrappers for each record, so he had first to acquire them. The acquisition of wrappers by him was, at least in many cases, of direct benefit to the Nestlé Co., and required expenditure by the acquirer which he might not otherwise have incurred. To my mind the acquiring and delivering of the wrappers was certainly part of the consideration in these cases, and I see no good reason for drawing a distinction between these and other cases.

Is such a transaction within the contemplation of section 8? I proceed on the view that it was a sale, and, if so, it was a sale by retail and not by wholesale. But subsections (1) and (2) must be read together in light of the apparent object of the section. Its object appears to me to be twofold, to benefit the public

and to protect the financial interest of the owner of the copyright. The section makes it possible for records to be available to the public for the manufacture of which the owner might not have granted a licence. And it protects the copyright owner by requiring royalties to be paid on the ordinary retail selling price. Where records are sold in the ordinary way of business it can be assumed that in his own interest the manufacturer will fix a full price to cover not only the cost of production and his own profit but also the profit required by retailers. But where there is a special order and none of the records made are to be sold in the ordinary way but all are to be sold, as here, in an unusual way in order to promote a scheme for advertising quite a different business from selling records, the protection of the copyright owner is not at all secure. In such a case the retailer will get the manufacturer to fix such a retail selling price as will best suit him, and this may be something quite different from an ordinary economic price.

If the respondents are right, the owner of the copyright gets nothing in respect of the advantage to the retailer arising from the requirement that wrappers must be acquired and delivered, and he would get nothing in respect of any collateral advantage accruing to an advertiser however clear or however valuable. It is true that the price of 1s. 6d. left the Nestlé Co. with a profit after paying the cost of mounting, postage, and other expenses, though we do not know whether the profit was as great as retailers normally require. But the original proposal in this case was to sell at 1s. plus three wrappers and it might have suited the Nestlé Co. to sell at 9d. or 6d. plus six wrappers. It might even suit a particular advertiser to sell at less than the price he paid the manufacturer.

In its context I cannot interpret the phrase "ordinary retail "selling price" as applying to all sales however extraodinary in character and as meaning whatever money price may be charged irrespective of the type of transaction or of conditions attached to the sale or of collateral advantages accruing to the seller or of whether the money price is really the whole consideration for the sale. I am of opinion that the Hardy Co.'s notice that the ordinary retail selling price was 1s. 6d. was invalid, that there was no ordinary retail selling price in this case and that the respondents' operations were not within the ambit of section 8. They were therefore infringements of the appellants' copyright and in my judgment this appeal should be allowed.

LORD TUCKER. My Lords, this case has in its course through the courts resulted in a very narrow division of judicial opinion which shows that the point in issue, though short, is one of considerable difficulty. The conclusion which I have reached can, however, be stated quite shortly. I do not doubt that these records were supplied by the manufacturers "for the purpose of "being sold by retail" within the meaning of section 8 (1) (*c*) of

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the Copyright Act, 1956. I think the contrast throughout the section is between retail and wholesale sales and I can find no justification for limiting the sales to ordinary retail sales nor do I find it easy to define what is an ordinary retail sale, but this does not, in my opinion, conclude the matter. The royalty has, by subsection (2) to be calculated on the basis of the "ordinary "retail selling price." This does not mean the price prevailing on an ordinary retail sale but the ordinary price obtainable on a retail sale, and I think the ordinary price so obtainable envisages a money sum constituting the entire consideration for the sale. Otherwise it would be impossible to calculate the royalty percentage payable in cases where the money value of the additional consideration is incapable of valuation. The fact that the retailer may choose to sell at a loss cannot affect the proper interpretation of the section or justify a sale by him for a sum of money plus the delivery of a number of wrappers or other articles which he desires to obtain for reasons which he considers beneficial to his trade. The ordinary retail selling price as prescribed by Regulation 3 of the Copyright Royalty System (Records) Regulations, 1957, provides that it is to be calculated "at the marked or "catalogued selling price of single records to the public." The records in question are marked as follows:—"Remember all you "have to do to get each New Stars record is to send three "wrappers of Nestlé's 6d. milk chocolate bars together with postal "order for 1s. 6d." Under Regulation 1 (1) (*f*) the notice required by subsection (2) of section 8 must state the ordinary retail selling price as defined by Regulation 3. In the present case the notice, as amended, stated that "the ordinary retail selling price of each record will "not be greater than 1s. 1½d. exclusive of "purchase tax and not greater than 1s. 6d. inclusive of purchase "tax." This statement does not disclose the entire consideration but only that part of it that is expressed in terms of money and is therefore, in my opinion, defective. It is necessarily defective because it is impossible to state "the ordinary retail selling price" envisaged by subsection (2) if the money price is only part of the consideration.

If this is not the correct view it follows that there would be no infringement if the retailer sold each record for a penny plus one hundred wrappers, and I cannot believe that this could have been intended by those who framed this section and fixed the percentage of royalty on the basis of the ordinary retail selling price which must, I think, envisage a retail sale where the whole consideration is a sum of money.

It being conceded that if the notice given under Regulation 1 (1) (*f*) is defective the protection of section 8 is lost and the notice given being, in my view, necessarily defective in view of the nature of the consideration, it follows that there has in this case been an infringement of the appellants' copyright.

I should add that I do not feel able to accept the view that the requirement with regard to the wrappers merely constituted

a limited class of the public who having qualified for inclusion in the class then became entitled to purchase for 1s. 6d. This seems to me an unnecessarily artificial description of what is on its face one indivisible transaction.

For these reasons I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, were it not that a majority of your Lordships think differently I would have contented myself with expressing my complete concurrence with the judgment of Jenkins L.J. in the Court of Appeal.

I find the appellants' case somewhat elusive as it seems to oscillate between considering whether the sale of the record here is an ordinary retail sale and considering whether there is an ordinary retail selling price of the record. I can find no warrant in section 8 of the statute for the view that it contemplates two kinds of retail sale, ordinary retail sale and some other kind of retail sale which is not ordinary. Subsection (1) of the section refers four times to retail sales, and when in subsection (2) reference is made to ordinary retail selling price the only meaning I can take from that is a reference to the ordinary selling price of the retail sales mentioned in subsection (1). As Jenkins L.J. points out, this is also the view taken in the Regulations made under the Act where, in the absence of a marked or catalogued selling price, the phrase is defined "the highest price at which single "records are ordinarily to be sold to the public." In my opinion there is or is intended to be a sale of the record here and it is a retail sale. The only question, as I see it, is: "Is there an "ordinary retail selling price on which the royalty can be "calculated?"

As I agree with Jenkins L.J. that the production of three wrappers of three sixpenny bars of chocolate is merely a qualification for purchasing the record I will say only a few words on the contrary view that it is part of the consideration for the purchase of the record incapable of monetary assessment. To Nestlé these pieces of paper are worthless. Nestlé are no doubt pleased to see that somebody has been buying their chocolate. They would know that anyhow, without the production of chocolate wrappers, from the figures of their turnover. The wrappers represent a liability to Nestlé rather than an extra consideration if it be assumed, as I think it must, that on presentation of the wrappers and the tender of 1s. 6d. Nestlé are bound to sell the record. But that is because of the offer they have made accepted by a member of the public. If it be said that the sale of the record is of value to Nestlé because it promotes the sale of their chocolate, the same can be said of advertising their chocolate in the Press or in a number of other ways. Such overheads, like other overheads, go to increase the cost of production and, unless compensated by increased sales, may go to increase the price of the chocolate. But the retail price of 6d., or whatever it is, is just the price of the chocolate and nothing else. In the present

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case there is no reason for assuming that the price paid by the purchaser is paid for anything but the chocolate. As the facts show, there is ample profit to Nestlé in the sale of the record alone and no reason to attribute something extra in the sale of the chocolate.

It was suggested that for six wrappers and 1s. 3d. they might sell the record for 1s. 3d. They might if it was a business proposition and they chose so to encourage the sale of their chocolate. That would leave the problem as before. If for some reason which it is difficult to imagine they were to make alternative offers of a record for 1s. 6d. on production of three wrappers or for 1s. 3d. on production of six wrappers, that might suggest that the wrappers for some reason were worth one penny each. But that would certainly not mean that someone could compel a sale of a record for 1s. 9d. and no wrappers. The suggestion that these wrappers represent some intangible consideration seems to me to be entirely unreal. It only makes sense if it be assumed that in the sale of the chocolate the purchaser was paying something less than 1s. 6d. for the chocolate and the balance towards the purchase of the record. I have already dealt with that argument. I would only add that the purchase of the chocolate is (or would normally be) a contract with the retailer and there is nothing to suggest that the 1s. 6d. is anything more than the ordinary retail selling price of the chocolate sold, as other chocolate and other comestibles often are, in wrappers to keep them clean or to identify them or for advertising purposes. There may be some cases where containers have some intrinsic value which increase the selling price, but that is not this case. I agree with Jenkins L.J. that the price of 1s. 6d. was wholly attributable to and exhausted by the purchase of the chocolate.

The letter press in the advertisement "Fill in the coupon "and send it with a Postal Order for 1s. 6d., the price of the "record, and your three wrappers" and on the cardboard mount of the record "Send three wrappers from Nestlé's 6d. milk "chocolate bars, together with postal order for 1s. 6d." is, in my opinion, entirely consistent with, indeed, in my opinion, goes to support, the view that the ordinary retail selling price of the record is 1s. 6d.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, section 8 of the Copyright Act, 1956, provides for a royalty of an amount, subject to a minimum, equal to $6\frac{1}{4}$ per cent. of the ordinary retail selling price of the record. This necessarily implies, in my opinion, that a sale to be within the section must not only be retail, but one in which there is no other consideration for the transfer of property in the record but the money price. Parliament would never have based the royalty on a percentage of a money price if the section was to cover cases in which part, possibly the main part, of the consideration was to be other than money. This is in no sense

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a remarkable conclusion as in most sales money is the sole consideration. It was not argued that the transaction was not a sale.

The question, then, is whether the three wrappers were part of the consideration or, as Jenkins L.J. held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store.

I think they are part of the consideration. They are so described in the offer. "They," the wrappers, "will help you "to get smash hit recordings." They are so described in the record itself—"all you have to do to get such new record is to "send three wrappers from Nestlé's 6d. milk chocolate bars. "together with postal order for 1s. 6d." This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration. For these reasons I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Syrett & Sons*; *McKenna & Co.*; *Howe & Rake.*

J. A. G.

[COURT OF APPEAL.]

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April 22, 23, 24, 28.
Lord Evershed M.R., Ormerod and Willmer L.JJ.

[Plaint No. O. 2092.]

Landlord and Tenant—Rent restriction—Premium—Paid to third person—Grant of tenancy conditional on sale of house at undervaluation—Person requiring premium—Demand by landlords' agents—Benefit not received by landlords but by separate though associated company—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 40), *s.* 2.

As a condition of obtaining for the plaintiff the grant of a tenancy of a dwelling-house within the scope of the Rent Acts, a firm of estate agents, C. & C. Ltd., required the plaintiff and his wife to sell their house to a property company, P.T.E. Ltd., for £500 less than the market value. The tenancy was granted by the defendant company which was closely associated by shareholding and directors with the other two companies, though the benefit of the £500 was not transferred to the defendant company. The plaintiff brought proceedings to recover the sum of £500 from the defendant company as an unlawful premium:—

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Held, (1) that the prohibition in section 2 of the Landlord and Tenant Act, 1949,[1] against the requiring of premiums was not limited to the payments of fines or like sums but extended to requiring, as in the present case, the deduction of a specific sum from a known or assumed sale price as a condition of the grant of a tenancy.

(2) That the prohibition was not limited to payments made to the person requiring the payment but covered this case where payment was to the order of the landlord.

Rex v. *Birmingham* (*West*) *Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.* [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198 distinguished and dictum of Lord Goddard C.J. [1951] 2 K.B. 54, 57 questioned.

Observations of Atkin L.J. in *Remmington* v. *Larchin* [1921] 3 K.B. 404, 411 considered.

(3) That the plaintiff and his wife, as joint owners of the house sold, should be treated as having paid the premium jointly, and were jointly entitled to recover it from the landlord who required it, even though another company received it.

APPEAL from Judge Leon sitting at Willesden County Court.

The plaintiff, William Alfred White, a joiner, brought proceedings to recover £500, alleged to be an unlawful premium which he had been required to pay by a firm of estate agents known as Clifford & Clifford Ltd., acting on behalf of the defendants, Elmdene Estates Ltd., to a third company known as Pegasus Training Estates Ltd. (hereinafter called "purchasers"). The defendants and the purchasers were "property" companies and all three companies were associated. The defendants and the purchasers were controlled by one Van Dooren and his family. They were also shareholders in Clifford & Clifford Ltd. and Van Dooren was a director of that company. It was, however, found that no part of the benefit obtained by the purchasers reached the defendants.

The following statement of the material findings was cited from the judgment of the county court judge by Lord Evershed

[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(1) A person "shall not, as a condition of the "grant, renewal or continuance of "a tenancy to which this section "applies, require the payment of any "premium in addition to the rent. "(2) Subject to the provisions of Part "II of the First Schedule to this Act, "a person shall not, as a condition "of the assignment of a tenancy to "which this section applies, require "the payment of any premium. . . . "(5) Where, under an agreement "made after March 25, 1949, any "premium has been paid which, or "the whole of which, could not lawfully be required under the foregoing "provisions of this section (or, if the "premium was required before the "commencement of this Act, which "could not lawfully have been required "if this Act had then been in force), "the amount of the premium, or so "much thereof as could not lawfully "be required or have been required, "as the case may be, shall be recoverable by the person by whom it was "paid. . . . (6) A person requiring any "premium in contravention of this "section shall be liable on summary "conviction to a fine not exceeding "£100, and the court by which he is "convicted may order the amount of "the premium, or so much thereof as "cannot lawfully be required under "this section, to be repaid to the person by whom it was paid." Subs. (7) repeals s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, subject to a qualification. "(8) For the avoidance of doubt it is "hereby declared that nothing in this "section shall render any amount "recoverable more than once."

M.R.: "At the relevant time the plaintiff and his wife were "joint owners of 174, The Heights, South Harrow (hereinafter "called '174'), where they lived. The house was subject to a "mortgage, payments under the mortgage deed were in arrear "and the plaintiff and his wife decided that the only way out "was for them to sell 174, repay the mortgage money out of the "price obtained, and obtain a flat. They had nowhere to go, "they were compelled to leave their own house. . . . During "their quest for a flat they passed the window of Clifford & "Clifford Ltd. (hereinafter called Clifford), who were estate "agents, and they saw advertised in the window a self-contained "flat to let unfurnished. They went in and asked if the flat was "available and if they could see it. Clifford's representative, a "Mr. Williamson, replied to their question with 'Have you got "'a house to sell?' They said 'Yes' and Williamson then said "that he would take them over the flat, 108 Welldon Crescent. "They went to see it and liked it. It was conceded on behalf "of the defendants that the tenancy offered and subsequently "granted was one to which the Rent Restriction Acts and in "particular the Act of 1949 applied. Williamson then made it "plain to the plaintiff and his wife that they could not have the "tenancy of the flat unless they were prepared to sell 174 at "£500 less than its fair market value. I was satisfied that the "fair market value of that house was at the time between "£2,300 and £2,400 and that Clifford knew this very well and "on behalf of the defendants required the plaintiff and his wife "to sell it to purchasers who turned out to be Pegasus Training "Estates Ltd. (hereafter called 'Pegasus') at £500 less than "its value. The plaintiff and his wife thought it over and, as "they had nowhere else to go, they felt they had no alternative "but to agree. They accordingly sold 174 to Pegasus for £1,800 "and received in return from the defendants a tenancy of "108, Welldon Crescent at a weekly rent of £1 15s. 0d. I hold "that the sale by the plaintiff and his wife to Pegasus of 174 "at an undervalue amounting to £500 was required by Clifford "acting for the defendants as a condition of the tenancy being "granted by the defendants to the plaintiff."

The judge, however, held that he was bound by *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.*[2] to decide in favour of the landlords. The plaintiff appealed.

H. Heathcote-Williams Q.C. and *Henry Palmer* for the plaintiff.

Conrad Dehn for the defendants.

In addition to the cases referred to in the judgments, the following were cited in argument: *Cantor* v. *Pacey*[3]; *Minns* v.

[2] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

[3] (1949) 153 E.G. 163.

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Moore [4]; *Temple* v. *Lewis* [5]; *King* v. *Cadogan (Earl)* [6]; *Camden (Marquis)* v. *Inland Revenue Commissioners* [7]; *Silverman* v. *Green* [8]; *Inland Revenue Commissioners* v. *St. John's College, Oxford* [9]; *Morgan* v. *Couchman* [10]; *Henderson* v. *Arthur* [11]; *Utting & Co. Ltd.* v. *Hughes* [12]; *Attorney-General* v. *Wolverton* [13]; *Crespigny* v. *Wittenoom* [14]; *Hutton* v. *Lewis* [15]; *Blake* v. *Attersoll* [16]; *In re Cosh's Contract* [17]; *Steeds* v. *Steeds*.[18]

April 28. The following judgments were delivered.

LORD EVERSHED M.R. The question is whether, if a proposing landlord, as a condition of the grant of a tenancy by him, requires the proposing tenant to sell his own—that is, the tenant's—property at a stated amount of undervalue, not to the landlord himself but (the landlord being a limited company) at the landlord's demand to another company closely associated with the landlord, that amounts to requiring the payment of a premium within the terms of section 2 of the Landlord and Tenant (Rent Control) Act, 1949: and further, if it does, whether the tenant, who paid it, can now recover the premium from the landlord who required it.

The transaction which we have to consider, it must be confessed, is not an attractive one, and might well (as the judge thought) be said to be within the mischief aimed at by the Act; but the question is whether it is within the Act's language.

[His Lordship stated the facts and continued:] It is quite clear that the value of the house, at the interview which the plaintiff and his wife had with the representative of Clifford & Clifford Ltd., was stated and assumed and accepted as being £2,300; so that if the condition were complied with it meant that the sale price would be £1,800—as was later the fact. It is also clear that the plaintiff and his wife were joint owners; though it appeared from certain questions which were, quite properly, put in cross-examination to the plaintiff, that he (at any rate) regarded the interests of himself and his wife in equity as being equal; so that the plaintiff, in answer to a specific question put by Mr. Dehn, said that if they had received the full value, £2,300, "there would have been £250 for himself and £250 for his wife."

The judge, in a very full and clear judgment, would have concluded, on the facts which he had found, in favour of the plaintiff but for a decision in *Rex* v. *Birmingham (West) Rent*

[4] [1950] 1 K.B. 241; 66 T.L.R. 739; [1949] 2 All E.R. 800.
[5] [1954] 1 Q.B. 22; [1953] 3 W.L.R. 762; [1953] 2 All E.R. 1130.
[6] [1915] 1 K.B. 821; [1915] 3 K.B. 485 (C.A.).
[7] [1914] 1 K.B. 641; [1915] A.C. 241; sub nom. *Inland Revenue Commissioners* v. *Camden (Marquis)*.
[8] [1953] C.P.L. 508 (Cty.Ct.).
[9] [1915] 2 K.B. 621.
[10] (1853) 14 C.B. 100.
[11] [1907] 1 K.B. 10.
[12] [1939] 2 K.B. 231.
[13] (1896) 65 L.J.Q.B. 610.
[14] (1792) 4 T.R. 790.
[15] (1794) 5 T.R. 639.
[16] (1824) 2 B. & C. 875.
[17] [1897] 1 Ch. 9.
[18] (1889) 22 Q.B.D. 537.

Tribunal; Ex parte Edgbaston Investment Trust Ltd.[1] in 1951, to which I shall later refer: but he felt bound by that decision to hold that the transaction was one outside the scope of the Act of 1949.

Mr. Dehn, for the defendants in this court, has conceded—in accordance with the findings of the judgment—first, that the tenancy of 108, Welldon Crescent with which we are concerned was within the ambit of the Rent Acts: second, that what Williamson required, at the interview described by the judge, was in truth a condition of the grant of the tenancy; and third, that the requirement made by Clifford's was made by them as agents for the defendant company.

In those circumstances, the two principal questions presented to us are as follows. Question (1): Is the allowance (and I again take a neutral term) which was required at this interview and which was accepted, a payment of a premium within the relevant sections of the Rent Act? It is the argument of Mr. Dehn that it is neither the one nor the other—that is, neither a payment nor a premium. Question (2) (if the answer to the first is affirmative): Is the premium, £500, recoverable now from the landlord who required it, although he did not receive it or any part of it? If both these questions should be answered in favour of the plaintiff there arises a third question: Having regard to the particular beneficial interests of the plaintiff and his wife, according to the plaintiff's evidence, is he entitled to recover the full amount of £500 or is he limited to half that figure, £250?

At this stage I must refer to the relevant parts of the Landlord and Tenant (Rent Control) Act, 1949, of which the vital section is section 2, which provides: "(1) A person shall not, as "a condition of the grant, renewal or continuance of a tenancy "to which this section applies, require the payment of any "premium *in addition to the rent*. (2) Subject to the provisions "of Part II of the First Schedule to this Act, a person shall not, "as a condition of the assignment of a tenancy to which this "section applies, require the payment of any premium." I need not refer to subsection (3)—nor indeed to subsection (4), though Mr. Dehn did draw attention to it. Subsection (5) provides: "Where, under an agreement made after March 25, 1949, any "premium has been paid which, or the whole of which, could "not lawfully be required under the foregoing provisions of this "section . . . the amount of the premium, or so much thereof "as could not lawfully be required or have been required, as the "case may be, shall be recoverable by the person by whom it "was paid." There is then a proviso relating to cases which have arisen or might have arisen under earlier legislation. Subsection (6): "A person requiring any premium in contravention "of this section shall be liable on summary conviction to a fine "not exceeding £100, and the court by which he is convicted

[1] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

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" may order the amount of the premium, or so much thereof as " cannot lawfully be required under this section, to be repaid to " the person by whom it was paid." Then by subsection (7) there is a repeal (subject to a qualification) of section 8 of the Act of 1920; and finally, in subsection (8): " For the avoidance " of doubt it is hereby declared that nothing in this section shall " render any amount recoverable more than once."

The word " premium " is in this Act extended, by way of definition, in section 18 (2) as follows: " The expression " ' premium ' includes any fine or other like sum and any other " pecuniary consideration in addition to rent." There is a First Schedule, headed " Transitional provisions as to premiums," Part I of which deals with adjustments for premiums paid before the commencement of this Act; and it is sufficient, I think, to state that the sense of this part of the Schedule is that such a premium may be converted, by the necessary arithmetical calculation, into a rent, for certain purposes which then follow. The point of my having stated it in that form is that, as Mr. Dehn quite rightly pointed out, it is at least clear that the First Schedule, Part I, does require that the relevant so-called " premium," if it is to be capable of arithmetical calculation, must at least be expressed as a money sum in one form or another.

It is necessary that I should also refer back to the previous legislation upon this matter; and before doing so I draw attention to the long title of the Act of 1949. So far as relevant, it provides thus: " An Act . . . further to restrict the requiring of premiums " in connection with tenancies to which those Acts "—that is, the earlier legislation—" apply." I go back to the fons et origo of these " premium " provisions, which is found in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, section 1 (2) of which states: " A person shall not in considera- " tion of the grant " (etc.) " of a tenancy of any dwelling-house " to which this Act applies require the payment of any fine, " premium, or other like sum in addition to the rent, and where " any such payment has been made in respect of any such " dwelling-house after " (a stated date) " then the amount shall " be recoverable by the tenant by whom it was made from the " landlord. . . ."

I observe that in that subsection the definition of " premium " now found in section 18 of the Act of 1949 is somewhat curtailed; for it refers only to " the payment of any " fine, premium, or other like sum ": there is no reference to " any other pecuniary consideration." It will also be noted that by the express terms of section 1 (2) the amount recoverable is stated to be recoverable " from the landlord."

In the year 1920 that section was replaced by section 8 of the Act of 1920—which, it will be recalled, is referred to in section 2 (7) of the Act of 1949. As re-stated in section 8 (1), the prohibition about premiums runs as follows: " A person shall not,

" as condition of the grant . . . of a tenancy or subtenancy of " any dwelling-house . . . require the payment of any fine, " premium, or other like sum, or the giving of any pecuniary " consideration, in addition to the rent, and, where any such " payment . . . has been made or given . . . the amount or " value thereof shall be recoverable by the person by whom it " was made or given." It will be observed that in this section there is added to the prohibited subject-matter (if I may so describe it) the giving of any pecuniary consideration. On the other hand, the words " from the landlord," which were found in section 1 of the Act of 1915, defining the person from whom the premium could be recovered, are omitted.

In the Act of 1949 the prohibition, or series of prohibitions, in section 2 is shorter. All you find is " payment of any " premium "; and then the scope and extent of the prohibition is shown by the expanded use of the word " premium," as stated in section 18 (2), so as to include " any fine or other like sum " and any other pecuniary consideration in addition to rent." It was Mr. Dehn's argument that under the Act as it now stands, and according to a proper construction of the English words used, the " payment " which is prohibited is limited to a cash sum, or at any rate to its strict equivalent—for example, perhaps payment by cheque in the ordinary way, or perhaps also a set-off in account against another sum expressed in money. And it is further his contention that the " premium," even as expanded in the definition, is limited to something payable to and received by the landlord.

Mr. Dehn cited to us a great number of cases. I certainly make no complaint of that fact: indeed, I think it right that I should record my own admiration for the great skill and industry that Mr. Dehn devoted to his presentation of this case. But having considered all these cases, I am bound to say that I do not think that they provide any assistance in solving our problem; though I am grateful for having had the opportunity of seeing them. Thus, I do not myself think it helpful, in the context of this legislation, to consider relatively old cases relating to the use of the word " premium," unexpanded by any definition, in its old strict conveyancing sense, or as used (for example) in certain taxing statutes. We were referred, for example, to statutes of the reign of King George III intended to prohibit or limit the sale of life annuities; and, as I have said, though we have examined these cases I cannot think they really assist in construing the provisions of this modern legislation—though there are some later, modern cases, to two of which at any rate I shall refer. Here, however, we are concerned with the effect, first, of this definition in section 18 (2). It was Mr. Dehn's submission that " other pecuniary consideration " must be construed ejusdem generis with " fines " and " premiums "—which (for reasons already indicated) he sought to confine to the kind of usage in which those words are found in connection with older

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conveyancing language where the "fine" or "premium" is in effect equivalent to, or in substitution for, a part of the rent and intended to reduce the annual amount payable by way of rent accordingly. I do not think that "other pecuniary considera-tion" ought to be, or can properly be, so limited. After all, the words in the definition are "any other pecuniary considera-tion"—which means, presumably, according to the ordinary sense, any pecuniary consideration other than (inter alia) fines or other like sums—that is, other sums like fines. It seems to me, therefore, that the phrase "any other pecuniary considera-tion" (though I am not suggesting it covers other than pecuniary considerations) is a formula of fairly wide import. It is quite true that (as I have pointed out) the word "giving," which was found, in relation to pecuniary consideration, in section 8 of the Act of 1920, is not found in this section. I am not saying that Mr. Dehn would go so far as to concede, if it were found that the word "giving" were somewhere included in these statutory provisions, that on this part of the case he was thereby defeated. But I think he was prepared to say that the case against him would be stronger had the word "giving" been repeated in this Act. But, in all the circumstances, I do not think that the absence of the word "giving" is significant. As I have pointed out, the purpose of this Act, according to its long title—and it is manifest in many other ways—is further to restrict the taking of premiums. It is quite true that it brings in (and brings in, I think I am right in saying, for the first time) the exaction of a premium not only on the grant or renewal of a tenancy but also on an assignment—a point which is of significance on another aspect of the case. But none the less it would, as I think, be a very surprising thing, in the face of this Act and its long title, if you could take it that the effect was to render permissible types of so-called "premiums," types of "pecuniary consideration" exacted, which had been prohibited by earlier legislation. I think that what Parliament has done has been, for the purpose of abbreviating the operative section, to put in a form of definition of the word "premium" but not thereby to limit the enacting part to a scope narrower than under the earlier legislation.

I, therefore, conclude that, where a specific sum is to be deducted from a known or assumed sale price as a condition of the grant of a tenancy, that is a "pecuniary consideration" within the scope of the definition, and amounts, therefore, to a premium. If I am right it must follow that the exaction of such a deduction must amount to a "payment"; and I find, indeed, no difficulty in so concluding: for the word "payment" in itself is one which, in an appropriate context, may cover many ways of discharging obligations. It may even (as is well known, though it does not arise in this case) include a discharge not by money payment at all but by what is called "payment in kind." It follows, therefore, that if, in the present case, the defendants

had required, as a condition of the grant of a tenancy, that the plaintiff should sell to the defendants his own house, 174, The Heights, for £500 less than the known or assumed value of £2,300, that would have been the requiring of the payment of a premium, within the scope of the section.

But there arises the second part of the question—already adumbrated—on which, I confess, I have found more difficulty: Is the "payment" contemplated by the section confined to one made to the landlord?—and it is upon this question that *Rex* v. *Birmingham (West) Rent Tribunal*[2] ex facie is in support of Mr. Dehn's argument and is such as to have compelled the judge to have decided this case as he did. It is, perhaps, an odd feature of this Act that nowhere in terms does it state to whom the required payment is to be made. Originally (it will be recalled) section 1 (2) of the Act of 1915 in terms was so expressed as to be limited to the case of a payment to the landlord. But the reference to the landlord was dropped in 1920; and it was pointed out in one of the cases to which I shall later come (*Remmington* v. *Larchin*[3]) that one possible reason for that was that the Act of 1920 comprehended the requirement of a premium upon the grant not only of a tenancy but also of a subtenancy. But, of course, if that is so then it does seem to follow that the dropping of the reference to the landlord was deliberate: in other words, that the intention of the amending legislation was not confined to payment to the landlord. It is quite true that, on this view, one might well have expected Parliament to have substituted for the phrase "the landlord" some words like "the person who received it." That they have not done. Nevertheless I think myself (if I am free to do so) that the dropping, in the Act of 1920, of the words "to the "landlord" was significant. A contrary view (as is quite plain) would very gravely limit the effectiveness of the legislation.

There is no doubt—and Mr. Dehn, of course, conceded—that payment to a mere nominee, a mere alter ego of the landlord, would be payment "to the landlord"; and if one pays a debt of the landlord's which he owes to some third party the same might equally be true. But even in the case where the payee was a pure nominee or alter ego it would by no means be easy in every case for a tenant so to prove. If the object of the legislation was, and is, to prevent tenants being charged excessive rents because of the economic pressure of a housing shortage, and if it was to achieve, or to assist in achieving, that end that it was made unlawful to charge a premium in addition to the rent, then why, as a matter of logic, should a premium paid to the landlord, direct or to his mere nominee, be unlawful, and one paid, to the landlord's order, to some other person whom the landlord nominated—say to a friend, to his son, to a trustee, or (as here) to an associated company—be lawful? If Mr. Dehn is right,

[2] [1951] 2 K.B. 54.

[3] [1921] 3 K.B. 404.

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this further must be added, that some words ought to be written in: you would have, in other words, to write into the legislation the words "to the landlord" in a case like this, or (having regard to subsection (2)) "to the person requiring the payment." Those words are not in fact there; and by well-established principles of construction words should not be written into an Act of Parliament unless the sense of the Act plainly requires that to be done.

Mr. Dehn further, and most naturally and properly, relied on other language in the section. For example, he referred to the phrase on which I have laid emphasis in reading the section, in section 2 (1), "in addition to the rent." He referred to the word "recoverable" in subsection (5). He referred (and this is perhaps stronger still) to the word "repaid" in subsection (6), where the court before whom a landlord may appear for making an unlawful charge may order that the premium be "repaid to "the person" who paid it.

Apart, however, from *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ltd.*,[4] I am satisfied, and treating this matter as res integra would conclude, that these considerations, to which I have alluded and which Mr. Dehn much pressed upon us in argument, are not sufficient to limit the cases under the Act to those in which the payment has been made to the person "requiring." No doubt that sort of case, if you look at the history of the legislation, is the one which would most commonly spring to the mind; but the words "in addition to the rent" I think only tend to show that this is something which is not the rent capitalised (as did occur in one of the cases which came before the court); nor indeed is it necessary after all (though it would normally be the case) that the rent should be paid to the landlord. Again, the word "recoverable," I think, in this context, only means that the premium, the sum paid, would be the proper subject of a claim which these courts would recognise. And finally, the word "repaid" in the relevant phrase in subsection (6) is I think used only in relation to the person who paid it, making the point that that person may get back what he himself paid. It remains equivocal from whom he may be able to get it back.

Rex v. *Birmingham (West) Rent Tribunal, Ex parte Edgbaston Investment Trust Ltd.*[4] came before the Divisional Court on an application for an order of certiorari. The case was a somewhat exceptional one on its facts. The tenant was anxious to get a flat in a building which at the time the agreement was entered into did not contain or consist of flats; and the agreement that was made was of a tripartite nature, the parties to it being the owners of the premises, called the landlords, who were going to let to the tenant a flat when the flat had come into existence; the builders, who were going to do the conversion and were

[4] [1951] 2 K.B. 54.

going to create the subject-matter on which alone the tenancy agreement could operate; and the tenant himself. Thus, you find that the agreement first of all sets out that the landlords and the tenant agree with the builders that the builders will do the necessary conversion of these dwelling-houses into a block of large flats, to the satisfaction of the named surveyor of the landlords, for a sum of money of which the landlords are going to pay half and the tenants between them are going to pay half. Next, the builders agreed that they would do that work and would look to the landlords for half the £18,000 and to the tenants, in the proportions later stated, for the remaining £9,000. Then in the third clause of the agreement it is provided that if the building and works should be completely finished to the satisfaction of the surveyor, the landlords will grant and each of the tenants will accept and execute a good and sufficient lease of one of the flats for a term from a certain date there mentioned, at a yearly rent, there being no further reference to the amount paid to the builders—which, ex hypothesi, when the agreement for a lease came to be executed, would have been already discharged. In those circumstances, however, the rent tribunal had decided that the sum which a given tenant had paid as his proportion of the builders' charges for doing the conversion was a premium. On the facts of that case, the Divisional Court held that it was not a premium; and, if I may respectfully say so, I think that was a correct decision, because it seems to me that it could not be said, with any fair use of language, that the payment of this sum to the builders was a requirement or condition of the grant of the tenancy, as the Act contemplates. There was a bargain made that, first of all, a subject-matter had to be created: the proposing landlords and the proposing tenant agreed that they would bear in certain proportions the cost of creating the subject-matter: and when that had been done to the satisfaction of the surveyor then there was an agreement that a tenancy would be granted.

Thus, it was concluded that the case was in truth outside the scope of the Act of 1949. But there is no doubt that, in course of his judgment, Lord Goddard C.J. used language which went (as I think) further than was necessary to dispose of the case on the lines which I have indicated. Thus, at the beginning of his judgment, Lord Goddard C.J. is reported as saying[5]: "The "whole question here depends on whether or not the Act of "1949 on its true construction has any application to the case "where a sum of money is paid not to the landlord but to some "other person"; and, later, ". . . in our opinion this Act can "only apply to premiums which are paid to the landlord." He then deals with the substance of the case, and I will read it because it seems to me (if I may say so) that here should be found the true basis of the decision. He says[6]: "In the present

[5] [1951] 2 K.B. 54, 56. [6] Ibid. 57.

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"case the terms of the main agreement of July 31, 1948, make "it clear that the builders, who were a party to the agreement, "and willing to enter into the speculation or enterprise, were "willing to convert the premises for the sum of £18,000 and only "to look to the landlords for half that sum. It is abundantly "clear from the agreement that the builders could never have "sued the landlords for anything more than £9,000. If they "were to obtain more, tenants had to be found. Then each "tenant had to agree to pay them £500, or he would not be "granted a lease; but he had to pay that money not to the land-"lords but to the builders. The landlords never had any claim "against the tenant for the £500, although they would probably "not have granted the lease to anybody who had not agreed to "sign the main agreement. The builders could only recover the "balance of the £9,000 from the various tenants up to £500 each. "The payments made by the tenants were made before the Act "came into force. Supposing that this had been a case after "the Act came into force, from whom could the tenants have "recovered the money if they had paid it? They could not "have recovered it from the builders because the consideration "which supported the payments was not the grant of the lease" —and note those words—"but the work which the builders did "in converting the premises. They could not have recovered it, "as it seems to me, from the landlords, for the landlords had not "received the money." Then, later, and this was the passage quoted by the judge which he felt particularly pressing upon him: "In the present case I prefer to base my judgment on the "proposition that, on its true construction, this Act was intended "to apply only to a pecuniary consideration paid to the landlord."

It is quite plain (if I may respectfully say so) that that statement, on the face of it, cannot be right. No reference had been made in the argument, so far as I can see, to subsection (2) of section 2 of the Act of 1949, which deals with the case of the demand of a premium as a condition of an assignment. In that case it would be difficult to suppose that the only person of whom it was intended to say "he received an unlawful premium" would be, not the assignor, but the landlord. To that extent, in my judgment, therefore, the view of the Divisional Court must require qualification. But, apart from that matter, I have concluded that the language in the *Birmingham* case [7] went further than was necessary or justifiable. The true view of the case, I think, is that it was not one of a demand, as a condition of a lease, of the payment of a particular sum at all: it was a case of a quite distinct commercial arrangement, outside the scope of the Act. If, therefore, Lord Goddard C.J. meant by his language that the Act was intended to apply only to a payment to the landlord as distinct from a payment to the landlord's order—and I am not sure that he did, for the limitation was unnecessary to

[7] [1951] 2 K.B. 54.

his reasoning—I am unable, with all respect, to agree with him. I cannot agree that this Act should be construed as though the words—not, "to the landlord," but "to the person requiring "the payment"—had been (as they are not) inserted in the relevant section.

That, however, is still not the end of it, because (and this argument was much pressed upon us by Mr. Dehn, and has indeed caused me some anxiety) it is no doubt true that the view apparently expressed by the Divisional Court in the *Birmingham* case [7] in 1951 may well have been acted on in other cases since. Other landlords may have said, upon that authority, "It is all "right so long as I tell the tenant not to pay me but to pay my "friend, or my son, or some other person whom I nominate"; and it is after all true that the unlawful demanding of a premium does amount, on the part of the landlord, to a criminal offence.

Such considerations were expressed in an earlier case, in 1921, of *Remmington* v. *Larchin*.[8] That again (as is true of so many of these cases) was a case of a somewhat special character on its facts. There a tenant with a short term left of his lease to run—they were rent-restricted premises—said to another: "If "you will pay me £*x* I will surrender my lease and get the land-"lord to grant you a new one at the protected rent"; and that bargain was made. It was quite clear that the landlord never knew, from first to last, anything about this payment which the old tenant had extracted from the new; and (as is, I think, clear from the judgments in this court) one reason for the decision against the view that this was a premium which could be recovered from anybody was that it was not a payment of a premium as a condition of the grant of a tenancy but the payment of a premium in consideration of somebody procuring the landlord to grant a tenancy—which is, of course, a different thing. But in the course of the judgments the point was debated and stressed by all the judges of this court that if there are two fair constructions of a penal Act you should tend to prefer that construction which does not extend but rather limits the penal consequences of the legislation. Atkin L.J., indeed, went a little further; for he said (and he was speaking of the Act of 1920 [9]): "Therefore "it is plain what was meant by the use of these words in that "Act. They meant the payment of a sum to the landlord in "consideration of a grant by him. . . ." It was conceded that that was, in the circumstances, a mere dictum. Atkin L.J.'s expression of opinion that the prohibited payment must be limited to a payment to the landlord is not found in the judgment of Bankes L.J. or of Scrutton L.J. Nevertheless, it is a point of substance and, I think, of difficulty, whether now, in 1959, we should hold that the *Birmingham* case [10]—though rightly decided—contains statements, as reasons, which went further than was required for the decision and which in our view were erroneous.

[7] [1951] 2 K.B. 54.
[8] [1921] 3 K.B. 404.
[9] Ibid. 411.
[10] [1951] 2 K.B. 54.

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On the whole I have come to the conclusion that we ought not now to hold that the *Birmingham* case [10] governs the present action. That the judge felt so compelled to hold is, of course, plain. But the reasoning of the Divisional Court in the *Birmingham* case [10] is not binding upon us, and I am not satisfied that there is, upon a true construction of the plain words of this section, a sufficient doubt as would justify me, contrary to my own view, in saying that the reasoning—or part of the reasoning, because that is all it amounts to—in the *Birmingham* case [10] ought to be sustained by this court, and that the matter is one which (if it thinks fit) Parliament ought to remedy. After all, I cannot think that many landlords, seizing upon these observations of Lord Goddard C.J.'s in the *Birmingham* case,[10] would have said: "It is all right; we can require payment of a premium "so long as it is not to us"; or that, if they had done so, they would have done so with a very clear conscience.

I, therefore, answer both parts of the first question formulated earlier in this judgment in favour of the plaintiff and adversely to the defendants.

There then arises the second question—also I think a difficult one: From whom is the premium which, on my construction, has been paid, recoverable? Again, the Act is perhaps strangely silent, save for the necessary inference from subsection (6). If I may refer to it again by way of reminder, that subsection provides that the person requiring the premium may be liable to summary conviction, "and the court by which he is convicted "may order"—and it is, of course, discretionary—"the amount "of the premium, or so much thereof" (etc.) "to be repaid to "the person by whom it was paid." That subsection at least shows plainly, if my view is so far right, that the person requiring the premium, even though he has not received it, may be ordered to repay it.

Mr. Dehn has said that if he is wrong on the first question, then it must follow that the premium is repayable from anybody, both him who required it and him who received it. I am not satisfied that that is so. Nor indeed is it necessary for this decision that I should express any view about it. I do not, therefore, express any view whether, if the Pegasus company had been sued, they might have been held liable to repay. This much, however, is clear, that the Pegasus company would not be within the terms of subsection (6), for the Pegasus company did not "require" the premium, within the contemplation of the section, seeing that they were not, and were never intended to be, parties to the grant of the tenancy. But it is also possible (as appeared from examples taken during the course of the argument) that you might have a recipient of a premium, of a pecuniary consideration, who was himself quite innocent of its being a result of any requirement by a landlord as a condition of granting a

[10] [1951] 2 K.B. 54.

tenancy. In those circumstances, I am not, as at present advised, prepared to say, and do not say, because it is unnecessary to say, whether anybody but the landlord is liable to pay back (in the sense in which I have used that phrase) the premium. But I do say that, having regard to the general context of the section, and subsection (6) in particular, I am satisfied that a landlord who required a premium is liable to pay it back even though he himself did not receive it.

In the circumstances, there remains only the third and subsidiary question, already indicated: Is Mr. White entitled to recover the full £500 or only half that sum, £250? I note that the point which I am now upon was not specifically taken in the defendants' pleading, though I am prepared to assume, particularly having regard to the plea in paragraph 2 of the defence, denying that the plaintiff paid a premium "of £500 or any sum," that it is open to the defendants to take the point. But the result of the absence of any specific plea is that all the evidence available to show what were the exact beneficial and other interests in the property 174, The Heights, of the plaintiff and his wife has to be derived from the statement by the plaintiff in cross-examination in which he certainly assumed—and there is no reason to suppose wrongly assumed—that the beneficial interests in the house were as between himself and his wife equal. But the conveyance (for example) from the plaintiff and his wife to the Pegasus company was not produced. I think, however, Mr. Dehn conceded (if I followed him) that the purchase price of £1,800 was in fact paid to the plaintiff and his wife jointly and that as owners they jointly conveyed the property to the Pegasus company.

The matter is not, I think, one that admits of long or elaborate argument, but on the whole I conclude that the right answer must be that the plaintiff and his wife are to be treated as having jointly paid the premium of £500 by way of deduction from the sum of £2,300 which otherwise would have been paid to them jointly and, therefore, they are jointly entitled to recover it from the landlord. In the circumstances it follows, as I think, that the plaintiff is entitled—in the absence of any objection (and there has been none) to his wife not being joined as co-plaintiff—to recover the full sum of £500. What he does with the £500 as between himself and his wife is a matter with which the defendant company is not in the least concerned.

It follows, for the reasons which I have attempted to state, that in my judgment the right answer to this case is that which the judge himself (apart from this last point, with which he did not deal) would have directed, had he felt himself free so to do: in other words, I think that the plaintiff is entitled to judgment for £500, being repayment to him of a premium, payment of which was unlawfully required by the defendant landlord as a condition of the grant of a tenancy.

ORMEROD L.J. I agree that this appeal should be allowed.

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Mr. Dehn, on behalf of the defendants, has conceded that the premises in question are premises to which section 2 of the Landlord and Tenant (Rent Control) Act, 1949, applies. He also agrees that whatever was required of the plaintiff was required as a condition of the grant of a tenancy, and that it was required by the defendants through their agents, the firm of estate agents.

There are two main questions, therefore, to be decided. The first is: Did the defendants, in requiring the plaintiff to sell his house at £500 less than the agreed value as a condition of granting him a tenancy, require him to pay a premium in addition to the rent? The second question is: If so, was it any less a premium because the plaintiff was required to sell to the Pegasus company and not to the defendants?

Mr. Dehn argued, with considerable force, that the answer to the first question must be in the negative. He submitted that there was nothing in the nature of a payment in the transaction and therefore it could not come within the section. He drew attention to section 8 of the Act of 1920 (to which Lord Evershed M.R. has already referred), where the words were, "the payment "of any fine, premium, or other like sum, or the giving of any "pecuniary consideration, in addition to the rent." He argued that the effect in the Act of 1949 of leaving out the word "giving" and relating the word "payment" to the words "pecuniary "consideration" as well as "premium" must be taken as meaning that "pecuniary consideration" was intended to mean nothing more than some form of payment such as handing over a cheque or perhaps some similar negotiable instrument. I cannot for my part agree that it was the intention of the legislature to narrow the scope of the expression "pecuniary consideration" in this way. As has already been pointed out, the purpose of the Act was further to restrict the requiring of premiums and not to ease the restrictions already imposed. According to section 18 (1) of the Act of 1949, the expression "premium" includes "any other pecuniary consideration in addition to the rent." There can be no doubt that on the facts found by the county court judge there was consideration. The plaintiff was required to do something he was under no legal obligation to do. He was required to sacrifice a sum of £500 on the sale of his house. That, in my view, must be as much a "pecuniary consideration" as if he had been required to make the actual payment of £500 in cash.

Though, of course, it is in no way conclusive, it is interesting to see from the evidence how the parties themselves regarded this transaction. It happened that some time after the plaintiff had been in possession of his flat he went to see the agent about some repairs to the premises which he had asked should be done, and he saw the agent in his office. The agent apparently denied that the plaintiff had asked for repairs to be done, and the plaintiff said: "I cannot understand you people. You have already "had £500 out of me. I think you are a pack of swindlers."

The agent, not unnaturally, said: "You cannot talk like that. "You must get out of the office." Then the plaintiff went on to say: "When I mentioned the £500 he said 'I did not have "'it.'" It is clear that, whatever the legal effect of the transaction, the parties themselves were regarding it as being one where the sum of £500 had been paid by the plaintiff to somebody, and Mr. Williamson, the agent, was saying: "It was not "paid to me." That is, as I have said, in no way conclusive, but it does point, I think, to what the reality of the transaction was in the minds of the parties, and that was, that here you had a house the agreed value of which was £2,300 and it was agreed that that house should be sold, as a condition of the grant of a tenancy, to another person, the Pegasus company, for a sum which was agreed to be £500 less than the agreed price. That to my mind must be as much a "pecuniary consideration" as if there had been an actual payment of that sum of £500.

On the second question such a consideration is, in my judgment, none the less a "premium" within the meaning of the section because the plaintiff was required to sell his house to a third person, the Pegasus company, and not to the defendants. It is one of the fundamental principles of the doctrine of consideration that it must move from the promisor but need not move to the promisee. Here the consideration moved from the promisor, the plaintiff, although it did not actually move to the promisee, the defendants, but to another party. Mr. Dehn agreed in the course of the argument that if the word "pecuniary" had been left out of the definition in section 18 and the word "consideration" was without qualification, he might be in a difficulty on that part of his argument, and I find it hard to understand why there should be any difference in the position because the consideration must, according to the definition, be a pecuniary one.

Mr. Dehn sought support for his argument in a number of authorities where the word "premium" was held to be a payment of a sum of money to the lessor. For my part, I did not feel that the court could derive assistance from the interpretation of an expression used in statutes dealing with matters so far removed from the one under consideration. The county court judge would have decided the case in favour of the plaintiff had he not felt himself bound by the decision of the High Court in *Rex* v. *Birmingham (West) Rent Tribunal*,[11] to which reference has already been made by Lord Evershed M.R. Mr. Dehn of course relied strongly on this case, and particularly on the words of Lord Goddard C.J., to which reference has been made, when he said[12]: "In the present case I prefer to base my judgment "on the proposition that, on its true construction, this Act was "intended to apply only to a pecuniary consideration paid to the "landlord." The case was very different from the one under

[11] [1951] 2 K.B. 54. [12] Ibid. 58.

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consideration. There was an agreement between a landlord, a tenant, and a builder, for the builder to convert a part of a house into a flat, and for the tenant to pay the builder the sum of £500 as his share of the cost, it being agreed that the landlord would grant a tenancy when the work was done to the satisfaction of the surveyor. There was no question of payment to the landlord: a payment was to be made to the builder in return for work done. There was no question, as in the present case, of the money being paid to a nominee of the landlord.

I agree with Lord Evershed M.R. that if Lord Goddard C.J.'s words mean that a "premium" is a sum of money which must be paid as it were into the pocket of the landlord, then the judgment went further than was necessary to decide that case; and I would agree that those words cannot now be supported. It appears to me that the proper construction of these words is that a "premium" is a sum of money which is paid to the landlord or to his order, and if those words are included then the dictum of Lord Goddard C.J. can be reconciled with the position as I think it is. The county court judge has found here that the defendants made no profit in this transaction. So far as that means that there is no evidence of any profit having been made, I would agree with him; but it does not, in my view, make any difference to the position. For a landlord to require that a payment shall be made to a third person seems to me to be nothing more than for him to specify the manner in which payment shall be made; and I think there is considerable force in the argument that a payment made to the order of the landlord is a payment made to the landlord. I am satisfied that in these circumstances this transaction comes within the section and that the sum of £500 is recoverable, and is recoverable from the defendants, by virtue of section 2 (5) of the Act of 1949.

There is nothing I wish to add on the question whether the plaintiff should receive the sum of £500 or only £250. I agree with the view expressed by Lord Evershed M.R. that he is entitled to recover the full sum of £500.

I would, therefore, allow this appeal.

WILLMER L.J. I am of the same opinion.

There are four questions which have been raised in this case: First—leaving aside for the moment the question to whom payment was made—can it be said that the defendants did require payment of any premium at all? Second, does the fact that payment was required to be made to a third party make any difference? Third, if a premium was "required" within the meaning of the Act, is it recoverable from the defendants? And fourth, if any sum is recoverable, is that sum the full amount of £500 or only £250, having regard to the fact that the plaintiff and his wife were joint owners of the house that was sold?

As to the first point, I can state my views very briefly. To my mind, there can be no doubt but that the plaintiff suffered

a detriment such as would constitute perfectly good consideration within the ordinary law of contract. Equally, it seems to me, there can be no doubt that that detriment was a pecuniary detriment, in the sense that it represented a sacrifice of £500. Again, in my judgment, there can be no doubt that the defendants required a "payment" to be made. It is true that no actual money passed, but I venture to point out that a taxpayer is none the less a taxpayer because income tax which he owes is deducted at source. Similarly, the plaintiff and his wife in this case none the less "paid" £500 because it was deducted from the purchase price of the house that they had for sale.

As to the second point—namely, whether the fact that payment was made to a third party makes any difference—as has already been pointed out by Lord Evershed M.R., the Act says nothing about the premium being paid to the landlord. Indeed, the existence of subsection (2) of section 2 shows that there must in some cases be circumstances in which a premium may be payable to somebody other than the landlord. On general principles I am very much exercised by the consideration that, unless the Act is held to cover a payment made in such circumstances as those of this case, it can so easily be evaded by an unscrupulous landlord by the simple expedient of directing payment of the premium to some third party. If so, the Act would very soon become a dead letter, because that is what every unscrupulous landlord would do. I share the doubts expressed by my brethren as to the value of citing dicta from other cases where the words "premium" or "payment of a premium" were considered in other contexts; and I think I may usefully refer to what was said by Lord Evershed M.R. in *Woods* v. *Wise*,[13] where he adverted to this very point, namely, the danger of applying literally what was said, for instance, about the word "premium" in the context of Finance Acts. We are here considering the word in the context of the Rent Acts, which form a wholly different background.

As it seems to me the junior counsel for the plaintiff put his finger upon the real point in relation to this aspect of the case when he pointed out that, under the ordinary law of contract, payment as directed by the party entitled to payment is held to be good consideration. I can see no reason why payment to Pegasus in this case, as directed by the defendants, should not be regarded as good consideration within the section.

The only obstacle in the way of this construction of the Act is, of course, the decision of the Divisional Court in what has been described as the *Birmingham* case.[14] My Lords have both dealt very fully with that case, and I see no object in going over it again. All I desire to do is to express my complete concurrence with what has been said by my Lords about that case;

[13] [1955] 2 Q.B. 29, 45; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

[14] [1951] 2 K.B. 54.

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and in the circumstances I do not think that that decision can be regarded as any obstacle in the way of our holding that this was a payment of a premium, required by the defendant landlords, notwithstanding the fact that payment was directed to be made to a third party.

Passing to the third question, namely, whether, the premium having been paid to a third party, it is now recoverable from the defendants, I desire to do no more than emphasise that, as I read it, section 2 of the Act of 1949 is primarily directed against the person "requiring" the payment of a premium. He is the person who is rendered liable to criminal prosecution under subsection (6), and he is the person who, under that subsection, may in such criminal proceedings be required to repay any premium unlawfully exacted. It seems to me that subsection (5) should be read together with subsection (6); and the conclusion appears to me to follow that the person who "requires" payment of a premium (in this case the landlord) is the person against whom primarily the amount may be recovered. It is unnecessary in this case to consider whether a premium unlawfully exacted could or could not be recovered from the person to whom it was paid. The plaintiff in this case has not sought to recover the premium from Pegasus, and it is not necessary to express any view on that point. I am satisfied that it is recoverable from the defendants as being the persons who "required" its payment.

Lastly, with regard to the question whether the full amount is recoverable or only £250, as has already been pointed out this is not a question that admits of much elaboration. I have come to the conclusion that the full amount is recoverable, on this basis. As I have already pointed out, the payment was made by deduction at source. What was due from Pegasus was a sum representing the purchase price of the house, and it was due to the plaintiff and his wife jointly. The result of the transaction was that a sum less by £500 was paid to the plaintiff and his wife jointly: in other words, the payment by deduction at source was a payment made by the plaintiff and his wife jointly. The contrary view suggested by Mr. Dehn, that this transaction should be looked at as though the whole amount of £2,300 had been received, had then been notionally split up between husband and wife, and that each thereafter had notionally been regarded as having paid back £250, seems to me to be wholly unreal, especially bearing in mind the fact that payment was made by deduction at source before the money ever came into the hands of the plaintiff and his wife at all. In those circumstances, I am satisfied that the plaintiff and his wife were jointly concerned in this transaction, and it follows that, no objection having been taken with regard to parties, the plaintiff is entitled in this case to sue for and recover the whole amount.

For those reasons, I am glad to be able to come to the conclusion to which the judge below would obviously have wished to

come, and would have come had he not felt himself to be precluded by the decision in the *Birmingham* case.[14]

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *M. Phillips & Co.; J. H. Milner & Son.*

E. D.

[14] [1951] 2 K.B. 54.

[MANCHESTER ASSIZES.]

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1958
Mar. 19, 20;
May 4.
Salmon J.

[1958 H. No. 3211.]

Injunction — Relator action — Attorney-General's discretion — Independent exercise of court's discretion—Repeated breaches of statute to public advantage—Prosecutions for private advantage—Question of public injury.

The defendants had sold flowers from stalls near the entrance to a cemetery in Manchester, on almost every Sunday since 1955. The stalls were about 7 feet long, and projected between 2 feet 6 inches and 3 feet 6 inches from the railings of the cemetery into a footway, between 15 and 16 feet wide, used by only a few pedestrians, except on Mothering Sunday. The defendants in trading in this manner committed offences under the Manchester Police Regution Act, 1844, and in consequence they had been prosecuted at the instigation of competitors, convicted and fined trivial sums on many occasions; they had continued to trade to the advantage of the public and themselves, providing colour in an otherwise somewhat dismal landscape. The Attorney-General brought this action for an injunction restraining the defendants from committing further breaches of the Act of 1844:—

Held, (1) that notwithstanding that the Attorney-General had exercised his discretion in bringing the action, and that the defendants had contravened the provisions of a statute, it was the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public; if they did, the fact that the injury was small would not, providing it was real, entitle the court to withhold the injunction; nor would it be germane that the public, though injured, might have received some compensating advantage from the defendants' acts; if, however, it was established that the public had in fact suffered no injury, the court might in the exercise of its discretion refuse an injunction even though there were no means available other than an injunction to prevent the defendants' acts.

Dicta of Farwell L.J. in *Attorney-General* v. *Birmingham, Tame & Rea District Drainage Board* [1910] 1 Ch. 48, 61, and of Devlin J. in *Attorney-General* v. *Bastow* [1957] 1 Q.B. 514, 520; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497 applied.

[Reported by DONALD HART, Esq., Barrister-at-Law.]

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(2) That, although a statutory provision could be contravened without public injury only in the most exceptional circumstances, and its breach was prima facie a public wrong, since the acts of the defendants did not tend to injure the public, nor was any member of the public inconvenienced in the slightest degree, and in view of the circumstances of the prosecutions, an injunction would be refused.

Attorney-General v. *Kerr and Ball* (1914) 79 J.P. 51; 12 L.G.R. 1277 applied.

Attorney-General v. *Cockermouth Local Board* (1874) L.R. 18 Eq. 172; *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882) 21 Ch.D. 752; *Attorney-General* v. *London & North-Western Railway Co.* [1900] 1 Q.B. 78; 16 T.L.R. 30 distinguished.

ACTION.

The Attorney-General, suing on the relation of the Manchester Corporation, alleged that since 1956 Robert Harris, Audrey Harris (his wife) and Jack Ferst had habitually erected stalls on a footway near the entrance to Southern Cemetery, Manchester, had placed there boxes, vases and buckets containing flowers, and had exposed such flowers for sale so as to obstruct or incommode the passage of the footway, contrary to section 102 of the Manchester Police Regulation Act, 1844.[1] It was further alleged that Robert Harris had been convicted and fined in respect of breaches of the Act on 74 occasions, Audrey Harris on 34 occasions, and Jack Ferst on 81 occasions, but they had continued to commit similar breaches. The Attorney-General contended that the penalties imposed under the Act had proved insufficient to secure compliance, and that the defendants intended to continue to trade in breach thereof, and claimed an injunction against each of the defendants perpetually restraining them from placing or using any stall or other article upon any footway within the City of Manchester, and from exposing for sale upon or near any such footway any flower or other article so as to obstruct or incommode the passage of such footway.

Robert and Audrey Harris, by a defence filed before solicitors were instructed to act on their behalf, alleged that they were registered street traders, licensed to trade by selling flowers in any street in the City of Manchester with certain exceptions not relevant to this action; that street traders selling flowers at other cemeteries had never been prosecuted; that prior to 1956 flowers had been sold outside Southern Cemetery for 35 years without any prosecution being brought; that the prosecutions only began when certain adjacent shopkeepers ceased to trade from stalls outside the cemetery; and that the proceedings were

[1] Manchester Police Regulation Act, 1844, s. 102: "Every person "shall be liable to a penalty of not "more than 40 shillings who in any "street shall commit any of the fol- "lowing offences . . . Every person "who shall . . . place or use any ". . . stall on any footway . . . "Every person who shall . . . by "hawking or exposing for sale any ". . . article on or near any foot- "way or by any other means shall "obstruct or incommode the free "passage of any such footway or "who shall insult jostle or annoy "any inhabitant or passenger."

in the nature of victimisation, brought at the instigation of the shopkeepers in furtherance of what was in reality a trade dispute. The defendant Ferst did not file a defence, but was present at the trial, which took place in Manchester, and gave evidence. The facts are fully set out in the judgment.

Fenton Atkinson Q.C. and *J. M. Lever* for the Attorney-General.

Rose Heilbron Q.C. and *Ivor R. Taylor* for the defendants Robert and Audrey Harris.

The following cases in addition to those referred to in the judgment were cited in argument: *Attorney-General* v. *Sharp* [2]; *Attorney-General* v. *Premier Line* [3]; *Lyons Sons & Co.* v. *Gulliver* [4]; *Attorney-General* v. *Sheffield Gas Consumers' Co.* [5]; *Attorney-General* v. *Ashborne Recreation Ground* [6]; *Davenport Corporation* v. *Tozer* [7]; *Fabbri* v. *Morris* [8]; *Brownsea Haven Properties* v. *Poole Corporation* [9]; *Attorney-General* v. *W. H. Smith & Sons.* [10]

Cur. adv. vult.

MAY 4. SALMON J. read the following judgment, in London. The Manchester Southern Cemetery is situated on the outskirts of the City of Manchester at West Didsbury and is bounded on one side by Princess Road and on another side by the Barlow Moor Road. The Princess Road footway is contiguous with the cemetery; it is between 15 and 16 ft. wide and is divided from the cemetery by iron railings. On this footway close to the iron railings there is a line of trees about 50 ft. apart. Opposite the cemetery there are playing fields adjacent to Princess Road and the Barlow Moor Road; in the latter road there is a number of shops, including several florists shops. Nearly every Sunday, since about the middle of 1955, the defendants have sold flowers from stalls placed close to the railings between two trees to the left of a pedestrian entry to the cemetery. Except for Mothering Sunday there are never more than a few pedestrians using this very wide footway. On very rare and isolated occasions the defendants may have placed their stalls on that part of the footway which is adjacent to a lay-by. The defendant Robert Harris and his wife Audrey Harris operated from one stall about 7 ft. long and which projected between some 2 ft. 6 ins. and 3 ft. 6 ins. from the railings. The defendant Ferst operated from an adjacent stall of similar dimensions. I entirely accept the evidence of the

[2] [1931] 1 Ch. 121; 46 T.L.R. 554.

[3] [1932] 1 Ch. 303; 48 T.L.R. 104.

[4] [1914] 1 Ch. 631; 30 T.L.R. 75.

[5] 3 De G. M. & G. 304.

[6] [1903] 1 Ch. 101; 19 T.L.R. 39.

[7] [1903] 1 Ch. 759; 19 T.L.R. 257.

[8] 63 T.L.R. 34; [1947] 1 All E.R. 315.

[9] [1958] Ch. 574; [1958] 2 W.L.R. 137; [1958] 1 All E.R. 205.

[10] 26 T.L.R. 482.

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defendant Robert Harris and the defendant Ferst who impressed me as being respectable citizens and reliable witnesses. I am satisfied that in offering flowers for sale in the manner I have described, they were not causing the slightest nuisance or inconvenience to the public using the footway in Princess Road. They were carrying on a business which was to the advantage of the public as well as of themselves and no doubt providing a splash of colour in an otherwise somewhat dismal landscape. It seems clear that no prosecution would ever have been instituted against the defendants but for the considerable pressure which was brought to bear upon the Manchester Corporation by the owners of some of the florists shops in the Barlow Moor Road. It appears from the letters of the town clerk in the agreed correspondence that after the practice now complained of had been going on for many months and had been observed and reported on by the police and by the city surveyor and engineer, the unanimous conclusion was reached by the police, the highways committee and the town clerk that no action could justifiably be taken against the defendants, a decision with which I am not disposed to differ. [His Lordship referred to the correspondence and continued:]

It would appear from these letters that the help of two councillors had been enlisted on behalf of the florists, and that they had apparently had interviews with the town clerk. After some further correspondence, and possibly some further interviews in which it was argued that the flower stalls operated by the defendants constituted unfair competition, the decision to which I have referred was reversed, and in February, 1956, the first of a large number of prosecutions was instituted against the defendants. These prosecutions were brought for two offences under section 102 of the Manchester Police Regulation Act, 1844. I do not pause to consider whether the defendants were competing fairly or unfairly with the florist shops because on no view could the mischief aimed at by any part of section 102 have been unfair competition. The section is a compendious one creating several hundred petty offences for each of which it imposes a maximum penalty of forty shillings. In so far as it is material to the present case the section enacts that every person commits an offence "who shall place any stall on any footway," and every person commits an offence "who shall by hawking or "exposing for sale any article on any footway or by any other "means obstruct or incommode the free passage of any such "footway."

There can be no doubt but that the defendants committed offences under this statute every time they offered flowers for sale outside the cemetery in the way I have described. The defendants did place a stall against the railings, which projected a little onto this very wide footway, and accordingly this stall technically obstructed that part of the footway on which it rested although it did not in the slightest incommode anyone using the footway.

I find that the obstruction was so slight and inappreciable that it certainly did not amount to nuisance. Accordingly, if any proceedings had been brought against these defendants based on nuisance, such proceedings would have been doomed to failure. See *Attorney-General* v. *Wilcox* [1] and *Rex* v. *Bartholomew*.[2] The defendants, however, have been prosecuted under the statute of 1844 on a very large number of occasions. Although the offences were trifling and caused not the slightest injury to the public, since they had been committed the magistrate had no course open to him other than to convict; as a rule he marked his view of the triviality of the matter by the smallness of the fines imposed even after many convictions. The last twenty-two fines for obstruction recorded against the defendant Robert Harris are for 2s. 6d. each. In spite of the convictions and fines over a number of years, the defendants continued and continue to ply their trade outside the cemetery, and thereby to commit the technical offences to which I have referred. These are the circumstances in which the town clerk was authorised to apply to the Attorney-General that all necessary steps should be taken to obtain an injunction against the defendants. This action was then instituted.

It is conceded that the granting of an injunction is discretionary. Mr. Fenton Atkinson on behalf of the plaintiff, however, argues that since the Attorney-General has in the exercise of his discretion come to the conclusion that an injunction should be granted, and accordingly brought this action, the court must exercise its discretion by granting an injunction. I reject this argument. In support of this argument Mr. Atkinson relied chiefly upon *London County Council* v. *Attorney-General*.[3] In that case Lord Halsbury observed [4]: "It may well be that it is "true that the Attorney-General ought not to put into operation "the whole machinery of the first law officer of the Crown in "order to bring into court some trifling matter. But if he did, "it would not go to his jurisdiction: it would go, I think, to the "conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a "court of law to intervene? If there is excess of power "claimed by a particular public body, and it is a matter that "concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought "to initiate litigation in that respect or not." That no doubt is perfectly accurate, but as was pointed out by Farwell L.J. in *Attorney-General* v. *Birmingham, Tame & Rea District Drainage Board*,[5] *London County Council* v. *Attorney-General* [6] decided no more than that: "It is for the Attorney-General to determine

[1] [1938] Ch. 934; 54 T.L.R. 985; [1938] 3 All E.R. 367.
[2] [1908] 1 K.B. 554, 561; 24 T.L.R. 238.
[3] [1902] A.C. 165; 18 T.L.R. 298.
[4] [1902] A.C. 165, 168.
[5] [1910] 1 Ch. 48, 61 (C.A.); [1912] A.C. 788 (H.L.).
[6] [1902] A.C. 165.

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" whether he should commence litigation but it is for the court " to determine what the result of that litigation shall be. . . . " That is to say, the court cannot say, ' You ought never to have " ' instituted these proceedings ': it must listen to his applica- " tion and then adjudicate whether an injunction should be " granted or not." In my judgment it is the duty of the court in making this adjudication to exercise its discretion quite independently of the discretion exercised by the Attorney-General. He is for this purpose in no better position to obtain judgment in his favour than any other litigant claiming an injunction.

In *Attorney-General* v. *Bastow*,[7] Devlin J. points out: " The fact that the Attorney-General asks for the injunction does " not mean that the court must grant it, even if a clear and " deliberate invasion of a public right is proved. The court still " has its discretion in the matter and it must have regard to the " circumstances to which it usually has regard in considering " whether or not it will grant this type of relief." It is true that towards the end of his judgment there occurs the passage on which Mr. Atkinson relies. It reads as follows[8]: " I distinguish " between administrative discretion and judicial discretion. The " Attorney-General . . . is the officer of the Crown who is en- " trusted with the enforcement of the law. . . . If he, having " surveyed the different ways that are open to him for seeing that " the law is not defied, has come to the conclusion that the most " effective way is to ask this court for a mandatory injunction . . . " then I think that this court, once a clear breach of the right " has been shown, should only refuse the application in excep- " tional circumstances." But Devlin J. added[9]: " I am dealing " purely with that type of case in which the only substantial " ground for not granting an injunction is that there are other " remedies available. In cases where other circumstances which " are not primarily a matter for administrative discretion arise, " then different considerations might apply and a different view " be taken." In that case the defendant's acts in their nature tended indubitably to injure the public. The only real question for decision was one which may be regarded as primarily a matter of administrative discretion, namely, whether there were other remedies available more appropriate than an injunction.

But the present case, however, in my view depends upon whether what the defendants are doing in any way injures the public; and this is not a matter upon which the discretion of any officer of the Crown can have any influence upon the court. As I have indicated, I have no hesitation in holding on the special circumstances of this case that the defendants have caused no injury to the public. I do not, however, hold that there are any means available other than an injunction to prevent these defendants from doing what they are doing.

[7] [1957] 1 Q.B. 514, 520, 521; [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.

[8] [1957] 1 Q.B. 514, 522.

[9] Ibid. 523.

This seems to me to be a similar case to *Attorney-General* v. *Kerr and Ball*,[10] where Lush J. refused an injunction although there had been persistent breaches of certain by-laws on the ground that no public injury had been suffered, and that in all the circumstances of the case it was not desirable that an injunction should be granted. It was sought to distinguish that case from the present on the ground that it concerned breaches of by-laws whereas this case concerns breaches of a public Act of Parliament. I cannot think that distinction makes any difference. Indeed Lush J. points out that by-laws impose a public duty and that their breach is prima facie a public wrong although on the facts of that case the breaches did not in reality injure the public.

It is further argued on behalf of the Attorney-General that if in a relator action he can show a clear and deliberate breach of an Act of Parliament, then an injunction is granted as a matter of course, not only on the ground with which I have already dealt, namely, that the court is virtually bound by the exercise of the Attorney-General's discretion, but also on the ground that the doing of the acts prohibited by statute is deemed to constitute a public injury and it is not competent for the courts to inquire whether or not such acts in fact injure the public.

This contention is difficult to reconcile with the two decisions in *Attorney-General* v. *Kerr and Ball*,[10] and with the observations of Devlin J. in *Attorney-General* v. *Bastow*.[11] It does, however, at first sight appear to gain some support from certain dicta relied upon by Mr. Atkinson if those dicta are looked at out of their context. When, however, they are considered in their context, and that context is analysed, they do not in my judgment establish Mr. Atkinson's contention. He relies particularly on the following passage from the judgment of Sir George Jessel M.R. in *Attorney-General* v. *Cockermouth Local Board*,[12] which reads as follows: "It is not necessary for the Attorney-General to show any injury "at all. The legislature is of opinion that certain acts will "produce injury, and that is enough." In that case the defendants had constructed works for the removal of the sewage of Cockermouth with an outfall into the river Derwent outside the defendants' district and in that of the Workington Local Board. This the defendants were empowered to do only by virtue of certain Acts of Parliament which, in effect, imposed a condition that the defendants should not deteriorate the purity of the water in the river. The sewage polluted the river at a point—eight miles from the town of Workington—where it entered the river. No polluted water however arrived at the town of Workington. It was held on the information at the relation of the clerk of the Workington Local Board that an injunction should be granted but that the bill of the local board of Workington alleging nuisance must be dismissed.

[10] (1915) 79 J.P. 51; 12 L.G.R. 1277.

[11] [1957] 1 Q.B. 514.

[12] (1874) L.R. 18 Eq. 172, 178.

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Salmon J.

The basis of the decision stated by the Master of the Rolls was that as the Act of Parliament gave the defendants the power only on certain terms of doing something which would otherwise be illegal, that is, the discharging of sewage into the river outside their own district, they could not take that power without observing the terms upon which it was granted. The Master of the Rolls, in making the observations upon which Mr. Atkinson relies, was I think only pointing out that in the circumstances of the case it mattered not, so far as the case for an injunction was concerned, that the defendants' breach caused no nuisance to the inhabitants of the town of Workington. Moreover, as was stated by Fry J. in the case to which I next refer, the pollution of the river was something which in its nature tended to the public injury.

In *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.*[13] the defendants without any power did certain acts which undoubtedly tended in their nature seriously to interfere with public rights, and so tended to injure the public. These acts consisted of driving piles into the river Severn for the construction of a bridge and interfering with a public highway and with the towing path of the river; no evidence was called of actual damage to the public by reason of these acts. Since however the defendants' acts in their nature tended to the public injury it was unnecessary for the plaintiff to adduce evidence of actual injury. It is to be observed that in that case there was no evidence called by the defendants, nor on the facts of the case could there have been any acceptable evidence that public injury had not been caused or was not to be apprehended from the defendants' acts. There seems to be a sensible difference between what the defendant company did in that case, and what the defendants have done in this case. The basis of Fry J.'s decision to grant the injunction was that the defendant company's acts were not only illegal but were acts which in their nature tended to injure the public.

In *Attorney-General* v. *London & North-Western Railway Co.*,[14] the Trent Valley Railway Act, 1845, incorporating the Railway Clauses Consolidation Act, 1845, empowered the defendants to carry their railway across a certain highway providing they ran their trains over the crossing at no more than 4 miles per hour. The defendant company exercised the power and then proceeded to run 120 trains in every 24 hours over the crossing at speeds much in excess of 4 miles per hour. In the action it was contended by the defendants that the public was not injured by the speed of the trains, and indeed if the trains ran over the crossing only at 4 miles per hour the crossing would be closed to the public for much longer than under the system thus operated by the defendants. The court granted the injunction and Mr. Atkinson relies on the following passage in the judgment of A. L. Smith

[13] (1882) 21 Ch.D. 752. [14] [1900] 1 Q.B. 78; 16 T.L.R. 30.

L.J.[15]: " . . . the legislature having prohibited the running of " trains over this crossing which adjoins a railway station at a " greater . . . speed than 4 miles per hour, the question whether " it is for the benefit of the public to run trains over it at a " greater speed is one with which we in a court of law have " nothing to do." This passage also must however be considered in its context. The basis of the decision stated in the judgments of the Court of Appeal was that to run a train across a highway without statutory permission was an act which in its nature tended to injure the public, and indeed constituted a serious public nuisance. The defendant company had statutory permission to run its trains across the highway but only on condition that it did so at no more than 4 miles per hour. In breaking this condition the defendant company was committing a nuisance in a highway and was unable to defend itself by showing that it was complying with the terms upon which it had statutory permission to cross the highway. In these circumstances it was not germane for the court to consider whether a speed in excess of 4 miles per hour benefited or injured the public.

Notwithstanding that the Attorney-General has exercised his discretion in bringing the action, and that the defendants have contravened the provisions of a statute, in my judgment it is the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public. If they did, the fact that the injury was small would not, providing it was real, entitle the court to withhold an injunction; *Attorney-General* v. *Wimbledon House Estates Co. Ltd.*[16] Nor would it be germane that the public, though injured, may have received some compensating advantage from the defendants' acts; *Attorney-General* v. *London & North Western Railway Co.*[17] If, however, it is established that the public has in fact suffered no injury as a result of the defendants' acts, the court may in the exercise of its discretion refuse an injunction. In every reported case the acts relied on by the plaintiff in actions such as these have clearly tended to the public injury. I have moreover searched the reports in vain for any relator action in which the acts complained of were as trivial, or even approached the triviality of the acts relied on in this action.

Undoubtedly it is only in the most exceptional circumstances that any statutory provision can be contravened without public injury. The circumstances of this case are, however, most exceptional. The acts done by the defendants do not on the very special facts of this case tend to injure the public, and indeed I am completely satisfied that no member of the public has been in the slightest degree inconvenienced by the defendants. I am uneasy, too, about the circumstances in which the prosecutions

[15] [1900] 1 Q.B. 78, 85.
[16] [1904] 2 Ch. 34; 20 T.L.R. 30.
[17] [1900] 1 Q.B. 78; 16 T.L.R. 489.

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were originally launched. I do not consider that in all the circumstances of this case an injunction should be granted, and in the exercise of my discretion I refuse an injunction.

Judgment for the defendants with costs, including costs of applications for interlocutory injunctions.

Solicitors: *Town Clerk, Manchester; Julian S. Goldstone & Co., Manchester.*

[PRIVY COUNCIL.]

J. C.* 1959 *June 22.*

SZE HAI TONG BANK LTD. . . . . APPELLANTS;

AND

RAMBLER CYCLE CO. LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Contract—Exceptions clause—Conversion—Cargo released to consignee against indemnity without production of bill of lading—"Responsibility of . . . carrier . . . to cease absolutely after" discharge—Whether carrier liable.

Conversion.

Shipping—Bill of lading—Release of goods without production of—Exceptions clause—Responsibility of carrier to "cease absolutely" after discharge—Construction—Implied limitation—Subject to primary contractual obligation to deliver only against production of bill of lading.

Singapore—Shipping.

The respondent manufacturer shipped from England to Singapore bicycle parts to the value of about £3,000 under a bill of lading requiring the goods to be delivered "unto order or his or their "assigns," and which, by clause 2, provided that "(c) . . . the "responsibility of the carrier . . . shall be deemed . . . to cease "absolutely after the goods are discharged" from the ship.

After the goods had been discharged in Singapore the carrier's authorised agent, in accordance with what was alleged to be the common practice there, released them to the consignee against a written indemnity by the latter's bank in favour of the carrier, but without production of the bill of lading. The consignee never paid for the goods, and on a claim by the respondent against the carrier for damages for breach of contract or for conversion the latter brought in the consignee and the indemnifying bank as third parties, claiming to be entitled to be indemnified by them. The bank—the present appellant—admitted liability to indemnify the carrier if the latter were held liable:—

Held, that a shipowner who delivers without production of the bill of lading does so at his peril. In delivering the goods, without

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

production of the bill of lading, to a person who, to its knowledge, was other than one entitled under the bill of lading to receive them, the carrier was liable for breach of contract and for conversion, and was not protected by the exception clause 2 (*c*). The extreme width of that clause must be cut down by an implied limitation; it must be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract, and at least so as not to permit the carrier deliberately to disregard its obligation as to delivery—to deliver against production of the bill of lading.

Glynn v. *Margetson & Co.* [1893] A.C. 351 at 357; 9 T.L.R. 437; *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149 at 164; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957; affirming [1956] 1 Q.B. 462 at 501; [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209; *The Cap Palos* [1921] P. 458 at 471; 37 T.L.R. 921 applied.

Chartered Bank of India, Australia and China v. *British India Steam Navigation Co. Ltd.* [1909] A.C. 369; 25 T.L.R. 480 distinguished.

Judgment of the Court of Appeal of Singapore affirmed.

APPEAL (No. 20 of 1958) from a judgment of the Court of Appeal of the Colony of Singapore (September 30, 1957) affirming a judgment of the High Court of Singapore (January 17, 1957).

The following facts are taken from the judgment of the Judicial Committee: The Rambler Cycle Company Limited manufactured bicycles in England and exported them to various parts of the world, and in particular to Singapore, where they had customers called the Southern Trading Company. In 1954 those customers ordered bicycle parts to the value of nearly £3,000 from the Rambler Cycle Company. Payment was to be 90 days, documents against payment. The Rambler Cycle Company made the goods and sent them off to Singapore. They shipped the goods on the S.S. *Glengarry*, which belonged to Glen Line Limited, and they paid the freight in advance. The steamship company issued a bill of lading dated July 30, 1954, in which they acknowledged that the goods were shipped by the Rambler Cycle Company and were to be conveyed by the *Glengarry* and were to be delivered at the port of Singapore "unto order or his "or their assigns." There was noted on the bill of lading a request by the Rambler Cycle Company saying: "Notify: "Southern Trading Company, C Short Street Singapore." The Rambler Cycle Company insured the goods through Lloyds and obtained an insurance certificate. That covered the goods during the voyage and for 90 days thereafter. The Rambler Cycle Company also drew a bill of exchange on the Southern Trading Company for the amount due. That was payable 90 days after acceptance. The Rambler Cycle Company also made out an invoice for the goods. The Rambler Cycle Company took all those documents to the Bank of China in London, who passed them on to their branch in Singapore. That branch was to hold them until the bill of exchange was paid and also any charges.

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Clause 2 of the bill of lading provided: "(c) . . . the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods shall be deemed . . . to cease absolutely after they are discharged" from the ship.

On September 1, 1954, the *Glengarry* arrived in Singapore. The shipowners had agents there called Boustead and Company, who acted for them in every way. On the authority of those agents, on September 2 and 3, 1954, the goods were discharged from the ship and placed in the go-downs of the Singapore Harbour Board. (That was done, no doubt, under clause 10 of the bill of lading "at the risk and expense of the owners of the goods.") Those shipping agents also wrote to the Southern Trading Company to notify them of the arrival of the goods. The Southern Trading Company wished to get possession of the goods but did not want to pay for them at that time. So they went along to their own bank, the Sze Hai Tong Bank Limited, and got that bank to sign a form of indemnity in favour of the shipowners, agreeing that, if the goods were released to the Southern Trading Company, they would indemnify the shipping company against any loss thereby occasioned. The indemnity was signed both by the Southern Trading Company and the Sze Hai Tong Bank and dated September 3, 1954. When the shipping company's agents received that indemnity, they authorised the Harbour Board to deliver the goods to the Southern Trading Company. The shipping company's agents never saw the bill of lading. It was not produced to them. It was, of course, still in the hands of the Bank of China, who would not deliver it except against payment. Yet the shipping company's agents issued a delivery order for the goods in favour of the Southern Trading Company. On September 4 and 6, 1954, the goods were removed from the Harbour Board premises by the Southern Trading Company.

The Southern Trading Company never did pay for the goods. They did not pay the draft. The Rambler Cycle Company did not know the goods had been delivered to the Southern Trading Company. They assumed that the goods had remained in warehouse at Singapore. They arranged for the insurance to be extended beyond the 90 days for two further periods of 30 days each consecutively. Eventually, in January, 1955, they discovered what had happened and in August, 1955, they brought an action against the shipping company claiming damages for breach of contract or for conversion. The shipping company brought in the Southern Trading Company and the Sze Hai Tong Bank as third parties, claiming that they were entitled to be indemnified by them.

The action was tried by Whitton J. in the High Court of Singapore. He gave judgment for the cycle company against the shipping company for £3,005 11s. 6d., and also made a declaration that the shipping company were entitled to be indemnified by the third parties. The shipping company did not appeal but

the Sze Hai Tong Bank did so. The Court of Appeal of Singapore (Knight Ag.C.J. of Singapore, Thomson C.J. of Malaya, and Chua J.) dismissed the appeal. The Sze Hai Tong Bank now appealed to Her Majesty in Council. The contest before the Board was solely whether judgment was properly entered against the shipping company: for if it was, the Sze Hai Tong Bank recognised that they were bound to indemnify the shipping company.

1959. May 6, 7, 8. *T. G. Roche Q.C.* and *G. R. F. Morris Q.C.* for the appellants.

Sir David Cairns Q.C. and *Michael Kerr* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Smith* v. *Young* [1]; *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.* [2]; *Gibaud* v. *Great Eastern Railway Co.* [3]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 1)* [4]; *J. Spurling Ltd.* v. *Bradshaw* [5]; *Heugh* v. *London and North Western Railway Co.* [6]; *Compania Importadora de Arroces Collette y Kamp S.A.* v. *P. & O. Steam Navigation Co.* [7]; *North Staffordshire Railway Co.* v. *Edge* [8]; *The Tasmania* [9]; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [10]; *Glyn Mills Currie & Co.* v. *East and West India Dock Co.* [11]; *The Stettin* [12]; *Bristol and West of England Bank* v. *Midland Railway Co.* [13]; *Hannam* v. *Arp* [14]; *Skibsaktieselskapet Thor Thoresens Linje* v. *H. Tyrer & Co. Ltd.* [15]; *London and North Western Railway Co.* v. *Neilson* [16]; *Woolmer* v. *Delmer Price Ltd.* [17]; *Lloyd* v. *Grace, Smith & Co.* [18]

June 22. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: The shipping company's agents were quite frank about what they did. Their representative said in evidence: "In issuing delivery "orders and in everything we do we act as agents for the Glen "Line. It is an accepted fact that, in absence of bills of lading, "goods are released on an indemnity. I agree we are supposed "to deliver on the bill of lading being produced to us. I agree "that, when we do not have the bill of lading produced, we "cover ourselves by getting an indemnity. When it is sug-"gested to me that we get these indemnities because we know

[1] (1808) 1 Camp. 439.
[2] [1908] A.C. 16; 24 T.L.R. 114.
[3] [1921] 2 K.B. 426; 37 T.L.R. 422.
[4] [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.
[5] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121.
[6] (1870) L.R. 5 Ex.Cas. 51.
[7] (1927) 28 Ll.L.Rep. 63.
[8] [1920] A.C. 254; 36 T.L.R. 115.
[9] (1890) 15 App.Cas. 223.
[10] [1926] A.C. 497; 42 T.L.R. 359.
[11] (1882) 7 App.Cas. 591.
[12] (1889) 14 P.D. 142; 5 T.L.R. 581.
[13] [1891] 2 Q.B. 653; 7 T.L.R. 627.
[14] (1928) 30 Ll.L.Rep. 306.
[15] (1929) 35 Ll.L.Rep. 163.
[16] [1922] 2 A.C. 263; 38 T.L.R. 653.
[17] [1955] 1 Q.B. 291; [1955] 2 W.L.R. 329; [1955] 1 All E.R. 377.
[18] [1912] A.C. 716; 28 T.L.R. 547.

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" we are doing what we should not do, I say that if no risk, we " would not need indemnity. I agree we get indemnity because " we are doing something we know we should not do, but it is " common practice. It is an everyday occurrence. We rely on " the bank's guarantee."

It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was " unto order " or his or their assigns," that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by clause 2 of the bill of lading, which says that: " During the period before " the goods are loaded on or after they are discharged from the " ship on which they are carried by sea, the following terms and " conditions shall apply to the exclusion of any other provisions " in this bill of lading that may be inconsistent therewith, viz., " (a) so long as the goods remain in the actual custody of the " carrier or his servants " (here follows a specified exception); " (b) whilst the goods are being transported to or from the ship " (here follows another specified exemption); " (c) in all other cases " the responsibility of the carrier, whether as carrier or as " custodian or bailee of the goods, shall be deemed to commence " only when the goods are loaded on the ship and to cease " absolutely after they are discharged therefrom."

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: " Of course not." There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.

But their Lordships go further. If such an extreme width

were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, "unto "order or his or their assigns," against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see *Glynn* v. *Margetson & Co.*[1]; *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[2]

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping company's agents in Singapore acknowledged: "We are doing something we "know we should not do." Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the shipping company itself. They were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause: see *The Cap Palos.*[3]

The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909, *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.*[4] There was there a clause which said that "in all cases and under all circumstances the liability of the "company shall absolutely cease when the goods are free of the "ship's tackle." The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud,

[1] [1893] A.C. 351, 357; 9 T.L.R. 437.

[2] [1956] 1 Q.B. 462, 501; [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209; [1957] A.C. 149, 164; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957.

[3] [1921] P. 458, 471; 37 T.L.R. 921.

[4] [1909] A.C. 369; 25 T.L.R. 480.

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see *United Africa Co. Ltd.* v. *Saka Owoade*.[5] But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself.

The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of his bounden obligations. Thus, in *Bontex Knitting Works Ltd.* v. *St. John's Garage*,[6] the lorry driver left the lorry unattended for an hour, in breach of an express agreement for immediate delivery. In *Alexander* v. *Railway Executive*[7] the cloak-room official allowed an unauthorised person to have access to the goods, in breach of the regulations in that behalf. In *Karsales (Harrow) Ltd.* v. *Wallis*[8] the agent of the finance company delivered a car which would not go at all, in breach of its obligation to deliver one that would go. In each of those cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf: and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent, see *Smackman* v. *General Steam Navigation Co.*[9]; *Ashby* v. *Tolhurst*,[10] by Sir Wilfrid Greene M.R., and *Swan, Hunter and Wigham Richardson Ltd.* v. *France Fenwick Tyne and Wear Co. Ltd.*[11]

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors: *Lawrance, Masser & Co.; Ingledew, Brown, Bennison & Garrett.*

C. C.

[5] [1955] A.C. 130; [1955] 2 W.L.R. 13; [1957] 3 All E.R. 216.
[6] (1943) 60 T.L.R. 44, 253.
[7] [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.
[8] [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866.
[9] (1908) 13 Com.Cas. 196.
[10] [1937] 2 K.B. 242, 253; 53 T.L.R. 770; [1937] 2 All E.R. 837.
[11] [1953] 1 W.L.R. 1026, 1030–1032.

[QUEEN'S BENCH DIVISION.]

GAYNOR *v.* ALLEN.

1959
May 27.

[1958 G. 1400.]

McNair J.

Road Traffic—Negligence—Speed limit—Police motor-cyclist—Speed limit exceeded—Driving in course of duty—Pedestrian knocked down—Civil liability—Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 3.

At about 7.20 p.m., some twenty minutes after lighting-up time, the plaintiff, while crossing a road subject to a 40-mile an hour speed limit, was knocked down by a police motor-cyclist driving at 60 miles an hour in the course of his duties. The policeman was killed and the plaintiff claimed damages for personal injuries against his administratrix, alleging negligence. In view of section 3 of the Road Traffic Act, 1934,[1] the policeman was exempted from observing the speed limit and it was submitted on behalf of the defendant that no conclusion could be drawn from the fact that he was driving at 60 miles an hour and therefore he was not negligent:—

Held, that in respect of his civil liability the police motor-cyclist was in exactly the same position as any "civilian" driver, and on the occasion in question owed the same duty to the public to drive with due care and attention and without exposing members of the public to unnecessary danger; in the circumstances, the policeman was negligent and was two-thirds to blame for the accident.

ACTION.

The plaintiff, Susan Gaynor, a state registered nurse, claimed damages against the defendant, Anne Patricia Allen, as administratrix of Edgar Gerald Allen, for personal injuries incurred when, on March 29, 1958, as a pedestrian she was attempting to cross the Great West Road at Hammersmith near the junction with Eyot Gardens and was knocked down by a police Triumph 500 c.c. motor-cycle, driven by a police officer, Edgar Gerald Allen, in the course of his duties. The police officer was killed.

The plaintiff, at the material time, lived in Eyot Gardens, a suburban road which joined the Great West Road between Hammersmith and Chiswick. It was her custom every day, in going to the hospital where she worked, to cross the Great West Road from Eyot Gardens into North Eyot Gardens, which involved crossing a dual carriageway of two roads some 30 feet wide, divided by a centre division some four or five feet wide, consisting of grass and in part railings. It was a crossing with which she was well familiar, having crossed it at least twice a day for

[1] Road Traffic Act, 1934, s. 3: "The provisions of any enactment, or of any statutory rule or order, imposing a speed limit on motor vehicles shall not apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes, if the observance of those provisions would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion."

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some months. On March 29, at about 7.20 p.m., which was some 20 minutes after lighting-up time, the plaintiff, returning from the hospital, came to the Great West Road, intending to cross to an island. The road was well lit and conditions were clear. According to her evidence she came to the edge of the road and stood there. She had no reliable recollection of anything after that until she recovered consciousness lying by the roadside, although she vaguely remembered starting to cross the road.

A witness, Davies, was riding a pedal-cycle meaning to cross the Great West Road. He saw no traffic and proceeded to cycle to the middle of the road, where he stopped. Some cars passed from left to right and one of them was travelling rather faster than the others. As he was standing there he saw the plaintiff standing on the kerb and thought that she wanted to cross the road. Davies did not see the plaintiff step off the kerb but he first heard the high whine of a motor-cycle and a couple of seconds later saw the dipped headlamp some 300 yards away. Thinking it safe to proceed he pedalled across to the other side. When he had gone about a yard he saw that the plaintiff had actually left the kerb where she had been standing and had crossed somewhere about half-way across the roadway. Having got safely across, he heard the increasing noise of the motor-cycle coming behind him; he turned his head round just at the moment when the motor-cycle hit the plaintiff. According to Davies the plaintiff was then approximately three-quarters of the way across and it seemed to him that the motor-cycle was trying to pass between her and the island. Davies also stated that the plaintiff was walking at a moderate pace looking straight ahead of her.

Another witness Loveday, a pedestrian, said that he heard the sound of a motor-cycle behind him and as it passed, noticed that it was going very fast. He confirmed that a group of cars had passed ahead of the cycle. He saw the plaintiff step off the pavement when the motor-cycle was still some distance behind him and thought that she would never get across. A few seconds after that there was a crash.

The plaintiff alleged that the deceased was negligent in that he drove at a speed which was excessive in the circumstances, failed to keep any proper or adequate look-out, failed to brake, failed to take any sufficient steps to avoid colliding with the plaintiff and failed otherwise to take any adequate steps for controlling his vehicle. The defendant, while denying negligence, alleged that the collision was caused wholly or in part by the negligence of the plaintiff herself in failing to keep a proper look-out and crossing the road at a time when she saw or ought to have seen that it was unsafe to do so.

Michael Sherrard for the plaintiff.

P. O'Connor for the defendant. Section 3 of the Road Traffic Act, 1934, in the circumstances of the present case, exempted

the policeman from observing the speed limit. Therefore no conclusion of any breach of duty can be drawn from the fact that he was driving at 60 miles an hour on a restricted road.

Section 3 does not absolve a driver from dangerous driving or allow him to ignore traffic lights. If the motor-cyclist had been a civilian he would undoubtedly have been guilty of some negligence in driving at 60 miles an hour, though not necessarily entirely to blame for the accident. To show that a police officer was driving at that speed on a restricted road does not prima facie show negligence.

Michael Sherrard in reply. The duty of a police officer to the public is to take the same care as any other driver of any other vehicle. The only effect of section 3 is that a police officer who exceeds the speed limit in the course of his duties is not liable to prosecution for exceeding the speed limit. But he is still under a duty to drive with due care and attention.

[Reference was made to *Ward* v. *London County Council.*[2]]

McNAIR J. stated the facts, found that the plaintiff was about half way across the road when the motor-cycle hit her; that the police motor-cyclist was properly engaged in pursuing a motor-car that was speeding, and that at the time he was proceeding at 60 miles an hour, probably more, in pursuance of his police duties. His Lordship continued:

In those circumstances, it is clear by reason of section 3 of the Road Traffic Act, 1934, although the road in question was subject to a 40 miles an hour limit, he (the driver) was not guilty of a criminal offence, for section 3 provides: "The provisions of "any enactment, or of any statutory rule or order, imposing a "speed limit on motor vehicles shall not apply to any vehicle on "any occasion when it is being used for fire brigade, ambulance "or police purposes, if the observance of those provisions would "be likely to hinder the use of the vehicle for the purpose for "which it is being used on that occasion." On the facts, I am prepared to infer and hold that this motor-cycle was being used for police purposes, and was being driven under conditions in which the observance of the 40 miles an hour speed limit would have hindered the use of that vehicle for the purpose for which it was being used.

That, however, deals only with criminal liability, and it raises a question which, so far as I know, is without authority, whether and to what extent the circumstances which bring that provision into effect, affects the civil liability of the driver. It is argued on behalf of the defendant that if the motor-cyclist had not been driving on official business and had been proceeding at 60 miles an hour or more on that road on that occasion it would have been difficult for him to escape at least partial liability, but those considerations do not apply in the present case. On the other

[2] [1938] 2 All E.R. 341.

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hand, it is observed, and rightly observed, that this exempting provision in section 3 of the Road Traffic Act, 1934, does not in any way absolve police drivers from criminal liability for dangerous driving or, indeed, for driving without due care and attention. It is submitted that section 3 must be given a strictly limited application to criminal responsibility and does not affect in any way the driver's civil liability.

In my judgment, the driver of this police motor-cycle on this occasion must be judged, as regards civil liability, in exactly the same way as any other driver of a motor-cycle in similar circumstances. He, like any other driver, owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger.

It seems to me that on this occasion it is clear that Davies was misled as to the speed of the motor-cycle's approach, because he only just managed to get across without being himself involved in a collision. Similarly, I think that the fair inference is that the plaintiff too (whom I am not prepared to assume failed to look to her right on this crossing, which she had crossed many times) was initially at least misled.

The question, as I see it, is this: First, is it clear that the police motor-cyclist, judged by the standard of an ordinary driver of a motor-vehicle on his private occasions, is to be held guilty of negligence causing the accident? I think the answer to that clearly must be "Yes." To drive at that speed on a restricted road, in the half-light at a time of the evening when it must be known that there may be pedestrians making their way home, is itself, in my judgment, to drive at an improper and unsafe speed.

The second question is whether the plaintiff herself is to be held to any extent, and, if so, to what extent, responsible for the accident. She was unconscious after the accident and is unable to give me her own evidence as to her actions or reactions, but I have this, that Davies deposes to the fact that he saw her walking at a medium pace, not dawdling, looking in front of her, at a time when she was half-way across the road, with no appearance that she was looking up the road at any time after she had stepped off. Loveday was not really in a position to see whether she did look to her right before stepping off, but he clearly formed the conclusion that she had misjudged the position, in that she thought she could get safely across, whereas in fact she could not.

I think that the fair conclusion is that when she stepped off the pavement, she did act in the way in which she normally would act, namely, she looked to the right to see whether her way was clear; that she may have seen the dipped headlight approaching and may have been misled in the same way as was Davies; but it seems that having once decided to make her way across, she went straight across without glancing again to her right.

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In those circumstances, I think that she must bear some part responsibility for the accident, and making the best estimate I can, bearing in mind this further fact, that this was not a pedestrian crossing, I think that the plaintiff must bear one-third of the responsibility and the defendant two-thirds.

[His Lordship considered the question of the damages and continued]: The special damages have been agreed at a figure of £350 19s. 6d. General damages I assess at the sum of £750. There will accordingly be judgment for the plaintiff for two-thirds of that figure.

Judgment for the plaintiff.

Solicitors: *D. J. Freeman & Fraser; Ponsford & Devenish, Tivendale & Munday.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

DEAN AND ANOTHER *v.* DISTRICT AUDITOR FOR ASHTON-IN-MAKERFIELD AND ANOTHER.

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May 5.

Lord Parker C.J., Donovan and Salmon JJ.

Local Government—District auditor—Surcharge—Appeal to Minister from refusal by district auditor to surcharge—Minister's direction to district auditor to surcharge — Surcharge imposed by district auditor in pursuance of Minister's direction—Whether appeal lies to High Court against surcharge so imposed—Whether persons so surcharged may apply for relief to High Court—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 229, 230.

At the audit of the accounts of an urban district council objection was made by local government electors to certain items of expenditure, upon the grounds that the expenditure had been unlawfully incurred and should be borne personally by those whose acts occasioned the expenditure. The district auditor who conducted the audit decided not to surcharge the amount concerned upon any person. One of the electors appealed from this decision to the Minister of Housing and Local Government under section 229 of the Local Government Act, 1933,[1] and the Minister allowed the

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

[1] Local Government Act, 1933, s. 229: "(1) Any person who is "aggrieved by a decision of a district "auditor on any matter with respect "to which he made an objection at "the audit, and any person aggrieved "by a disallowance or surcharge "made by a district auditor may, "where the disallowance or surcharge "or other decision relates to an "amount exceeding five hundred "pounds, appeal to the High Court, "and may in any other case appeal "either to the High Court or to the "Minister. (2) The court or Minister "on such an appeal shall have power "to confirm, vary or quash the "decision of the auditor, and to "remit the case to the auditor with "such directions as the court or "Minister thinks fit for giving effect "to the decision on appeal, . . . "(3) Where an appeal is made to the "Minister under this section, he may "at any stage of the proceedings, "and shall, if so directed by the "High Court, state in the form of a "special case for the opinion of the "court any question of law arising "in the course of the appeal, but

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appeal and directed the district auditor, in pursuance of section 229 (2) of the Act, to surcharge the amount of the expenditure upon three named persons, who included the two appellants in the present appeal. The district auditor, in compliance with the Minister's direction, surcharged these appellants. They appealed against the surcharge to the High Court under section 229 (1) of the Act, contending that they had a right of appeal because they were persons "aggrieved by a . . . surcharge made by a district "auditor." They also applied by the same motion for relief under section 230 of the Act. It was contended against the appellants that if they had no right of appeal they were debarred from applying to the court for relief, since section 230 provides that a person surcharged may apply "to the tribunal . . . to whom he "might have appealed," and the appellants were not persons who "might have appealed":—

Held, (1) that the rights of appeal given by section 229 (1) were rights of appeal from the acts of the district auditor in the exercise of his judicial as opposed to his administrative duties, that once the audit was made the district auditor was functus officio so far as his judicial duties were concerned, and that therefore no appeal lay in respect of the surcharge made by the district auditor, since it was made in the execution of an administrative duty to obey the direction of the Minister.

(2) That the words in section 230, "the tribunal . . . to whom "he might have appealed," were intended to identify the tribunal to which the application must be made, and did not provide a condition which, if not complied with, debarred the applicant from relief. Accordingly, the fact that the applicants had no right of appeal did not prevent their making an application for relief under section 230.

Per curiam: The words in section 229 (3) of the Act, "the "decision of the Minister shall be final," mean what they say.

Per Salmon J. In the unlikely event of the Minister's representative (on the hearing of an appeal to the Minister) denying a person the right to be heard in his own defence, there may well be a remedy in the High Court; but such a remedy would not be by way of an appeal under section 229 of the Act.

APPEAL against and application for relief from surcharges.

On October 1, 1954, the tenant of a dwelling-house known as No. 1, Shaw Street, Ashton-in-Makerfield, applied to the Ashton-in-Makerfield Urban District Council, under section 26 of the Housing Repairs and Rents Act, 1954, for a certificate that one of the conditions justifying an increase of rent under the Act, namely, that the dwelling-house was in good repair, was not

"save as aforesaid the decision of the "Minister shall be final."

S. 230: "(1) In the case of a sur- "charge, the person surcharged may, "whether or not he appeals under "the preceding section, apply to the "tribunal (whether the High Court "or the Minister) to whom he "appeals or, if he does not appeal, "to the tribunal (whether the High "Court or the Minister) to whom he "might have appealed, for a declara- "tion that in relation to the subject "matter of the surcharge he acted "reasonably or in the belief that his "action was authorised by law, and "the court or Minister, if satisfied "that there is proper ground for "doing so, may make a declaration "to that effect. (2) Where such a "declaration is made . . . the court "or Minister may, if satisfied that "the person surcharged ought fairly "to be excused, relieve him either "wholly or in part from personal "liability in respect of the sur- "charge . . ."

fulfilled. The appellant Frank Burrows, the chief public health inspector of the council, having inspected the premises, prepared a certificate of disrepair in the form prescribed by the Fifth Schedule to the Housing Repairs (Increase of Rent) Regulations, 1954. On October 12, 1954, this certificate was signed by the appellant Frank Dean, the clerk to the council, and was sent to the tenant. The landlord of the premises, one Robert Whitter, was disabled thereby from recovering any sum by way of repairs increase of rent under the Act.

The Housing Repairs and Rents Act, 1954, provides that a certificate of disrepair shall be issued by a local authority if the local authority is satisfied that a dwelling-house is not in good repair. The appellants had no power to issue the certificate of their own motion, and it was therefore invalid.

In 1956 Robert Whitter issued a writ in the Chancery Court of the County Palatine of Lancaster, claiming a declaration that the certificate was invalid. The council resolved to defend the action and engaged a solicitor and counsel. In due course counsel advised that there could be no defence to the proceedings, which were accordingly compromised upon the terms that the certificate was a nullity, and that the council would pay the plaintiff's party and party costs, which amounted to £68 14s. 2d. The council's costs amounted to £50, making a total of £118 14s. 2d.

At the audit of the council's accounts for the year ending March 31, 1957, Robert Whitter and two other local government electors for the urban district attended and made objection to the expenditure of the £118 14s. 2d., contending that this expenditure had been unlawfully incurred and should be borne personally by those whose acts and omissions occasioned the incurrence of the expenditure. The district auditor decided that there had been neither negligence nor misconduct by any member or officer of the council in respect of the incurrence of the expenditure, and refused to make any surcharge.

Robert Whitter, as a person aggrieved by the decision of the district auditor, then appealed to the Minister, who, after a hearing conducted by a person appointed by him, allowed the appeal and directed the district auditor to surcharge the sum of £118 14s. 2d. in equal proportions upon the two appellants and one Richard Lloyd Hughes, who was not a party to the present appeal. In compliance with the Minister's direction, the district auditor surcharged each of the two appellants with one-third of this sum.

The appellants appealed by motion in the Divisional Court from this surcharge, contending that they were persons "aggrieved by a . . . surcharge made by a district auditor" and that therefore an appeal lay to the High Court by reason of the provisions of section 229 (1) of the Local Government Act, 1933. Both appellants also applied by the same motion for relief from personal liability in respect of the surcharge under section 230 of the Act, on the grounds that in relation to the

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subject-matter of the surcharge they had acted reasonably or in the belief that their action was authorised by law. The respondents to the motion were the district auditor, the council and the Minister of Housing and Local Government.

Norman F. Stogdon for the appellant Dean.

John Rankin for the appellant Burrows.

C. R. Hurle-Hobbs for the district auditor.

J. R. Cumming-Bruce for the Minister of Housing and Local Government.

The council was not represented.

The judgments are reported solely on the questions whether an appeal to the High Court lay from the act of the district auditor in surcharging the appellants at the direction of the Minister, and whether the appellants might apply to the High Court for relief from personal liability in respect of this surcharge.

The following case was cited in argument on these questions: *Reg.* v. *Inhabitants of Chiddingstone*.[2]

LORD PARKER C.J. These proceedings come before the court by way of an appeal by Frank Dean, who is the clerk to the Ashton-in-Makerfield Urban District Council, and Frank Burrows, the chief public health inspector of that council, against what is alleged to be a decision of the district auditor for the No. 2 Audit District, which includes the urban district of Ashton-in-Makerfield, whereby they were surcharged, together with one Richard Lloyd Hughes, who does not appeal to this court, in the sum of £118 14s. 2d. They also apply for relief under section 230 (1) of the Local Government Act, 1933.

[His Lordship stated the facts and continued:] At the opening of the appeal objection was taken that this court had no jurisdiction in the matter; in other words, that the Minister's decision was final. It was also submitted that not only did this court have no jurisdiction in regard to entertaining an appeal, but that it also had no jurisdiction to entertain an application for relief under section 230.

It is necessary to look at a few sections of the Act in order to see the scheme. Matters of accounts and audit are dealt with in Part X of the Act. Provision is made for the appointment of district auditors, for the audit of accounts by the district auditor, and for the deposit of accounts. By section 226 (1) it is provided: "A local government elector for the area to the "accounts of which the audit relates may be present or may be "represented at the audit and may make any objection to the "accounts before the auditor." By subsection (2): "The "district auditor shall, on the application of any person who

[2] (1862) 2 B. & S. 294; 6 L.T. 44; 26 J.P. 246.

" is aggrieved by his decision on any matter with respect to " which that person has made an objection, or of any person " aggrieved by a disallowance or surcharge made by the auditor, " state in writing the reasons for his decision." It was pursuant to that section that Whitter objected at the audit that the district auditor ought to have made a surcharge of this sum of £118. The district auditor, having refused to do so, was required to and did state in writing the reasons for his decision. Then by section 228 (1) it is provided that the district auditor shall have certain duties at every audit held by him. The subsection sets out six items of what he shall do and it is sufficient to refer to only two or three of them. It is his duty by paragraph (*a*) " to " disallow every item of account which is contrary to law "; by paragraph (*b*) " to surcharge the amount of any expenditure dis- " allowed upon the person responsible for incurring or authorising " the expenditure "; and by paragraph (*d*), which is the relevant one in this case, " to surcharge the amount of any loss or " deficiency upon any person by whose negligence or misconduct " the loss or deficiency has been incurred." The district auditor has to come in the course of the audit to certain decisions; he has to decide in the case of an objection whether it is valid or not, and he has to decide under section 228 whether any sum has to be disallowed or surcharged under any one of the paragraphs to subsection (1) of that section.

[His Lordship read section 229 of the Act, and continued:] The preliminary point taken arises on those sections to which I have referred. It is submitted that the surcharge that in fact was physically made by the district auditor, as a result of directions made by the Minister, was not made by the district auditor within the meaning of section 229 (1) and that therefore an appeal will not lie by the party aggrieved to the High Court or the Minister. It is also submitted that in any event, Whitter having appealed to the Minister as a person aggrieved by the district auditor's refusal to comply with his objection and the Minister having determined the appeal, the Minister's decision by virtue of section 229 (3) is final, and that accordingly there is now no appeal to this court. The point, in my view, comes down to the very narrow question of what is meant in subsection (1) by the expression " any person aggrieved by . . . a " surcharge made by a district auditor." Does that include a surcharge made, as in this case, at the direction of the Minister, or is it to be confined to a surcharge made pursuant to the district auditor's duty under section 228? The first thing to observe is that once the district auditor has come to his necessary decisions and the audit is made, he is functus officio so far, at any rate, as his judicial duties are concerned and his only duties thereafter are such as can be found in the Statute, which in this case are to obey a direction of the Minister if the matter has been before the Minister or of the court if the matter has been before the court. That is an administrative as opposed to a judicial

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Lord Parker C.J.

duty. When one looks at section 229 it appears that all the rights of appeal there set out are rights of appeal from what the district auditor has done in the exercise of his judicial duties. Thus the opening words, "Any person who is aggrieved by a "decision of a district auditor on any matter with respect to "which he made an objection at the audit," are clearly referring to, and can only refer to, the decision that is made under section 226 in the course of the exercise of the auditor's judicial function. Similarly, it seems that "a disallowance or surcharge "made by a district auditor" is again referring to what he has done pursuant to section 228 in the exercise of his judicial duty. Indeed, the very words which follow assimilate the disallowance or surcharge to a decision, for section 229 (1) provides that a person aggrieved "may, where the disallowance or surcharge or "other decision relates to an amount exceeding five hundred "pounds, appeal," thereby clearly showing that appeals in that subsection are appeals from decisions or actions taken in the course of the auditor's judicial duties.

Subsection (2) points to the same conclusion where it provides that "The court or Minister on such an appeal shall have power ". . . to remit the case to the auditor with such directions as "the court or Minister thinks fit for giving effect to the decision "on appeal"—that is, the decision of the Minister or of the court. That should be contrasted with the words which follow: "and "if the decision of the auditor is quashed, or is varied," then certain things follow. I think that on that short ground alone, as a pure matter of construction, there is no appeal to this court where the only surcharge made was one by the district auditor acting administratively on the directions of the Minister.

But the matter does not rest there because, as I have already said, subsection (3) provides that subject to the stating of a special case the decision of the Minister shall be final. If those words do not mean what they say, the position would be rather extraordinary. There would be in a sense no end to the possibilities of litigation and the absurdities that would arise. Take the present case. Whitter, instead of appealing, as a person aggrieved, to the Minister, might have appealed to this court and this court might have done what the Minister did. Is it then to be said that these appellants could go to the Minister and in effect ask the Minister to reverse the decision arrived at by this court? It seems to me that the words "the decision of "the Minister shall be final" mean what they say. It is submitted that those words only mean that the decision shall be final as between the appellant Whitter and the district auditor and possibly the local authority. But the decision whether Whitter's objection is right and whether Dean and Burrows are liable to be surcharged is really one and indivisible, and subsection (3) is an added reason for saying there can be no appeal in this case.

It is said with some force by Mr. Stogdon and by Mr. Rankin

for the appellants that there is no machinery specifically laid down for the people liable to be surcharged to appear before the Minister or his representative to defend themselves, to be represented by counsel and matters of that sort. It is curious that there is no provision made in the Act itself or by rules to that effect, but the words of section 229 are much too clear to be influenced by considerations of that sort. I have no doubt that at such an inquiry the Minister should, and no doubt does, take every possible step to see that those upon whom the surcharge may fall shall be present, shall hear the accusations made against them and shall in effect be able to defend themselves. So much for the appeal.

As regards the application for relief, that depends on the wording of section 230 (1). [His Lordship read the subsection and continued:] The important words there are that if the person surcharged does not appeal, he may apply to the tribunal, whether the High Court or the Minister, "to whom he might "have appealed." Mr. Stogdon took up the attitude at the outset that if he did not have a right of appeal under section 229, he was also debarred from applying under section 230 because he was not a person who "might have appealed." He invoked that argument in support of his submission that the construction which I have just suggested as the correct construction of section 229 must be wrong, because it would be a most extraordinary position if a man in these circumstances not only had no right of appeal but no right of claiming relief. On behalf of the district auditor it was submitted that not only was there no right of appeal but that there was no right of application under section 230, again because of the words "to whom he might have "appealed." I cannot think that those words were ever intended to provide a condition which, if not complied with, debarred a man from relief; in other words, it was not intended to deal with a case where a man might have no right of appeal at all. What the subsection does is to identify the tribunal to whom the application is made, whether it is the High Court or the Minister. Which it is depends upon the amount of the surcharge: if the amount of the surcharge is over £500, then the application has to be made to the High Court; if it is under £500 it can be made either to the Minister or the High Court.

Accordingly, I think that those words, "to whom he might "have appealed," are not intended to be a condition of an application being made, but are intended merely to identify the particular tribunal to which the application must be made; in other words, the tribunal to which, if there were a right of appeal, the applicant would have appealed.

In my view the present appellants have a right to apply to this court for relief under section 230. The question whether, when a surcharge is being made pursuant to section 228 (1) (*d*), it is possible to say that the applicant has acted reasonably or in the belief that his action was authorised by law is a matter

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which the court at this stage does not decide. It is enough to say that there is jurisdiction to entertain an application.

DONOVAN J. I agree and for the same reasons.

SALMON J. I agree. I only desire to add this. Dean, Burrows and Hughes were present at an inquiry held by the Minister's representative and it is not suggested, and could not be suggested, that they were denied the right of putting forward anything they desired to put forward on their own behalf. In the unlikely event of an inquiry of this sort being held and the Minister's representative denying a person, against whom allegations of negligence are being made, the right to be heard in his own defence, I am far from satisfied that such a person would not have any remedy in this court. I am convinced, however, that that remedy would not be by way of appeal under section 229.

[Their Lordships proceeded to hear the applications by the two appellants for relief under section 230 of the Act. Both applications were dismissed.]

Appeals and applications dismissed with costs to the district auditor. The Minister of Housing and Local Government did not ask for costs.

Solicitors: *J. G. Haley; Jaques & Co. for Barker & Midgley, Blackpool; Solicitor, Ministry of Housing and Local Government.*

[PRIVY COUNCIL.]

J. C.*

1959

June 22.

MAXINE FOOTWEAR CO. LTD. AND ANOTHER . APPELLANTS;

AND

CANADIAN GOVERNMENT MERCHANT MARINE LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Shipping—Bill of lading—Seaworthiness—Hague Rules—Doctrine of stages—Fire—Loss of cargo—Overriding obligation to exercise due diligence "before and at the beginning of the voyage" to make ship seaworthy—Continuous obligation from at least the beginning of loading until start of voyage—Failure to exercise due diligence—Exemptions excluded—Doctrine of "stages"—Canadian Water Carriage of Goods Act, 1936—*Carriage of Goods by Sea Act*, 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sch., arts. III, r.* 1; *IV, r.* 2 (*b*).
Canada—Shipping.

Article III, rule 1, of the Hague Rules (scheduled to the Canadian Water Carriage of Goods Act, 1936), which provides that

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* *Present*: VISCOUNT KILMUIR L.C., LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW and LORD DENNING.

"The carrier shall be bound, before and at the beginning of the "voyage, to exercise due diligence to, (*a*) make the ship seaworthy," is an overriding obligation, and if it is not fulfilled and in consequence damage results the immunities of article IV—which, by rule 2, provides that "Neither the carrier nor the ship shall be "responsible for loss or damage arising or resulting from . . . "(*b*) fire, unless caused by the actual fault or privity of the "carrier"—cannot be relied on. The words "before and at the "beginning of the voyage" in article III, rule 1, mean the period from at least the beginning of the loading until the vessel starts on her voyage, and the carrier's obligation to exercise due diligence to make the ship seaworthy continues over the whole of that period.

The respondents' ship, while in port and after loading had begun, caught fire owing to the negligence of their servants in thawing out frozen scupper pipes with an acetylene torch and she had to be scuttled. The appellants' goods, which had been loaded under a bill of lading incorporating the Canadian Water Carriage of Goods Act, 1936, to which were scheduled the Hague Rules, were lost. On a claim for damages:—

Held, that the negligence which caused the fire was a failure by the respondents to exercise due diligence within article III, rule 1, during the relevant period—from the beginning of loading until the ship sank—as the result of which the ship became unseaworthy, and that unseaworthiness caused the loss of the appellants' goods, for which they were entitled to recover damages.

Paterson Steamships Ltd. v. *Robin Hood Mills Ltd.* (1937) 58 Ll.L.Rep. 33 applied.

Observations on the doctrine of "stages."

Dictum of Lord Macmillan in *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.* [1932] A.C. 328 at 350; 48 T.L.R. 127 considered.

Judgment of the Supreme Court of Canada reversed.

APPEAL (No. 13 of 1958) from a judgment of the Supreme Court of Canada (Kerwin C.J., Taschereau, Fauteux and Abbott JJ., Cartwright J. dissenting) (October 1, 1957) affirming a judgment of the Exchequer Court of Canada (Cameron J.) (February 14, 1956) which in turn had affirmed a judgment of the Admiralty Court for the District of Quebec (Smith J.) (June 3, 1952) whereby the present appellants' action as shippers against the respondents as carriers for non-delivery of their goods was dismissed.

The following facts are taken from the judgment of the Judicial Committee: The first named appellants were shippers and the second named appellants consignees of cargo loaded on board the *M.V. Maurienne* (hereinafter called the ship) at Halifax, N.S., in February, 1942, to be carried to Kingston, Jamaica. The cargo and ship were destroyed by fire before she left Halifax. The second named appellants had assigned their rights to the first named appellants.

The registered owner of the ship was His Late Majesty King George VI represented by the Honourable the Minister of Transport of the Dominion of Canada. The respondents originally submitted that the contract of carriage on which the appellants relied was with the Crown and not with the respondents. That

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point failed in all courts below and was not taken before the Board.

The contract of carriage was subject to the Canadian Water Carriage of Goods Act, 1936. The following provisions of the Hague Rules, which were scheduled to that Act, were material.

"Article III.

"RESPONSIBILITIES AND LIABILITIES.

"1. The carrier shall be bound, before and at the beginning "of the voyage, to exercise due diligence to,

"(*a*) make the ship seaworthy;

"(*b*) properly man, equip, and supply the ship;

"(*c*) make the holds, refrigerating and cool chambers, and "all other parts of the ship in which goods are carried, fit and "safe for their reception, carriage and preservation.

"2. Subject to the provisions of Article IV, the carrier shall "properly and carefully load, handle, stow, carry, keep, care "for and discharge the goods carried.

"Article IV.

"RIGHTS AND IMMUNITIES.

"1. Neither the carrier nor the ship shall be liable for loss "or damage arising or resulting from unseaworthiness unless "caused by want of due diligence on the part of the carrier to "make the ship seaworthy, and to secure that the ship is properly "manned, equipped and supplied, and to make the holds, re-"frigerating and cool chambers and all other parts of the ship "in which goods are carried fit and safe for their reception, "carriage and preservation in accordance with the provisions of "paragraph 1 of Article III.

"Whenever loss or damage has resulted from unseaworthiness, "the burden of proving the exercise of due diligence shall be "on the carrier or other person claiming exemption under this "section.

"2. Neither the carrier nor the ship shall be responsible for "loss or damage arising or resulting from,

"(*a*) act, neglect, or default of the master, mariner, pilot or "the servants of the carrier in the navigation or in the manage-"ment of the ship;

"(*b*) fire, unless caused by the actual fault or privity of the "carrier;

"(*c*) perils, danger, and accidents of the sea or other navigable "waters;

"(*d*) act of God;

"(*e*) act of war;

"(*f*) act of public enemies;

"(*g*) arrest or restraint of princes, rulers or people, or seizure "under legal process;

"(*h*) quarantine restrictions;

" (*i*) act or omission of the shipper or owner of the goods, " his agent or representative;

" (*j*) strikes or lock-outs or stoppage or restraint of labour " from whatever cause, whether partial or general;

" (*k*) riots and civil commotions;

" (*l*) saving or attempting to save life or property at sea;

" (*m*) wastage in bulk or weight or any other loss or damage " arising from inherent defect, quality or vice of the goods;

" (*n*) insufficiency of packing;

" (*o*) insufficiency or inadequacy of marks;

" (*p*) latent defects not discoverable by due diligence;

" (*q*) any other cause arising without the actual fault and " privity of the carrier, or without the fault or neglect of the " agents or servants of the carrier, but the burden of proof shall " be on the person claiming the benefit of this exception to show " that neither the actual fault or privity of the carrier nor the " fault or neglect of the agents or servants of the carrier con- " tributed to the loss or damage.

" 3. The shipper shall not be responsible for loss or damage " sustained by the carrier or the ship arising or resulting from " any cause without the act, fault or neglect of the shipper, his " agents or his servants."

The cargo consisted of three wooden crates and one drum of shoe leather and shoe findings. It was delivered to Canadian National Railways in Montreal on or about January 26, 1942. Canadian National Railways issued a through bill of lading which contained a clause paramount stating that the bill of lading had effect subject to the provision of the Water Carriage of Goods Act. The bill of lading being subject to the Act such a clause had to be inserted under section 4 of the Act.

The ship arrived at Halifax on Saturday, January 31. It had been common ground that the appellants' cargo was loaded in No. 3 hold. The loading of that hold probably began on Tuesday, February 3, and finished on Friday, 6th. The loading of all cargo was completed at about 8.15 on Friday evening. The intention was to sail on Saturday.

On the morning of Friday it was found that three scupper pipes passing through No. 3 hold and discharging from the bath, toilet and galley sink were blocked by ice at the point at which they met the ship's side. The master instructed one of the officers to have those pipes thawed out. That work was done between 3 and 4 p.m. on Friday afternoon by an employee of a Halifax firm, Purdy Bros., who used an acetylene torch.

There was cork insulation round the pipes. The heat of the acetylene torch acting on the cork started a fire. That was detected at about 11.30 p.m. In spite of efforts to extinguish the fire, it spread and at about 5.30 a.m. on Saturday, February 7, the master was forced to order the scuttling of the ship which resulted in the loss, inter alia, of the appellants' cargo.

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1959. May 26, 27, 28. *C. Russell McKenzie Q.C.* (Canadian Bar) and *S. O. Olson* for the appellants.

Leon Lalande Q.C. (Canadian Bar) and *John F. Donaldson* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[1]; *Gosse Millerd* v. *Canadian Government Merchant Marine Ltd.*[2]; *Colonial Steamships Ltd.* v. *Kurth Malting Co.*[3]; *Easwest Produce Co.* v. *The Ship S.S. Nordnes*[4]; *Ionian Steamship Company of Athens* v. *United Distillers of America*[5]; *F. O. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.*[6]; *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[7]; *The Europa*[8]; *J. & E. Kish* v. *Charles Taylor, Sons & Co.*[9]; *Minister of Food* v. *Reardon Smith Line Ltd.*[10]; *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*[11]; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[12]; *McFadden* v. *Blue Star Line*[13]; *C. Wilh Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.*[14]; *A. E. Reed & Co. Ltd.* v. *Page, Son and East Ltd.*[15]; *Dominion Glass Co. Ltd.* v. *The Ship Anglo Indian.*[16]

June 22. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: In the view which their Lordships take the precise times of loading of No. 3 hold do not matter.

It was found by the trial judge and admitted before their Lordships that the officer who ordered and supervised the thawing was negligent. The cork insulation created a danger of fire and the man operating the torch should have been warned or some other method used.

On the pleadings the appellants claimed for their goods; the respondents relied on the immunities under article IV, rule 1 and rule 2 (*a*) and (*b*). They further submitted that they had performed their obligations under article III, rule 1. The appellants submitted that the respondents had not exercised due diligence to make the ship seaworthy within article III, rule 1; that the unseaworthiness so resulting caused the damage; and that in these circumstances the respondents could not rely on the immunities under article IV.

[1] [1934] A.C. 538; 51 T.L.R. 5.
[2] [1927] 2 K.B. 432; 43 T.L.R. 544; [1929] A.C. 223; 45 T.L.R. 63.
[3] [1954] S.C.R.(Can.) 275.
[4] [1956] Ex.C.R.(Can.) 328.
[5] (1956) 2 A.M.C. 1750.
[6] (1927) 27 Ll.L.Rep. 395.
[7] [1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405.
[8] [1908] P. 84; 24 T.L.R. 151.
[9] [1912] A.C. 604; 28 T.L.R. 425.
[10] [1951] 2 T.L.R. 1158; [1951] 2 Ll.L.Rep. 265.
[11] [1915] A.C. 705; 31 T.L.R. 294.
[12] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.
[13] [1905] 1 K.B. 697; 21 T.L.R. 345.
[14] [1932] 1 K.B. 490.
[15] [1927] 1 K.B. 743; 43 T.L.R. 272.
[16] [1944] S.C.R.(Can.) 409.

The District Judge in Admiralty found that the fire was due to the heat generated by the acetylene torch and this is not now disputed. It had been contended by the appellants that the presence of ice made the ship unseaworthy. This was rejected by the judge and this finding is not now disputed.

The judge held that the warranty of seaworthiness was not a continuing warranty. He held that on the evidence the appellants' cargo had been loaded before the attempt to thaw the ice had begun and that the ship was seaworthy at the "loading "stage." He further held that the question of seaworthiness for the voyage never arose as the ship never sailed. In these circumstances the respondents were entitled to rely on article IV.

One of the questions for decision in this appeal is whether the qualified obligation under article III, rule 1, applies only at stages or is a continuing obligation from at any rate the beginning of the loading down to the beginning of the voyage.

The Exchequer Court on appeal held that the fourth officer, and possibly the captain and chief engineer, were negligent in relation to the use of the acetylene torch. Cameron J. held that the presence of ice did not make the ship unseaworthy. He went on to consider whether "in the negligent use and application of "the acetylene torch, the respondents failed before and at the "beginning of the voyage to make the vessel seaworthy, and the "holds and all other parts of the vessel in which goods were carried "fit and safe for their reception, carriage and preservation "as required by rule 1 of article III." If the respondents had not so failed they would be entitled to immunity under article IV.

The judge held that the obligations under article III had been fully carried out before the thawing out operations started. He further held that on this basis the fire arose from negligence in the management of the ship. The respondents were therefore entitled to the benefit of rule 2 (*a*) of article IV. The court considered various authorities on what constituted management. It was further held that the respondent could rely on rule 2 (*b*) in that the negligence of the respondents' servants did not constitute actual fault or privity of the carrier.

In the Supreme Court the majority held that on the evidence the appellants' goods were not stowed until after the commencement of the fire. On the assumption that a plaintiff can only rely on unseaworthiness at the commencement of the loading, and that for this purpose the commencement of the loading means the commencement of the loading of each shipper's parcel and not the commencement of loading any cargo, the appellants had therefore established a breach of article III subject to due diligence. The Supreme Court held that the respondents had established due diligence. This was on the basis that due diligence need only be exercised by the owners personally or those who act for the owners in a mangerial capacity, that is a class similarly restricted to that to which fault or privity has to be brought home under the fire clause. There was no evidence that members of that restricted

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class knew that the pipes were frozen or that an acetylene torch was to be used.

Cartwright J., dissenting, agreed with the finding that the appellants' goods were not stowed until the commencement of the fire. He held that an owner only escapes liability for damage caused by unseaworthiness if due diligence has been exercised not only by himself but by his experts, servants or agents. He further held that this failure to exercise due diligence caused the fire which amounted to unseaworthiness and caused the loss. He would have entered judgment for the appellants.

The question as to the scope of due diligence was dealt with by this Board in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[1]: "The condition"—that is, of the exercise of due diligence to make a vessel seaworthy—"is not fulfilled merely because the "shipowner is personally diligent. The condition requires that "diligence shall in fact have been exercised by the shipowner or "by those whom he employs for the purpose—see *Dobell & Co.* "v. *Steamship Rossmore Co.*[2]"

The failure to exercise due diligence by the fourth officer was therefore, if the matter becomes relevant, a failure to exercise due diligence by the carrier within article III, rule 1. On this point their Lordships agree with Cartwright J.

Before proceeding to consider the arguments it is convenient to state certain conclusions which appear plain to their Lordships. From the time when the ship caught on fire she was unseaworthy. This unseaworthiness caused the damage to and loss of the appellants' goods. The negligence of the respondents' servants which caused the fire was a failure to exercise due diligence.

Logically, the first submission on behalf of the respondents was that in cases of fire article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under article IV, rule 2 (*b*). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.

In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.

The further submissions by the respondents were based, as they had to be, on the construction of article III, rule 1. It was submitted that under that article the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage.

[1] (1937) 58 Ll.L.Rep. 33, 40.

[2] [1895] 2 Q.B. 408; 11 T.L.R. 501.

It is difficult to believe that this construction of the word "before" could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law.

It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague Rules, as does the present Act. "It is important to remember that the Act of 1924 "was the outcome of an International Conference, and that the "rules in the Schedule have an international currency. As these "rules must come under the consideration of foreign courts it is "desirable in the interests of uniformity that their interpretation "should not be rigidly controlled by domestic precedents of ante-"cedent date, but rather that the language of the rules should be "construed on broad principles of general acceptation." (*Stag Line Ltd.* v. *Foscolo, Mango & Co.*[3])

In their Lordships' opinion "before and at the beginning of "the voyage" means the period from at least the beginning of the loading until the vessel starts on her voyage. The word "before" cannot in their opinion be read as meaning "at the "commencement of the loading." If this had been intended it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words "at least."

On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage to and loss of the appellants' goods. The appellants are therefore entitled to succeed.

It becomes therefore unnecessary to consider whether the Supreme Court were justified in holding that the appellants' goods were all loaded before the fire.

It is also unnecessary to consider the earlier cases as to "stages" under the common law. The doctrine of stages had its anomalies and some important matters were never elucidated by authority. When the warranty was absolute it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed and judgment entered for the appellants for $2,801.33.

[3] [1932] A.C. 328, 350; 48 T.L.R. 127.

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The respondents must pay the appellants' costs of this appeal and in the courts in Canada.

Solicitors: *Waltons & Co.; Richards, Butler & Co.*

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[COURT OF APPEAL.]

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July 1, 2, 3, 21.
Lord Evershed M.R., Romer and Pearce L.JJ.

BARCLAYS BANK LTD. *v.* INLAND REVENUE COMMISSIONERS.

[1958 B. 3270.]

Revenue — Estate duty — Valuation — Shares — Control of company — Shares held by deceased beneficiary—Further shares held as trustee —Whether register of members conclusive—Whether deceased in control of company—Method of valuation—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7 (5)—*Finance Act,* 1940 (3 & 4 *Geo.* 6, *c.* 29), *ss.* 55, 58 (*as amended by Finance Act,* 1946 (9 & 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company — Control — Estate duty purposes — Trustee shareholder — Register of members—Whether conclusive—Finance Act, 1940, *s.* 55. *Meaning of "deemed"—Humpty Dumpty.*

At the date of his death on December 15, 1955, the deceased owned beneficially 1,100 shares in a company. By a settlement made on December 1, 1936, he had settled 3,650 shares in the same company upon trust for his wife and children, he himself taking no benefit. The deceased had always been a trustee of the settlement. His name appeared as the first of the four trustees' names in the company register, and since Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the company's articles of association, it was he who exercised the powers of voting.[1] The issued share capital of the company had always been 8,350 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital.

The trustees took out a summons to determine whether the deceased had control of the company within the meaning of section 55 of the Finance Act, 1940,[2] in which event the 1,100 shares

[1] Companies (Consolidation) Act, 1908, Table A:—Art. 60: "... On "a poll every member shall have one "vote for each share of which he is "the holder."

Art. 61: "In the case of joint "holders the vote of the senior who "tenders a vote, whether in person "or by proxy, shall be accepted to the "exclusion of the votes of the other "joint holders; and for this purpose "seniority shall be determined by the "order in which the names stand in "the register of members."

[2] Finance Act, 1940, s. 55, as amended: "(1) Where for the purposes of estate duty there pass, on "the death of a person dying after "the commencement of this Act, "shares in or debentures of a company to which this section applies, "then if—(*a*) the deceased had the "control of the company at any time "during the five years ending with "his death ... the principal value "of the shares or debentures, in lieu "of being estimated in accordance "with the provisions of subsection (5) "of section 7 of the Finance Act, 1894, "shall be estimated by reference "to the net value of the assets "of the company in accordance with

should be valued for estate duty by reference to their assets value in accordance with section 55 (2), or, whether they should be valued by reference to their market value under section 7 (5) of the Finance Act, 1894:—

Held, (1) (by Lord Evershed M.R. and Pearce L.J.) that the phrase "control of the company" in section 55 (1) (*a*) of the Finance Act, 1940, is a wide phrase, and that subsection (3) is a definition provision, and in that subsection "the control of powers "of voting" means no more than the "control of voting," the words being apt to cover a person who could either by the exercise of the voting power himself or by the exercise of rights he held indirectly command or produce the result that the majority of the votes would be given as he wished, and that prima facie the section applied to the deceased.

(2) That control of a limited company depends upon its own constitution, and what it does is determined by the resolutions of its corporators, so that those who command a majority in general meeting control the company, and it is nihil ad rem that those who control the company are themselves controlled from without.

(3) That the Crown had discharged the onus which rested upon it of showing that the deceased during the relevant period by virtue of the 3,650 shares registered in the names of himself and his three co-trustees—his own name being first on the register—and of the 1,100 shares of which he was the registered proprietor and beneficial owner was "in control of the company" within the meaning of section 55 (1) and (3) of the Act of 1940.

Inland Revenue Commissioner v. *J. Bibby & Sons Ltd.* (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167, and *Inland Revenue Commissioners* v. *Silverts Ltd.* [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491 followed.

Shields (John) & Co. (Perth) Ltd. v. *Inland Revenue Commissioners* (1950) 29 T.C. 475 applied.

(4) *Per* Romer L.J.: The deeming provisions in subsection (3) of section 55 are supplementary to or expansive of subsection (1) and not merely expository, subsection (1) dealing with direct control and subsection (3) with indirect control, and that, on the facts, the case fell within subsection (1), the deceased having the "control of the "company" by reason of his voting power, and regard need not be had to subsection (3) of section 55.

"the provisions of the next succeeding subsection. . . . (3) For the "purposes of this section a person "shall be deemed to have had control "of a company at any time if he "then had—(*a*) the control of powers "of voting on all questions, or on "any particular question, affecting "the company as a whole which if "exercised would have yielded a "majority of the votes capable of "being exercised thereon . . . or if "he could have obtained such control . . . by an exercise at that "time of a power exercisable by him "or with his consent. . . . (5) Control of a company which a person "had in a fiduciary capacity shall be "disregarded for the purposes of this "section. . . ."

S. 58: "(4) References in this "Part of this Act to a disposition's "being made by any person, to a "power's being exercised or exercisable by any person, . . . include "references to its being made, or "being exercised or exercisable, or "being done, by him and another "jointly or by another at his direction or by a company of which he "had control within the meaning of "subsection (3) of section 55 of this "Act, whether with or without the "consent of any other person; . . . "(5) References in this Part of this "Act to a person having any power "or control or doing any act in "a fiduciary capacity shall be construed as references to his having "that power or control or doing that "act in a fiduciary capacity imposed "on him otherwise than by a disposition made by him and in such "a capacity only."

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Decision of Danckwerts J. [1959] Ch. 341; [1959] 2 W.L.R. 99; [1959] 1 All E.R. 55 reversed.

APPEAL from Danckwerts J.[3]

The deceased, Tom Shipside, died on December 15, 1955, having, by his will dated December 18, 1952, appointed the plaintiffs to be his executors and trustees. Probate was granted to them on March 24, 1956. The estate of the deceased included at his death 1,100 fully paid ordinary £1 shares in T. Shipside Ltd. registered in the sole name of the deceased, and these shares he owned beneficially. By a settlement dated December 1, 1936, the deceased settled 3,650 fully paid ordinary £1 shares in the company upon trust for the benefit of his wife and his children, he himself taking no beneficial interest. The deceased and two other persons were the original trustees, but as a result of appointment made on November 30, 1948, when one of the original trustees retired, the deceased and three other persons became the trustees and remained so until the deceased's death. The 3,650 shares were registered in the company's register of members in the names of the four trustees, the name of the deceased appearing as the first holder. The company had been incorporated under the Companies Acts, 1908 to 1917, and Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the articles of association. The deceased was therefore the person with the right to exercise the votes.

The issued share capital of the company had always been 8,350 ordinary £1 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital. It being uncertain whether the deceased had control of the company so as to affect the valuation of the 1,100 shares for estate duty, the plaintiffs took out a summons to determine whether, upon the true construction of section 55 of the Finance Act, 1940, the principal value of the 1,100 shares should be estimated in accordance with the provisions of section 55 (2) of the Act of 1940, or in accordance with section 7 (5) of the Finance Act, 1894. If the former method, which required the value of the shares to be estimated by reference to the net value of the company's shares, were adopted, the burden of estate duty would be higher than if the valuation were made under section 7 (5) of the Act of 1894, which provided for a valuation by reference to the market value of the shares.

Danckwerts J. held that the deceased did not have control of the company within the meaning of section 55 of the Finance Act, 1940, and his shares should be valued under section 7 (5) of the Finance Act, 1894.

The Commissioners of Inland Revenue appealed.

[3] [1959] Ch. 341; [1959] 2 W.L.R. 99; [1959] 1 All E.R. 55.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Commissioners of Inland Revenue, the appellants.

B. L. Bathurst Q.C. and *Denys B. Buckley* for the plaintiff, the respondents.

The following cases, in addition to those referred to in the judgments, were cited in argument: *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*[4]; *Liversidge* v. *Sir John Anderson.*[5]

Cur. adv. vult.

July 21. The following judgments were read.

LORD EVERSHED M.R. The plaintiffs in this action are the personal representatives of one, Tom Shipside, who died on December 15, 1955. The assets of the deceased's estate included 1,100 fully paid shares of £1 each in the capital of a company, T. Shipside Ltd., formed in the year 1917 to acquire the motor business formerly carried on by the deceased. The share capital of the company was and is £10,000, divided into 10,000 shares of £1 each, carrying the right, upon a poll, of one vote per share at general meetings of the company. The issued share capital was at all material times, and is, £8,350. The company's regulations include clause 61 of Table "A" in the Companies (Consolidation) Act, 1908, whereby, in the case of joint holders of shares "the vote of the senior who tenders a vote, whether "in person or by proxy, shall be accepted to the exclusion of "the votes of the other joint holders; and for this purpose "seniority shall be determined by the order in which the names "stand in the register of members." The deceased was a director of the company from the date of its incorporation until the date of his death.

In addition to the 1,100 shares registered in his sole name, of which he was, admittedly, the beneficial owner, his name also appeared first on the register as joint holder with (since 1948) the names of three other persons of a further 3,650 of the company's shares. These 3,650 shares are the subject of a settlement made by the deceased on December 1, 1936, in favour of his wife and three children (to the exclusion of any beneficial interest in himself). By the settlement he had the power during his life of appointing new trustees—a power which he exercised in 1948.

It will be noted that the 3,650 shares, plus the deceased's own 1,100, together amount to a majority of the issued shares of the company; so that if he exercised his voting rights, under the company's regulations, as "senior" registered holder of the 3,650 shares and as sole proprietor of his own 1,100 shares, he would command a majority of all the votes at general meetings

[4] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13; 29 T.C. 49.

[5] [1942] A.C. 206; [1941] 2 All E.R. 612.

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of the company. In these circumstances, the question has arisen whether it should now be held that at any time during the last five years of the deceased's life he was "in control" of the company within the meaning of section 55 of the Finance Act, 1940: for, if so, it must follow that his own 1,100 shares in the company must be valued for estate duty purposes, not according to their value in the market pursuant to section 7 of the Finance Act, 1894, but according to the value of the company's assets as provided by the Act of 1940. It is this question of the proper basis of valuation which is posed for the court by the originating summons, and which Danckwerts J. answered in the sense favourable to the plaintiff executors. It is to be noted, as Mr. Bathurst for the plaintiffs observed, that an answer favourable to the Crown may have the added effect of so increasing the value of the estate as to raise also the general rate of estate duty payable in respect of it.

The problem turns entirely upon the true interpretation of the relevant provisions of the Finance Act, 1940.

[His Lordship read section 55 (1), (3) and (5) and section 58 (4) and (5) and continued:] It is easy, and perhaps not profitable, to criticise the draftsmanship of an Act of Parliament; but the inelegance and obscurity of some, at any rate, of the relevant provisions of the Act of 1940 is certainly remarkable, and in this respect section 58 (4) undoubtedly takes pride of place. Nevertheless, it is a mistake to suppose that, to the draftsman of this Act, the phrases "control of the company" or "controlling interest in the company" had acquired the precise significance which later judicial pronouncements in *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[1] and other cases have given them. In 1940, only Rowlatt J., in *B. W. Noble Ltd.* v. *Inland Revenue Commissioners*,[2] had anticipated the law as later laid down when he said that the phrase "controlling interest" in regard to a company was a reference to the situation of one "whose shareholding in the company is such that he is the "shareholder who is more powerful than all the other shareholders put together in general meeting"; for on this point I do not think the decision of this court in *Himley Estates Ltd. and Humble Investments Ltd.* v. *Inland Revenue Commissioners*[3] is relevant. In that case the question for the determination of the court was whether the company then in question was to be treated as being under the control of not more than five persons within the meaning of subsection 6 (*d*) of section 21 of the Finance Act, 1922. The voting shares were held by 14 persons, all of whom were admittedly beneficial owners of their shares. But it was said on behalf of the Crown that they were nonetheless friends (though not relatives or nominees) and supporters of the tenant for life, Lord Ednam, and that the case fell,

[1] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.
[2] (1926) 12 T.C. 911.
[3] [1933] 1 K.B. 472.

therefore, somehow within the language (the "ridiculous" language, according to one member of this court) of the definition at the end of the subsection, "a company shall be deemed to be "under the control of any persons where the majority of the "voting power or shares is in the hands of those persons or "relatives or nominees of those persons, or where the control is "by any other means whatever in the hands of those persons." The debate before Rowlatt J. and this court was substantially directed to the interpretation of that special formula quite different from anything found in the Act of 1940.

It follows then, if I am right so far, that the draftsman, in using the phrase in section 55 (1) (*a*), "control of the "company," would not, or at least may well not, have intended by it what a draftsman in 1959 would intend. In the absence of judicial interpretation "control of the company" is a somewhat wide phrase. This consideration leads me, therefore, to the view that subsection (3) was intended as a definition or exposition; and this view seems to be supported by the return, in subsection (5), to the phrase "control of a company"—for I feel it difficult to suppose that subsection (5) was only intended to apply to subsection (1) cases and not to subsection (3) cases. My view is also, I think, supported—as Mr. Pennycuick conceded—by the reference to subsection (3) in section 58 (4). If "control of a company" in subsection (1) was thought to have a precise but limited meaning, which subsection (3) was intended to expand, I should have expected subsection (3) to say "In "this section the phrase 'control of a company' shall be "deemed to include . . ." etc., or words to that effect.

But in the end, it may not very much matter. Mr. Bathurst conceded that the phrase in subsection (3) (*a*), "control of "powers of voting," etc., would cover the ordinary case of a majority shareholder entered in the register. As Lord Radcliffe indicated in *St. Aubyn* v. *Attorney-General* (*No. 2*),[4] the effect of a "deeming" clause may be to cover both the obvious and the not-so-obvious.

In my view, the difficulty in subsection (3) (*a*) is caused by the words "powers of." What is really meant by the phrase "control of the powers or voting" is surely no more than "the "control of voting": perhaps "rights" would have been a better word than "powers." What, however, I think the words were intended and are apt to cover is the person who can, either by the direct exercise of the voting power or rights that he has, or indirectly by requiring such power or rights to be exercised as he wants by others, command, or produce the result, that the majority of the votes will be given as he wishes. It covers the absolute owner of 51 per cent. of the (voting) shares: it covers also, to my mind, the beneficial owner of 51 per cent. registered in the name of a nominee.

[4] [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

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One result of this view may be that in the contemplation of the section more than one person may have "control of a "company" within the section at the same time. This indeed is made clear by subsection (3) itself, for example where A owns beneficially 51 per cent. of the shares, but B is the governing director (see paragraphs (*a*) and (*b*) of the subsection)—for the argument is not affected by the later repeal of paragraph (*b*). Similarly, a custodian trustee and managing trustee might both have "control." The latter point is, however, not likely to be of much practical significance having regard to subsection (5). The relevance for present purposes is that, in construing the section, the fact that "control" is, within the meaning of the section, found to be in one person, does not impliedly negative "control" also in someone else. After all, the section is not concerned to regulate companies, but to tax the estates of people whose interests in a company have a certain proprietary quality.

I therefore conclude that the section applies prima facie, and subject to exclusion under subsection (5), to a person who was, during the relevant period, in a position, by virtue of the voting rights vested in him, to secure the passing of any ordinary resolution at a general meeting. The next question then arises, is the prima facie result altered if it is shown that a relevant number of the shares, whose votes he was able and entitled to cast, were registered in him jointly with others as a trustee or otherwise? I assume in posing the question that subsection (5) has no application, and since, for the purposes of this case, it is conceded that subsection (5) cannot help the plaintiffs, having regard to the fact that Mr. Shipside himself made the trust disposition (see section 58 (5)), I shall disregard the possible application of the former subsection to this case.

Danckwerts J. thought that the question posed should be answered affirmatively. His grounds, briefly, were (and they are those submitted by the plaintiffs): (1) it is clear, for example, from subsection (5) of section 55, that you must go beyond the company's constitution and inquire of the capacity in which the registered shareholder in fact held his shares; and (2), when you find that the person entitled or primarily entitled to vote is one of four trustees, then it follows that he is speaking not with his own voice but with the united voices of all four trustees; it therefore follows that Mr. Shipside, though first on the register, was not voting the trust shares for himself and for his own purposes (as he was in respect of his own 1,100 shares): he was voting those shares on behalf and in the interests, to the exclusion of his personal interest, of the four trustees as a body. It was therefore said (and held by Danckwerts J.) that the present case was outside the scope of the relevant authorities, particularly *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[5] in the House of Lords; the two cases in this court, *Inland Revenue*

[5] 29 T.C. 167.

Commissioners v. *Silverts Ltd.*[6] and *S. Berendsen Ltd.* v. *Inland Revenue Commissioners*[7]; and the case before the First Division of the Court of Session in Scotland in 1950 (which was expressly approved by this court in the *Silverts* case[8]), namely, *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners.*[9]

I have, for my part, reached a different conclusion from Danckwerts J. and I can state as follows the grounds for my conclusion:

(1) Although the *Bibby*[10] and other cases (above referred to) were decisions on somewhat different contexts and related to the tax liability of companies and not of individuals, nevertheless, the speeches and judgments in those cases seem to me to have laid it down as a clear general proposition of law that control of a limited liability company depends upon, and is to be judged by reference to, the company's own constitution. I do not repeat the citations which Danckwerts J. made in his judgment, but in my view the general proposition has been affirmed with increasing emphasis as one case has succeeded another. What the company, being a "persona ficta," does or does not do is determined by the resolutions of its corporators, so that those who command a majority of the corporators or their votes in general meeting, control the company, the validity of the transactions of which cannot be questioned so long as the resolutions have been duly passed in accordance with the company's regulations—however much those who voted may have regarded or disregarded other (outside) obligations resting upon them. "A clean cut" (said Viscount Simonds in the *Bibby* case[11]) "there must be." It is nihil ad rem that the control of the company may be in the hands of persons who are themselves controlled from without. The company is in this respect like a motor-car the speed and direction of which is controlled by the driver—notwithstanding any influence or encouragement to which the driver is subject from other passengers.

(2) In the absence, therefore, of some compelling context to the contrary, the court must respect the general rule binding upon it; and it should avoid making fine distinctions. In my judgment there is no such compelling context in section 55 of the Act of 1940. For reasons which I have earlier attempted to state, other persons than the majority shareholder may well also, under the section, be deemed at the same time to control the company: and in this connection I refer to the last three lines of subsection (3) of the section. But these other "controllers" (if such there be) do not displace the control of the man who, according to the company's regulations, secures by his votes the passing of the resolutions—any more than the "control" of a

[6] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491.
[7] [1958] Ch. 1; [1958] 3 W.L.R. 164; [1957] 2 All E.R. 612.
[8] [1951] Ch. 521.
[9] (1945) 29 T.C. 475.
[10] 29 T.C. 167.
[11] Ibid. 185.

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motor-car by the driver is displaced by the fact that he may be acting under the influence and orders of a passenger who might therefore also be sensibly alleged to be in "control."

(3) It is true that, as Danckwerts J. pointed out, you are required by section 55 (5) to look into the character of the shareholder to see whether he is a trustee. But I observe that that subsection in terms affirms rather than negatives the trustee's "control." The subsection does not say that a majority shareholder, who is a trustee, shall not be deemed to control the company; it says rather that the control which the trustee has is to be disregarded. Further, if Mr. Bathurst's argument were accepted, the subsection can, as he concedes, only apply to a sole trustee—a result which seems to me, to say the least, to be an unlikely intention.

(4) If I am right so far, then the only remaining question is whether the facts that the deceased, as the "senior" of the four trustees, had by virtue of clause 61 of Table "A" only a prior right of voting quoad the other trustees, and that, when he voted, he must be taken to have spoken with the voices, in unison, of all four trustees, make any difference. It is true that these facts did not precisely arise in any of the decided cases; but in my opinion we should not on that ground distinguish this case from the Scottish case of *Shields*,[12] which has been expressly approved in this court. It is true that under the relevant article in the *Shields* case [12] Mrs. Bell had more than mere priority—she was to be treated as the sole proprietor of the trust shares. But, like the deceased, she had still to attend and vote; and like him, if (as we must assume) she performed her trust duties properly, she spoke with the voice of all the trustees.

In my judgment, therefore, we ought, in conformity with the principles of law binding upon us, to hold that the Crown has in this case discharged the onus which rests upon it of showing that the deceased, during the relevant period, was (by virtue of the 3,650 shares registered in the names of himself and his three co-trustees—his own name being first on the register—and of the 1,100 shares of which he was the registered proprietor and beneficial owner) "in control of the company" within the meaning of section 55 (1) and (3) of the Act.

Mr. Bathurst argued that on this view anomalies would arise, of which he gave examples. It may be that some anomalies do arise, upon my view of the construction—and on sections worded as are these, it would be perhaps surprising if it were not so. But I do not think that my construction involves anomalies so striking as to require that construction to be rejected.

Finally, I am also not satisfied that acceptance of the Crown's argument involves a manifestly unjust result or one which is contrary to the apparent intention of Parliament. The deceased was without doubt closely connected with the business of the

[12] 29 T.C. 475.

company which bears his name. Immediately before the making of the settlement he appears to have held in his own right 4,750 shares out of an issued total of 8,350, or approximately 57 per cent. At that time he undoubtedly "controlled the company." He appears also to have been at all times a director. I have also referred to the fact that by the terms of the settlement he gave himself the power (which he exercised eight years after the passing of the Act of 1940, retaining his own place as first on the register) to appoint new trustees. It is no doubt a misfortune for his estate that the deceased on making the settlement, or thereafter, forbore from putting the name of one of the trustees other than himself first on the register. But he did not do so. It appears to me at least highly likely that the conduct and management of the company's affairs remained (and may even have been intended to remain) after the settlement exactly the same as it had been before.

I add that I am glad to be able to reach the conclusion that I do without recourse to the almost offending language of section 58 (4). As regards that subsection, I content myself by saying that, as at present advised, I am inclined to agree with Mr. Bathurst that its terms are not apt to apply to the circumstances of the present case. I have also not found it necessary to do more than refer to section 58 (5), since it was (as I have earlier stated) conceded before us that so far as the deceased was concerned, the subsection effectively disqualified the plaintiffs from invoking subsection (5) of section 55.

For the reasons which I have stated, I would allow the appeal and answer the question raised by the originating summons in the sense of paragraph 1 (a).

Pearce L.J., who is unable to be present today but who has seen the draft of the judgment which I have delivered, has authorised me to say that he agrees with it.

ROMER L.J. I agree with the Master of the Rolls and Pearce L.J. in thinking that this appeal should be allowed, but as I have reached that conclusion by a somewhat different road, and as we are differing from the judge, I will add a few words of my own.

For myself I incline to the view that if a case be found to come within subsection (1) of section 55 of the Finance Act, 1940, it is unnecessary to look further and, in particular, it is irrelevant to inquire whether the case falls within the terms of subsection (3) of the same section. In other words, it seems to me that the "deeming" provisions of subsection (3) are supplementary to, or expansive of, subsection (1), and are not merely expository thereof. I think that subsection (1) is dealing with direct control of a company, whilst subsection (3) is concerned with indirect control. If subsection (3) were merely expository of subsection (1), it must at least be assumed to cover the case of a registered beneficial owner, but such an owner does not easily fit into the

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words " the control of powers of voting on all questions." These words in their natural sense would seem to indicate control of powers vested in some third person, as distinct from the exercise of powers which are vested in a registered owner himself—a distinction which is recognised in terms of subsection (3) (*b*). I feel that if subsection (3) had been intended to be an exhaustive definition of what constituted " control of a company " for the purposes of section 55 the draftsman would have used wider language in subsection (3) (*a*), such as " the powers of voting or " the control of powers of voting," etc. It is true that section 58 (4) tends to the opposite view to that which I have expressed, but that subsection is drawn in such a bewildering manner as to be an unsure guide to the interrelation of subsections (1) and (3) of section 55. I find some support for the construction of these subsections which appeals to me from the approach of Lord Greene M.R. to a somewhat similar question in *In re Parsons*.[13]

On the footing, then, which I have indicated, the first question to consider is whether the Crown have succeeded in establishing that the deceased had the control (within the meaning of section 55 (1)) of T. Shipside Ltd. at any time during the relevant period before his death.

The Master of the Rolls has stated the material facts of the case and I do not repeat them. The answer to the question which I have posed depends upon whether the shares comprised in the settlement which this gentleman made in 1936, and in respect of which he and his co-trustees were at all material times on the company's register, are relevant to the issue. His name appeared first on the register in respect of the joint holding of these shares, and it is the Crown's contention that this fact, combined with his own beneficial holding, gave him control of the company at and prior to his death. The contrary view, accepted by Danckwerts J. and advanced before us by Mr. Bathurst and Mr. Buckley, is based upon the contention that no regard should be had to the settled shares in considering whether the deceased had control of the company.

Now the precise words " the control of the company " which appear in section 55 (1) have not been judicially interpreted in any decision binding upon this court. The words " controlling " interest," however, have been considered in more than one case, including *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*,[14] which was a decision of the House of Lords. The cases in question were concerned with other statutes and dealing with other issues than those which arise under the Finance Act, 1940, s. 55; but it appears to me that the result of the decisions is that where Parliament speaks in a taxing statute of a " con- " trolling interest " in a company, that expression is referable to voting control and to nothing else. If so, I am unable to

[13] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.
[14] 29 T.C. 178.

attribute a different meaning to the words "control of a company"; and, accordingly, the control of a company is in the hands of the person (if any) whose holding carries a majority of votes. "The control of a company," said Lord MacMillan in *Bibby's* case,[15] "resides in the voting power of its shareholders." Nor does it matter that the shares which confer the voting power are held by a trustee. "The trustee, like the beneficial owner, "controls": *per* Lord Porter.[16] Nor, as was pointed out by Lord Simonds[17] in the same case, is it material that the trustee has to pay regard to the wishes of others. "Those" (he said) "who by their votes can control the company do not the less "control it because they may themselves be amenable to some "external control."

Prima facie, then, if the deceased had been the sole trustee of the settlement and the shares comprised therein had been registered in his name alone, it could, I think, hardly be contended that the voting power so vested in him should be disregarded in an inquiry whether or not he had control of the company. And, indeed, as the Master of the Rolls has pointed out in his judgment, section 55 (5) inferentially recognises that control of a company may be in the hands of a person who holds shares as trustee for third parties. But the plaintiffs' argument in the present case is based upon the fact that the deceased was only one of four trustees; that any decision of two or more trustees must be unanimous; and that, accordingly, the vote and voice of the deceased at a meeting of the company were those of the trustees as a body and not the personal vote and voice of him as an individual. True it is, said Mr. Bathurst and Mr. Buckley, that by reason of article 61 of Table "A" of the Companies Act, 1908, the vote of Mr. Shipside, as the first of the joint holders on the register, was accepted to the exclusion of the votes of the other trustees; but the fact remains, and should be recognised by the court, that Mr. Shipside's vote was the vote of the trustees as a whole and that each trustee had an equal say as to the manner in which that vote should be cast. It seems to me that this argument seeks to apply by analogy the decision of this court in *S. Berendsen Ltd.* v. *Inland Revenue Commissioners*,[18] in which it was held that where a registered shareholder was a body corporate it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate. In the course of his judgment in that case, my Lord, the Master of the Rolls, said[19]: "Where the registered "shareholder is a body corporate you nevertheless may, and "indeed must, for certain purposes, look beyond the register; "for since the company cannot itself speak you must find out "with whose voice it must do so. You may therefore ask, who

[15] 29 T.C. 178, 181.
[16] Ibid. 184.
[17] Ibid. 184, 185.
[18] [1958] Ch. 1.
[19] Ibid. 38.

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" does control the body corporate by the necessary shareholding " in it? "

The plaintiffs say that it is not even necessary to look beyond the share register of T. Shipside Ltd., for the names of all the trustees appeared upon it; but that it is clear that the voice of the deceased was that of the body of the trustees, which (by reason of article 61 of Table " A ") could no more speak as such than could an incorporated body. In my opinion this contention must be rejected for three reasons: In the first place it necessarily involves the view that section 55 (5)—as qualified by section 58 (5)—was directed only to cases in which the majority voting power in a company is in the hands of a sole trustee of a settlement to the exclusion of the far more common case of settled shares being held by two or more trustees. I find it difficult in the extreme to suppose that this can have been the intention of the legislature. Secondly, there is no true analogy, in my judgment, between the position of the deceased and his co-trustees on the one hand and a corporation on the other. It was of the essence of the decision in *Berendsen's* case [20] that a corporation is unable itself to speak, which cannot be said of a body of individuals, and I do not think that the limiting provisions of article 61 are sufficient to constitute an analogy. Thirdly (and possibly of most importance), the plaintiffs' contention is, in my judgment, inconsistent with the decision of the Court of Session in *John Shields & Co. (Perth) Ltd.* v. *Inland Revenue Commissioners*,[21] which was approved by this court in *Inland Revenue Commissioners* v. *Silverts Ltd.*[22] In that case the majority of shares in a company consisted of a trust shareholding of which there were four trustees. One of the articles of association of the company provided, so far as relevant, that " if two or more persons are registered as joint " owners of any shares any one of them nominated in writing by " them all from time to time, or in default of such nomination " the person first named on the register in respect of such shares, " shall, as regards voting . . . be deemed the sole owner." No such nomination as that mentioned in the article was made. There were four trustees on the company's register in respect of the trust holding, and of these a Mrs. Bell was named first in the register. Other points arose in the case to which it is not, for present purposes, necessary to refer, but the court held that the controlling interest in the company resided in Mrs. Bell. The plaintiffs' submission in the present case, as applied to *Shields'* case,[23] would have resulted in a decision that the controlling interest in the company was vested in all four trustees and not in Mrs. Bell alone. It is true that in *Shields'* case,[23] having regard to the article which I have quoted, unless Mrs. Bell attended a meeting of the company and voted, the voting power conferred by the trust holding could not be exercised at all and that that would not be the position under article 61 of Table " A,"

[20] [1958] Ch. 1.
[21] 29 T.C. 475.
[22] [1951] Ch. 521.
[23] 29 T.C. 475.

but in my opinion that is a distinction without a difference. The essential fact is that the voting control was held to reside in Mrs. Bell, notwithstanding that as a trustee she could only properly record a vote with the unanimous concurrence of her co-trustees and that in that sense her own voice was the voice of them all Mr. Bathurst suggested that if the deceased had stayed away from a meeting of the company, or had attended but refrained from voting, the trustee whose name next appeared on the register could exercise the voting power conferred by the settled shares and that such power was accordingly not vested in the deceased exclusively. I think that the answer to that is that control of a company may well exist in a person even though he may, on occasion, choose not to exercise it; and, so far as I am aware, there is in any case no suggestion made that the deceased did not at any time during the five years which preceded his death exercise the voting power himself.

Accordingly, I am of opinion, for the reasons above stated, that on the facts of this case it falls within section 55 (1), and regard need not be had to the provisions of section 55 (3). If, however, I am wrong in thinking that subsection (3) of section 55 is not merely expository of subsection (1), I would agree that in the end the same result follows, for the reasons which the Master of the Rolls has stated in his judgment.

In conclusion I would only add that except to the extent that section 55 does or may operate harshly (a question with which we are not concerned) I cannot regard the present case as one of any special hardship. For the deceased, in settling the shares in question, took good care to see that, during the lifetime of his wife, the voting powers attaching to such shares remained in his own control, so that he could continue to exercise the same influence over the conduct and management of the company's affairs as he had done previously. Moreover, by clause 8 of the settlement of 1936 he expressly reserved to himself during his life the power to appoint new trustees, a power which he in fact exercised when one of the original trustees retired in 1948.

I agree that the appeal must be allowed.

Appeal allowed. Respondents to pay party and party costs here and below. Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Gibson & Weldon for J. & A. Bright, Nottingham.*

B. A. B.

[COURT OF APPEAL.]

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July 13, 14.

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In re ROYCE'S WILL TRUSTS. TILDESLEY *v.* TILDESLEY AND OTHERS.

[1956 R. No. 2189.]

Will — Attestation — Trustee — Provisions in will for remuneration of trustee and solicitor — Attesting witness subsequently appointed trustee — Whether entitled to remuneration — Wills Act, 1837 (7 *Will* 4 *&* 1 *Vict. c.* 26), *s.* 15.

Solicitor—Remuneration—Will—Attestation by solicitor—Subsequent appointment as trustee—Whether entitled to remuneration.

A testator by clause 16 of his will provided that "if and so "long as my trustees are retaining any part of the trust fund "[his residuary estate] and receiving and applying the income" they were entitled to pay themselves 5 per cent. of the income thereof "to be equally divided between them by way of remunera- "tion for their services . . .". By clause 17 he provided that "any person who may for the time being be an executor or a "trustee of my will and who may be a solicitor shall be entitled "to charge and shall be paid out of my estate for his services "in the same manner as though not being an executor or trustee "he had been employed by my executors or trustees to render "such services . . ."

One of the two trustees appointed by the testator died after proving the will; the surviving trustee appointed a solicitor, who had attested the will, to be a trustee in the place of the trustee who had died:—

Held, (1) that on the true construction of section 15 of the Wills Act, 1837,[1] the question was whether at the time of attestation any beneficial interest was given to an attesting witness under the instrument the execution of which he was going to attest, and that an attesting witness was not disqualified by the fact that after attestation he became interested under it by some later act or event; so that the solicitor, who attested the will, was not by virtue of section 15 precluded from taking benefits under clauses 16 and 17 of the will if he were, upon their true construction, otherwise entitled to them.

Observations of Mathew J. in *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311, 312 applied.

(2) That the solicitor was entitled to the benefits given both by clauses 16 and 17. By these clauses different amounts were given for different services to the trustees and were cumulative.

Wilson v. *O'Leary* (1872) 7 Ch.App. 448 considered.

Decision of Wynn-Parry J. [1959] Ch. 191; [1958] 3 W.L.R. 676; [1958] 3 All E.R. 586 reversed.

APPEAL from Wynn-Parry J.[2]

By his will dated April 20, 1933, Sir Frederick Henry Royce,

[1] Wills Act, 1837, s. 15: "If any "person shall attest the execution of "any will to whom or to whose wife or "husband any beneficial . . . interest, "gift . . . shall be thereby given or "made, such . . . gift . . . shall, so far "only as concerns such person attest- "ing the execution of such will, or "the wife or husband of such person ". . . be utterly null and void, and "such person so attesting shall be "admitted as a witness to prove the "execution of such will . . . notwith- "standing such . . . gift . . ."

[2] [1959] Ch. 191; [1958] 3 W.L.R. 676; [1958] 3 All E.R. 586.

Bt., appointed the plaintiff, Mrs. Ethel Tildesley, and one Albert William Claremont, a solicitor, executors and trustees. After giving his residuary estate to his trustees upon trust to sell, the testator directed them to hold one-tenth of the residue upon trusts which had been held to be valid charitable trusts and, after giving certain bequests, he settled the trust fund constituting the balance of his estate as to two-fifths on his wife for life and as to two-fifths on the plaintiff for her life, with ultimate trusts for her children and, in default of children, as to part of the capital thereof upon the trusts declared by clause 9. By clause 9 the testator gave one-tenth of the trust fund to the children of his late sister of whom the second defendant, Mrs. Minnie E. Beare, was one.

By clause 16 he provided: "I declare that if and so long "as my trustees are retaining any part of the trust fund [his "residuary estate] and receiving and applying the income it shall "be lawful for them to pay to themselves out of such income "before dividing the same such a sum as shall equal five per "cent. thereof to be equally divided beween them by way of "remuneration for their services. . . ." By clause 17 he provided: "I declare that Albert William Claremont or any person "who may for the time being be an executor or a trustee of "my will and who may be a solicitor shall be entitled to charge "and shall be paid out of my estate for his services in the "same manner as though not being an executor or trustee he "had been employed by my executors or trustees to render such "services. . . ."

The testator died on April 22, 1933, and his will was proved in the Principal Probate Registry on June 6, 1933, by the plaintiff and Albert William Claremont. The latter died on August 5, 1934, and by a deed of appointment dated July 16, 1934, the plaintiff appointed the first defendant, George Henry Richards Tildesley, a solicitor, to be the other trustee of the testator's will.

By this summons the court was asked first to determine whether, having regard to the fact that Mr. Tildesley was an attesting witness to the testator's will, he had been and was entitled as a trustee of the will: (a) to receive remuneration for his services under clause 16 of the will, or (b) to charge professional remuneration as a solicitor against the testator's estate under clause 17; and, secondly, if question 1 was answered in his favour, whether Mr. Tildesley was entitled during his trusteeship, so long as the trustees retained any part of the trust fund and applied the income thereof, both to remuneration under clauses 16 and 17 of the will or was entitled at his option only to remuneration under one of such clauses. The defendants to the summons were Mr. Tildesley, Mrs. Beare and the Attorney-General.

Wynn-Parry J. held that Mr. Tildesley, as an attesting witness, was precluded by section 15 of the Wills Act, 1837, from

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taking any benefit under the will and accordingly that he was not entitled to remuneration for his service under clauses 16 or 17 of the will.

Mr. Tildesley appealed. Mrs. Beare gave notice that, in the event of the appeal being allowed, she would contend that Tildesley was entitled at his option to remuneration either under clause 16 or under clause 17 of the will but not under both clauses.

Sir Lynn Ungoed-Thomas Q.C. and *Raymond H. Walton* for Mr. Tildesley.

H. E. Francis for the plaintiff.

E. I. Goulding for the second defendant, Mrs. Beare.

Denys B. Buckley for the Attorney-General.

The following cases were cited in argument which were not referred to in the judgments: *In re Pooley* [3]; *Hindson* v. *Kersey*.[4]

LORD EVERSHED M.R. The question raised in this appeal is one which Wynn-Parry J. found (as he said more than once) to be a difficult question. He added at one point that he could well imagine that different minds might take different views. The question turns, in the end of all, upon the proper construction, as applied to the facts of this case, of section 15 of the Wills Act, 1837.

[His Lordship read section 15 of the Wills Act, 1837, stated the facts, and read clauses 16 and 17 of the testator's will, and continued:] I may now state the question, which is this: the defendant, Tildesley, is one of the two persons who attested the will: is he, therefore, disqualified, having now become, by virtue of the appointment, a trustee, from claiming a benefit under either one of, or both, clauses 16 and 17 of the will? That is the problem which the judge, Wynn-Parry J., felt to be difficult. The only other party before us is the second defendant, Mrs. Minnie Elizabeth Beare (represented by Mr. Goulding). She is, as we understand, one of the children of the sister of the testator mentioned in clause 9, and, therefore, puts the argument on behalf of those who are interested to resist the claim of Tildesley to enjoy the benefits conferred by clause 16 or clause 17; and on behalf of Mrs. Beare a subsidiary point has been put forward, namely, that, in the circumstances, as a matter of construction of the clauses, Tildesley, in any event, cannot claim to receive benefits under both clause 16 and clause 17. To that I will return presently; for the first question is: Having attested the will, can he now take any benefit at all under any of the provisions of the will? The argument, which succeeded in the court below, is that he could not; and it is put on the broad lines that, having been an attesting witness, he cannot, within the terms of section 15

[3] (1888) 40 Ch.D. 1; 5 T.L.R. 21.

[4] (1760) Burn's Ecc.Law, 9th ed., Vol. 4, p. 116.

of the Act, take any benefit at all under the will which he attested.

I have myself, with all respect to the judge, come to a different conclusion; and I am at least comforted by the circumstance that he himself stated that he could well imagine that different minds might take different views. Putting it in its briefest form, it seems to me that the argument that Mr. Goulding and Mr. Buckley have put forward makes the section read as though it said: "If any person shall attest the execution of a will he shall "not thereafter take any benefit thereunder." That would perhaps have been a simple way to express the intention had that been the view of the legislature. But it is not the language of the section. The relevant terms are: "If any person shall attest "the execution of any will to whom . . . any beneficial . . . "interest . . . shall be thereby given . . . ", then such beneficial interest shall be wholly null and void. As a matter of English, it seems to me that the language points, upon the face of it, to an inquiry at one date only, namely, the date when the will is being attested; and the question has then to be posed: At the time of the attestation is any beneficial interest given to the attesting witness under the instrument the execution of which he is going to attest? The phrase "any beneficial . . . interest "... shall be thereby given" has, however, this possible equivocation in it, that, in strictness and according to general principle, one cannot (of course) speak of a "beneficial interest" being "given" by a will before the testator has died. For certain purposes, therefore, it may be arguable (though it does not, as I think, arise in this case, and I prefer, therefore, to express no view) that it would be relevant to look at the date when the will came into operation. But subject to that possibility, it seems to me, I confess, that the section is contemplating a point of time when somebody is attesting a will; and the question has to be asked: Is any beneficial interest given to him under the instrument which is in question?

It will be noted that in the present case the right (if there be a right) to receive a benefit under the will does not arise by virtue of any expression used by the testator. When the execution of the will was attested the defendant Tildesley's name did not anywhere appear in it; and equally, of course, when the testator died he was not a beneficiary under the will. It has happened that, by an event—an act—of persons other than the testator, which occurred after the testator's death, Tildesley has been appointed a trustee—as anybody in the world might have been appointed trustee—to take the room of one named by the testator who had died or retired; and his interest under the will arises, therefore, from what might, naturally, in other circumstances, be called, properly, a novus actus interveniens; and I have come to the conclusion that it cannot be said, therefore, of this attesting witness that he was one, at any relevant date,

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to whom any beneficial interest was given by the will which he attested.

That view, to my mind, is supported also by two other considerations. The first is one of the history of the section. The first relevant enactment was that of the Statute of Frauds, set out in Burn's Ecclesiastical Law, p. 94, together with considerable discussions about its effect on the part of Lord Mansfield and Lord Camden. I do not find it necessary to refer to what Lord Mansfield or Lord Camden stated; but it is perhaps appropriate to read section 5 of the Statute of Frauds: "All devises "and bequests of any lands or tenements, devisable either by "force of the Statute of Wills, or by this statute, or by force "of the custom of Kent, or the custom of any borough, or any "other particular custom, shall be in writing, and signed by the "party so devising the same, or by some other person in his "presence and by his express directions, and shall be attested "and subscribed in the presence of the said devisor, by three "or four credible witnesses, or else they shall be utterly void, "and of none effect."

It is clear that the effect of section 5 of the Statute of Frauds was this, that, unless the devise or bequest was attested by three "credible" (that is, not disqualified) witnesses, the whole instrument, or at the very least the whole devise or bequest, was entirely void; and a witness was held to be incompetent if he, under the will, took any interest whatever in the subject-matter of the devise or bequest. The result, of course, was that if a non-competent person did attest a will, and there were not three other competent ones who did, the whole instrument, or (as I have said) at least a very material part of it, was avoided altogether.

The Wills Act of 1752 was clearly intended somewhat to mitigate that effect. It was (so far as is relevant for present purposes) exactly in the terms of section 15 of the Act of 1837, save that in the latter there is a reference to the wife or husband of an attesting witness. But it was admitted by Mr. Goulding (and, if I may say so, rightly so) that the object of these enactments was to protect a testator who was in extremis, or otherwise weak and not capable of exercising judgment, from being imposed upon by someone who came and presented him with a will for execution under which the person in question was himself substantially interested; and if that is indeed the real object (as I think it is) of these enactments, then, to my mind, the object is not achieved if this section is construed so as to disqualify someone who, at the time he attested the execution of a will, had no interest whatever under the will as it stood and only became interested under it by some later event or act—what I have called a novus actus interveniens: for example, if he should be the object of some appointment made by some person named in the will having a power to appoint; or (as in the present case)

if he happened to be a person who was later appointed a trustee of the will by the then existing trustees.

The second consideration which in my judgment supports the view I take is that which I have already anticipated, namely, the reference to "wife or husband." In my readings of the section I omitted the references to wife and husband; but I will now read the relevant part of the section with the reference to "wife or husband" in it. "If any person shall attest the "execution of any will to whom or to whose wife or husband "any beneficial . . . interest . . . shall be thereby given," then such beneficial interest "shall, so far only as concerns such "person attesting . . . or the wife or husband of such person ". . . be utterly null and void."

If (following the argument of Mr. Goulding and of Mr. Buckley) the relevant words ought to be read as equivalent to "If any person shall attest the execution of a will who shall "thereafter take any benefit," and you add in the reference to the husband and wife—"who or whose husband or wife shall "thereafter take any benefit," then I find it extremely difficult to see how you can limit the wife or the husband, as the case may be, to an individual who happened to be the wife or the husband at the time the will was attested. If an interest subsequently taken as a result (as in this case) of a later appointment is sufficient to disqualify a trustee from his remuneration, then it would appear to me difficult to say that subsequent marriage to an attesting witness would not equally be a disqualification, since, at the time when the wife or husband took, she or he had acquired the character of being wife or husband of an attesting witness.

But Mathew J., in the year 1881, decided to the contrary in the case of *Thorpe* v. *Bestwick*.[1] In that case the marriage with the attesting witness occurred after the attestation but before the death of the testator; and Mathew J. said this[2]: "I think "the plaintiffs are entitled to judgment. The policy of the "Wills Act . . . in depriving the attesting witness of any legacy "given by the document of bequest, is not to allow wills to be "proved by the evidence of persons benefited by them, and it "makes void any devise to an attesting witness, or to his or her "wife or husband. In the present case the plaintiff, at the time "when the will was attested, took no benefit under it, but he "subsequently married the devisee, and I am asked to hold that "the result of this marriage is to destroy the validity of the "devise."

Now in my judgment the reasoning of that decision is consistent, and consistent only, with the view that in this case the attesting witness is not disqualified by the fact that after attestation—indeed in this case after the death—he became interested by virtue of the appointment made of him as a trustee by Mrs. Tildesley and Claremont.

[1] (1881) 6 Q.B.D. 311.

[2] Ibid. 312.

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For those reasons, therefore, I myself conclude that the defendant Tildesley is not, by virtue of section 15 of the Wills Act, excluded from taking benefits under clauses 16 and 17 of the will, if he be otherwise, upon their true construction, entitled to them.

That brings me to the second question. But it will be observed that the remuneration which is given in clause 16, consisting of a share in 5 per cent. of the income, is stated to be "by way "of remuneration for their services." By clause 17 the testator states that Claremont or any other executor or trustee "who "may be a solicitor shall be entitled to charge . . . for his "services in the same manner as though not being an executor "or trustee he had been employed . . . to render such services."

What is said on behalf of Mrs. Beare is that this is really a duplication: that two legacies (for both operate in the nature of legacies) are given for one and the same thing, namely, services as a trustee; and although there is, or may be, a general rule in favour of cumulative gifts, if it appears that two gifts are given to the same person in one will, that rule does not apply in the case of gifts in favour of an executor for a specific purpose. But, in my judgment, that consideration does not here apply. In the case to which Mr. Goulding referred of *Wilson* v. *O'Leary*,[3] the rule against double gifts in favour of an executor was intimated, in passing, in the judgment as applicable to the case where the same amount was given to the same person for the same service. It is to be noted that here the amounts are quite different—in the one case a share of 5 per cent. of income; in the other (in effect) the right to charge profit costs. But the services, to my mind, are also not the same. The language perhaps might be improved; but clause 16 relates to the general services of trustees as trustees —whether lay or professional: clause 17 relates to professional services rendered by a solicitor in the course of his professional work. That is shown quite plainly by the very last words of the will—"as though not being an executor or trustee he had been "employed by my executor or trustee to render such services."

It was necessary for Mr. Goulding to concede that, if he was right, notwithstanding the very clear and express language and the reference by name to Claremont, Claremont was equally disabled from taking under both clauses. Without saying more, I construe clauses 16 and 17 as giving the right first to Claremont and now to Tildesley (section 15 of the Wills Act being out of the way) to enjoy the benefits under both clause 16 and clause 17. The result is that, for the reasons which I have attempted to state, in my judgment the appeal should be allowed, and it should be declared accordingly that the defendant, Tildesley, is entitled, notwithstanding his attestation of the will, to the benefits which are conferred by clauses 16 and 17. I think it is unnecessary to say more than that. But formally, the cross-notice, which Mrs.

[3] (1872) 7 Ch. 448.

Beare delivered under R.S.C., Ord. 58, r. 6, will, of course, be rejected.

HODSON L.J. I agree, and have nothing to add.

ROMER L.J. I agree, and have very little to add. The question, and the only question, for this court is whether an attesting witness is disqualified from receiving a benefit which did not accrue to him—even as an expectancy—until long after the testator's death, the suggested disqualification deriving from section 15 of the Wills Act, 1837.

It is to be noted that neither at the date of the testator's will nor at the date of his death had the defendant Tildesley any beneficial interest in the estate which was recognisable at law or in equity; nor would he ever have received any beneficial interest at all but for the intervention of third parties—videlicet, those in whose hands lay the power of appointing new trustees.

Now take a gift of £1,000 to trustees, to invest and accumulate for 10 years, and then to distribute at the trustees' discretion among the then employees of a particular company. A. attests the will but is not in the employment of that company either at the date of the will or at the date of the testator's death. Subsequently to the testator's death, he enters the company's employment, and is still in it at the end of the 10 years' period. On the respondent's argument, any benefit that he then receives under the exercise of the trustees' discretion is struck at by section 15. I cannot believe that the section has such an effect. In the case supposed, it could not be said of A. at any relevant time that he was an attesting witness to whom a beneficial interest was given by the will. I cannot see how the contrary view would be material in any way to the policy underlying the Statute of Frauds and the two Wills Acts—which was, to ensure that a man's testamentary disposition really does truly and freely express his own wishes, uncoerced by outside influence.

For myself, I think that Sir Lynn Ungoed-Thomas was right in saying that, in the present case, Tildesley was functus officio as an attesting witness long before it could be said of him in any sense that he was "interested" under the will. If that is right (and, in my judgment, it is), section 15 cannot have any application to the case; and I accordingly agree that the appeal should be allowed.

Appeal allowed. Declarations accordingly. Costs of all parties as between solicitor and client to be paid rateably out of corpus of funds in hands of trustees.

Solicitors: *Callingham, Griffith & Bate; Jaques & Co. for Ollard, Ollard & Sessions, Wisbech; Treasury Solicitor.*

B. A. B.

[HOUSE OF LORDS.]

H.L. (N.I.)† CAVANAGH . . . . . APPELLANT;

AND

ULSTER WEAVING CO. LTD. . . . RESPONDENTS.

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May 11, 12, 13;
June 18.

Negligence—Safe system of work—Reasonable care—General practice—"Folly" to neglect to provide precaution—Meaning of "folly."

Damages—Personal injuries—Jury—Assessment of damages by jury—Whether award so excessive as to warrant interference by appellate court.

Judicial Precedent—Question of fact—Jury question—Opinion of judge on it not a precedent.

Fact or Law—Negligence—Standard of care—Question of fact—Master and servant.

The plaintiff, who was employed by the defendants as a labourer, was seriously injured when he fell from a crawling ladder, which had no handrail, onto a glass roof whilst carrying a bucket of cement in the course of his employment on the roof of the defendants' factory. At the time of the accident the plaintiff was wearing rubber boots provided by the defendants, the soles of which were wet and slippery. As a result of his injuries the plaintiff's right arm had to be amputated three inches above the elbow. In an action against the defendants for damages alleging negligence and breach of statutory duty the plaintiff was awarded £6,520 by the jury, which was reduced to £5,868 in view of a finding of contributory negligence.

The plaintiff did not allege that the system adopted by the defendants for the carrying of cement on the roof was contrary to the general practice of the trade, but at the trial the defendants called expert evidence, which was not seriously challenged, that this "set-up [the system in question]" was "perfectly in accord with "good practice."

On appeal, the jury's verdict was set aside on the grounds that there was no evidence of negligence fit to be left to the jury, the plaintiff having failed to show, in the words of Lord Dunedin in *Morton* v. *Wm. Dixon & Co. Ltd.*, 1909 S.C. 807, 809, that "the "thing which" the employer "did not do was a thing which was "commonly done by other persons in like circumstances" or "that "it was a thing which was so obviously wanted that it would be "folly in anyone to neglect to provide it." On appeal to the House of Lords:—

Held, (1) that, on the evidence, the jury was entitled to find the defendants guilty of negligence, since the evidence as to trade practice alone could not be treated as conclusive in favour of the defendants.

Observations of Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42, and of Lord Cohen in *Morris* v. *West Hartlepool Steam Navigation Co.* [1956] A.C. 552, 579; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385, as to the ambit of Lord Dunedin's dictum in *Morton* v. *Wm. Dixon & Co. Ltd.*, 1909 S.C. 807, 809 applied.

(2) That although the amount of damages awarded by the jury was high, it was not so extravagant as to require an appellate court to interfere with their verdict.

† *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD JENKINS.

Per Lord Keith of Avonholm: Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care. Lord Dunedin was laying down no principle of law but stating the factual framework within which the law would fall to be applied.

Per Lord Somervell of Harrow: Lord Dunedin's observation was in its context clearly only intended to apply where the practice proved was clearly proved, and where the circumstances covered by the practice were precisely similar to those in which the accident happened. There may be many cases in which, although the circumstances are not precisely similar, evidence of practice should be given some though less weight.

APPEAL from the Court of Appeal in Northern Ireland (Curran L.J. and Sheil J., Lord MacDermott C.J. dissenting).

This was an appeal from a judgment of the Court of Appeal in Northern Ireland dated June 16, 1958, setting aside a verdict of a jury and judgment entered thereon on the order of Black L.J. dated January 21, 1958, awarding the plaintiff, Michael Cavanagh, £5,868 damages for injuries, on the ground that those injuries resulted from the negligence and breach of duty of his employers, the defendants, the Ulster Weaving Co. Ltd.

The facts are taken substantially from the judgment of Lord MacDermott C.J. in the Court of Appeal.

On October 27, 1953, the plaintiff met with a serious accident while working on the roof of a factory at Linfield Road, Belfast, which was owned and occupied by his employers, the defendants. The plaintiff was a labourer and his task at the time in question was to act as helper to a man called Reilly who was engaged in pointing ridge-tiles. This required the use of a cement mix and it was the plaintiff's job to bring the cement up in a bucket from the yard where it was mixed to the part of the roof at which Reilly was working. The weight of a full bucket, some three stone, was a sufficient burden to engage one hand fully and to place certain restrictions on the plaintiff's movements and posture as he made his way along the roof to the place where the cement was needed.

This roof was of a usual factory type. It consisted of a series of transverse ridges, each a pitched roof in itself with one aspect slated and the other glazed and the apex, where the glazing and the slates came together at the top, covered by ridge tiles. The other apex, the point at the bottom from which the slated aspect of one ridge and the glazed aspect of its immediate neighbour arose, formed a gutter along which it was possible to walk. To get from where he gained access to the roof to where Reilly was at work the plaintiff had to make his way along a path or gangway of planks laid across the transverse ridges. Then, when he came to the ridge the tiles of which Reilly was pointing, he had

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to get down into the gutter between that ridge and the next so that he might proceed along the gutter to where Reilly was working on an ordinary ladder placed flat against the roof. To provide a means of getting from the plank gangway which lay across the roof ridges to the gutter below there was a roof ladder, or a crawling ladder as it is also called. This ladder was about 11 feet long. It lay flat against the slated aspect, which was 9 feet 6 inches in length, with one end in the gutter and the other projecting a foot or so beyond the ridge-tiles. It consisted of two lengths of wood $\frac{7}{8}$ of an inch thick, connected by flat rungs which were about 1 inch thick. The upper surface of each rung was therefore about $1\frac{7}{8}$ inches from the slates. To the plaintiff walking along the plank gangway with his bucket of mix this roof ladder ran down before him to his right and close to the gangway. To get where he was going he had to step onto the ladder at this point and go down it to the gutter. The slope of the slated aspect, and therefore of the roof ladder, was one of 37° to the horizontal. While he was descending, the plaintiff was faced with the glazed aspect of the next ridge. This glazing was carried between metal glazing bars about 2 feet apart and running up from near the gutter to near the ridge-tiles. There were two skins of glass about 1 inch apart. That outside was of obscured "Artic" glass; that inside was of wire-reinforced glass.

The plaintiff had been working on this roof for three or four weeks before the accident and had carried a bucket full of cement down this roof ladder on many occasions. He did so facing the glass and with his back to the slates. This was the ordinary way of making the descent when carrying a burden. With the hands free it would have been possible to crawl down facing the slates, but that was not regarded as a practicable method when a bucket of cement had to be carried in one hand.

The accident happened about 3.30 p.m. In the morning the plaintiff had been wearing shoes but it became wet in the gutters and the foreman had given him a pair of rubber boots to wear instead. These he had on when injured. On getting to the roof ladder the plaintiff left his bucket of cement down on the plank gangway and stepped onto the second or third rung of the ladder. Then he turned and picked up the bucket and was about to descend to the gully when, as he described it, "my feet just "left me and I hit the glass with my right side." The plaintiff did not fall through the glass, but he broke it and was severely lacerated and his right arm had to be amputated above the elbow.

The plaintiff alleged negligence and breach of statutory duty against the defendants. The allegations of breach of statutory duty were founded on alleged contraventions of subsections (1) and (2) of section 27 of the Factories Act (Northern Ireland), 1938, and of certain of the Building Regulations (Northern Ireland), 1950. The trial judge, Black L.J., held that the building regulations relied on by the plaintiff did not apply and this ruling

was accepted in the Court of Appeal. The questions submitted to the jury and the answers thereto were as follows:—

"Q. 1. Were the defendants guilty of negligence? A. Yes.

"Q. 2. If the answer to question 1 is 'Yes' was the plaintiff's injury caused either wholly or partly by the defendants' negligence? A. Partly.

"Q. 3. Was there provided so far as was reasonably practicable safe means of access from the ridge of the roof to the gutter? A. No.

"Q. 4. If the answer to question 3 is 'No' was the plaintiff's injury due either wholly or partly to failure to provide such safe means of access? A. Partly.

"Q. 5. Was the plaintiff liable to fall a distance of more than ten feet? A. Yes.

"Q. 6. If the answer to question 5 is 'Yes' did the place afford secure foothold and if necessary secure handhold? A. No.

"Q. 7. If the answer to question 6 is 'No' was the plaintiff's injury due either wholly or partly to failure to afford secure foothold or if necessary secure handhold? A. Partly.

"Q. 8. Was the plaintiff's injury due partly to his own fault? A. Yes.

"Q. 9. What damages would the plaintiff be entitled to recover on the basis that the defendants were wholly responsible for the accident? A. £6,520.

"Q. 10. If the answer to question 8 is 'Yes' to what net sum is it just and equitable that the amount mentioned in the answer to question 9 should be reduced having regard to the plaintiff's share in the responsibility for the damage? A. £5,868."

The defendants appealed on the grounds that there was no evidence to support the findings of negligence and breach of statutory duty; that the trial judge was wrong in law in holding that subsection (1) or subsection (2) of section 27 of the Act of 1938 was applicable; and that the damages found were excessive and could not reasonably have been awarded on the evidence. The plaintiff in his statement of claim did not allege that the defendants were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. At the trial, however, the defendants called as an expert a civil engineer who was asked the question: "How far does this set-up accord with good practice?" He answered: "For the type of access to building work I would say that it is perfectly in accord with good practice. I have very considerable experience of such work on roofs for over 20 years."

In view of that evidence, which was not seriously challenged, the Court of Appeal by a majority (Lord MacDermott C.J. dissenting) allowed the appeal since in the words of Curran L.J. "a jury would not be justified in finding that the defendants

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" were lacking in reasonable care for the safety of the plaintiff " in providing such a set-up." The judgments of Curran L.J. and Sheil J. were based on the view that the plaintiff had failed to show, in the words of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*[1]: " that the thing which he [the employer] did not " do was a thing which was commonly done by other persons " in like circumstances " or " that it was a thing which was " so obviously wanted that it would be folly in anyone to neglect " to provide it."

The plaintiff appealed.

Cyril A. Nicholson; Charles Stewart Q.C. and *J. P. Higgins* (all of the Northern Ireland Bar) for the plaintiff.

F. A. L. Harrison Q.C.; Robert Lowry Q.C. and *C. B. Shaw* (all of the Northern Ireland Bar) for the defendants.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Kennan* v. *Murphy*[2]; *Russell* v. *Moore*[3]; *Metropolitan Railway Co.* v. *Jackson*[4]; *Qualcast (Wolverhampton) Ltd.* v. *Haynes*[5]; *Harris* v. *Brights Asphalt Contractors Ltd.*[6]; *Place* v. *Searle*[7]; *Barkway* v. *South Wales Transport Co. Ltd.*[8]; *Trott* v. *W. E. Smith (Erectors) Ltd.*[9]; *Banbury* v. *Bank of Montreal*[10]; *Marshall* v. *Gotham Co. Ltd.*[11]; *Young* v. *Rank*[12]; *McCarthy* v. *Coldair Ltd.*[13]; *Adsett* v. *K. and L. Steelfounders and Engineers Ltd.*[14]; *Taylor* v. *R. & H. Green and Silley Weir Ltd.*[15]

Their Lordships took time for consideration.

June 18, 1959. VISCOUNT SIMONDS. My Lords, I have been privileged to read the opinion which my noble and learned friend, Lord Tucker, is about to deliver, and I concur in it. The evidence given by the expert called for the defence in regard to what was called " the set-up," which was not seriously or, perhaps, at all challenged, was of very great weight, but I cannot say that it was so conclusive as to require the learned trial judge to withdraw the case from the jury. There were other matters also which they were entitled to take into consideration, and it was for them to determine whether in all the circumstances the respondents had

[1] 1909 S.C. 807, 809.
[2] (1880) 8 L.R.Ir. 285, 295, 296.
[3] (1881) 8 L.R.Ir. 318, 345.
[4] (1877) 3 App.Cas. 193.
[5] [1959] 2 W.L.R. 510; [1959] 2 All E.R. 38.
[6] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.
[7] [1932] 2 K.B. 497, 514, 515.
[8] [1950] A.C. 185; 66 T.L.R. (Pt. 1) 597; [1950] 1 All E.R. 392.
[9] [1957] 1 W.L.R. 1154; [1957] 3 All E.R. 500.
[10] [1918] A.C. 626; 34 T.L.R. 518.
[11] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.
[12] [1950] 2 K.B. 510; 66 T.L.R. (Pt. 2) 231; [1950] 2 All E.R. 166.
[13] [1951] W.N. 590; [1951] 2 T.L.R. 1226.
[14] [1953] 1 W.L.R. 137, 773; [1953] 1 All E.R. 97; [1953] 2 All E.R. 320.
[15] [1951] 1 Lloyd's Rep. 345.

taken reasonable care. I do not think that the learned judges of the Court of Appeal were justified in concluding that reasonable men might not find the verdict which this jury found. If I may respectfully say so, I think that the error of the majority of the court lay in treating as conclusive evidence which is not conclusive, however great its weight, particularly where it has to be weighed against other evidence. But that does not mean that the familiar words of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*,[1] which have been so often quoted both in Scottish and English cases, are not to be regarded as of great authority in determining what is in all the circumstances reasonable care. It would, I think, be unfortunate if an employer who has adopted a practice, system or set-up, call it what you will, which has been widely used without complaint, could not rely on it as at least a prima facie defence to an action for negligence, and I would say with the greatest respect to those who think otherwise, that it would put too great a burden on him to require him to prove that the circumstances of his own case were "precisely" similar to those of the general practice that I have assumed. But these are not questions that arise on the present appeal, and I am content to move that the appeal be allowed with costs here and below.

LORD TUCKER. My Lords, the evidence before the jury, viewed, as it must be, in the light most favourable to the plaintiff, has been described in detail in the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland, and I do not propose to do more than point out what, in my view, the jury may have considered its salient features.

The plaintiff was carrying a bucket of cement, weighing some 3 stone, down a roof ladder laid flat against the slated aspect of a slanting roof. He had come along a gangway of planks laid across the transverse sides of the roof and had put the bucket down on the plank before starting to descend the ladder, facing forwards; having placed his feet in position on the second or third rung of the ladder from the top, he had to turn to pick up the bucket and, in so doing, he slipped and fell a distance of some 6 feet against the sloping glass roof opposite him. He was wearing rubber boots which had been provided for him by the defendants in view of an accumulation of water in the gully between the slanting roofs along which he had to proceed after descending the ladder. A pair of boots was put in evidence by the defendants during the plaintiff's evidence without objection, and though never strictly proved by the defendants as being the actual boots worn by the plaintiff at the time of the accident, were accepted by him as similar to those which he was wearing. There was evidence that these boots were in fact two sizes larger than they should have been for a man with feet the size of the plaintiff's. The ladder down which he had to descend was at an angle

[1] 1909 S.C. 807, 809.

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of approximately 37 degrees, and its rungs were about $1\frac{7}{8}$ inches from the slates of the roof. There was no handrail with which the plaintiff could support himself with one hand as he descended with the bucket in the other hand, nor was there any protection to save him from the glass in the opposite roof if he should slip, which was a contingency made more probable in the case of a man wearing rubber boots two sizes too big with wet soles. The jury had before them a model of the ladder and were given a demonstration of how the boots would fit on to the rungs.

My Lords, in this summary of the facts I have purposely omitted one piece of evidence, viz., that given by an expert called for the defence with regard to practice. It was this evidence which the majority of the Court of Appeal in Northern Ireland considered decisive in favour of the defendants' case. I will return to it later. For the moment I will deal with the submission of counsel for the defendants that, apart from any evidence as to practice, the trial judge should have ruled that there was no evidence of negligence fit to be left to the jury. This submission was based partly on the ground that the plaintiff had never specifically alleged in his pleading that a handrail or handhold should have been provided, nor had he set out precisely what positive safeguards should have been provided, and in part to an answer given by the plaintiff to the judge to the effect that there was no connection between the accident and the rubber boots.

With regard to the pleading, it had been alleged that safe means of access to his work had not been provided, that he had been required and permitted to descend the ladder whilst carrying a bucket of cement without adequate or any means of supporting or steadying himself, and that a safer system of work had not been provided whereby, inter alia, the plaintiff would not have been required or permitted to use a ladder which, owing to its position and condition, was an unsafe means of communication.

Evidence was given by an expert witness for the plaintiff that there was nothing that a man could hold on to walking down, and the expert for the defence stated in cross-examination that for a man wearing rubber boots which were wet, and carrying a bucket of cement, it would be desirable that he should have a handhold. In this state of the pleadings and evidence I have no doubt that the trial judge would have been wrong if he had withdrawn from the jury the absence of a handrail or handhold as an element proper for their consideration in all the circumstances of this case.

With regard to the rubber boots, the trial judge's report of the evidence shows that the plaintiff, in answer to a question from the judge, said: "There is no connection between the "accident and the rubber boots." It was argued that this answer ruled out the rubber boots from consideration as having any bearing on the case. The judge, in a note at the end of his report, says that the plaintiff, whilst giving his evidence frankly

and candidly, sometimes gave his answers without sufficient consideration, and referring specifically to the answer cited above said that if the plaintiff had really addressed his mind to the matter he would probably have answered quite differently. However this may be, the answer should not be considered in isolation. The witness had just previously said: "I say the boots could "have caused the accident." Later he said: "What caused "the accident was me walking in the gully in the wet and the "roof ladder being slippery." Your Lordships have not seen a shorthand note of the evidence, and do not therefore know the precise form of the questions which elicited these answers. The jury saw and heard the witness and were, in any event, entitled to form their own view of the cause or causes of the accident in the light of all the evidence. In my view, neither of the submissions referred to above can be sustained.

My Lords, this brings me to what is a more important part of the case, namely, the evidence as to practice, and the views of the majority of the Court of Appeal as to the effect of this evidence. The plaintiff in his statement of claim had not alleged that the defendants were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. The defendants called as an expert a civil engineer, who was asked this question. "How far does this set-"up accord with good practice?" He answered: "For the type "of access to building work I would say that it is perfectly in "accord with good practice. I have very considerable experience "of such work on roofs for over 20 years." I would draw attention to the fact that the words "this set-up" came from counsel, and it was never explained precisely what constituted "the set-"up," and in particular whether the practice which he described as "good" included the use of rubber boots such as those produced in evidence. It was said that this evidence stood unchallenged, but as I read the note of the cross-examination it looks as if it may have been directed in part, at any rate, to stress the use of the rubber boots as a feature peculiar to the present case to distinguish it from general practice. However this may be, and whatever is the proper view of the effect of Lord Dunedin's well-known words in *Morton* v. *Wm. Dixon Ltd.*,[2] it was for the jury to assess the value to be attached to such sketchy evidence as this, given without any explanation as to what was covered by the words "set-up." They may well have considered it insufficient, more especially if they attached importance to the use of wet rubber boots on a ladder of this kind.

Assuming, however, that the practice spoken to should be read as including the use of wet rubber boots on this ladder, what is the bearing of such evidence on the ultimate decision of judge or jury?

My Lords, I have already expressed my views on the value

[2] 1909 S.C. 807, 809.

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of this kind of evidence in *Morris* v. *West Hartlepool Steam Navigation Co.*,[3] which I need not repeat, but it was not necessary for me in that case to refer to the language of Lord Dunedin in *Morton* v. *Wm. Dixon Ltd.*[4] I would, however, desire to express my agreement with what was said by my noble and learned friend, Lord Cohen, in *Morris's* case[5] where, after reviewing what had been said on this subject in *Paris* v. *Stepney Borough Council*,[6] and considering the language used by Parker L.J. in the case under consideration,[7] he said[8]: "I think that the effect "of their Lordships' observations is that, when the court finds "a clearly established practice 'in like circumstances,' the prac- "tice weighs heavily in the scale on the side of the defendant, "and the burden of establishing negligence, which the plaintiff "has to discharge, is a heavy one." And later he equates the word "folly" as used by Lord Dunedin and Lord Norman to "unreasonable or imprudent," thereby emphasising that Lord Dunedin could not have been intending to extend the employer's common law liability beyond that which had been laid down in *Smith* v. *Charles Baker & Sons*[9] and many subsequent cases in this House. To give to the word "folly" any other meaning would necessarily have this result. This is made plain by the submission of the defendants' counsel in the present case to the effect that, even if the evidence might otherwise warrant a finding of want of reasonable care, the case should have been withdrawn from the jury on the ground that, as a matter of law, it could not, in view of the evidence of practice, be held to amount to "folly."

My Lords, I would respectfully accept the statement of the law on this subject in the present case by the Lord Chief Justice (Lord MacDermott) who, it may be observed, was a party to the decision in *Paris* v. *Stepney Borough Council*[10] in your Lordships' House. Curran L.J., who with Sheil J. formed the majority in the Court of Appeal, took the view that once practice was established this was conclusive in favour of the defendants. He said that where positive evidence is adduced for the defendant that an employer has not omitted to do anything that is commonly done by other persons in like circumstances "such a fact is clearly "relevant and once it is established it is my opinion that a "finding by the jury that it was folly in the defendants to neglect "to provide something else cannot be justified." Counsel for the defendants did not seek to support this as a correct statement of the law.

Sheil J. appears to have considered the system apart from the rubber boots and reached the conclusion that it could not be considered folly to omit to provide a handrail. As to the

[3] [1956] A.C. 552, 576; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.
[4] 1909 S.C. 807, 809.
[5] [1956] A.C. 552.
[6] [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[7] [1954] 2 Lloyd's Rep. 507, 518.
[8] [1956] A.C. 552, 579.
[9] [1891] A.C. 325; 7 T.L.R. 679.
[10] [1951] A.C. 367.

boots he said: "It may well be that these boots were the cause "of this accident and Black L.J. thought they were a cause, "but it is too much to attribute to the defendants responsibility "for an accident thus caused." I do not think the rubber boots can be eliminated from the case. They had to be taken into consideration with all the other circumstances. Furthermore, I do not think the learned judge gave sufficient weight to the fact that he was setting aside a verdict of a jury and not reviewing a decision of a judge sitting alone.

For these reasons I would allow this appeal on the ground that the jury's verdict on common law negligence should not have been disturbed. In these circumstances I do not think it is necessary or desirable to express a concluded view on the defendants' liability under section 27 (1) of the Factories Act (Northern Ireland), 1938, which is the only other ground of liability now relied upon. The question whether the provision of rubber boots constitutes a part of "the means of access" to the place of work raises a question of some difficulty which it may be better to decide if and when it arises in a case in which it is possible to ascertain whether or not the tribunal of fact regarded them as the sole or a contributory cause of the accident in question.

There remains only the question of damages. The defendants contend that the jury's assessment of £6,520 (reduced to £5,868 by reason of the plaintiff's contributory negligence) should be reduced on the ground that it was excessive. The plaintiff's right arm was badly lacerated and after two or three weeks was amputated three inches above the elbow. He suffered much pain during the unsuccessful efforts to save the arm. The stump was healed before he left hospital. He wears an artificial limb and artificial hand. When examined by a doctor in January, 1958, over four years after the accident, he complained of coldness towards the end of the stump. This condition was confirmed by the doctor, who thought it unlikely to improve. He was aged 20 at the time of the accident and was employed as a labourer at £4 15s. a week. His loss of wages down to the date of trial amounted to £180, by which time he had obtained employment as a gateman at £5 7s. In addition to the pain and suffering and the permanent diminution in his enjoyment of some of the amenities of life the jury had, of course, to consider what he might reasonably have been expected to earn during a working life of perhaps 45 or 50 years, taking account of the fall in the value of money, the tendency for wages to rise and the possibility of his improving his status in the labour market contrasted with his present position and future prospects in the event of an increase in the number of unemployed. When all these matters have been weighed in the balance and finally evaluated most favourably for the plaintiff, the figure of £6,500 is appreciably higher than I should have thought it proper for a judge to award. But your Lordships are not dealing with the award of a judge

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with whose estimate of damages an appellate court, though slow to interfere, is entitled and indeed bound to reconsider by way of rehearing. I do not think that the present award is so extravagant as to compel your Lordships to infer that the jury, properly directed as is admitted, must have taken into consideration matters which were inadmissible or irrelevant and arrived at an estimate which no twelve reasonable men could have reached so as to require your Lordships to order a new trial on the question of damages. On this part of the case also I am in agreement with the view expressed by the Lord Chief Justice.

Since writing the above I have had an opportunity of reading the opinion which is to be delivered by my noble and learned friend Lord Somervell of Harrow, and I desire to express my agreement therewith.

I would accordingly allow the appeal and restore the judgment of the trial judge in accordance with the verdict of the jury.

LORD KEITH OF AVONHOLM. My Lords, I agree that this appeal should be allowed substantially for the reasons given in the speech delivered by my noble and learned friend Lord Tucker. We are concerned here, in my opinion, with an act or acts of commission and it was conceded that, if this were so, much of the argument presented by counsel for the respondents disappears. The plaintiff was, in my opinion, in the circumstances of this case, placed in some peril by the acts of the respondents, his employers. He was far from being an experienced man in roof work. He had not worked on roofs until his employment on this particular job some three or four weeks before the accident. He was faced with carrying a heavy bucket of cement, down a roof (or crawling) ladder, in an upright position on a slope of 37 degrees without any adequate handhold and wearing rubber boots which were wet and would naturally tend to slip from the somewhat precarious grip which his heels had on the rungs of the ladder and which, further, were probably two sizes too large for him. The boots were supplied by the defendants' foreman, who must have had full knowledge of the circumstances in which the plaintiff was working. I am quite unable to hold that there was no evidence on which the jury could hold, as they did, that the defendants were negligent. If this is so, it is unnecessary to consider the statutory breach on which the plaintiff also relied.

I would add, however, a few words on the Dunedin formula, as it was called, in *Morton* v. *Wm. Dixon Ltd.*,[11] particularly as I was a member of the court which had occasion to consider that formula in *Gallagher* v. *Balfour, Beatty & Co.*[12] The dictum of Lord Dunedin was used with reference to an alleged act of omission in providing a safe system of work. In the sphere of negligence, in the relationship of master and servant, I find the border line between acts of omission and acts of commission

[11] 1909 S.C. 807, 809. [12] 1951 S.C. 712.

very fine. It might be said to be an act of commission to put an employee to work in a place which was obviously unsafe. In the present case it might be that giving the plaintiff rubber boots for his work could have been neutralised by providing some countervailing precaution which would exclude any charge of negligence and so it might be suggested that the cause of the plaintiff's injury was an act of omission rather than of commission. The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle. All that Lord Dunedin meant, in my opinion, was that if a plaintiff was complaining of a particular act of omission as constituting negligence, there were two ways in which he might endeavour to show this: by proving that the omission complained of was a precaution commonly undertaken by others in like circumstances, or was so obvious "that it would be folly in anyone to neglect to provide "it." It is on the second alternative that discussion has generally turned. But I see no particular difficulty. There is no magic in the word "folly." It gives the formula the characteristic that was described by Lord Normand in *Paris* v. *Stepney Borough Council* [13] as "trenchant." But the language could be phrased otherwise without any loss of meaning. Lord Dunedin might equally have said: "It would be stupid not to provide it," or "that no sensible man would fail to provide it," or "that com-"mon sense would dictate that it should be provided." Lord Cooper himself, who was particularly averse from watering down Lord Dunedin's language, on three separate occasions in his judgment in *Gallagher* [14] used "inexcusable" as the equivalent of "folly." With this may be read the passage from Lord Normand's judgment in *Paris* v. *Stepney Borough Council* [15] that the formula "does not detract from the test of the conduct and "judgment of the reasonable and prudent man." In *General Cleaning Contractors Ltd.* v. *Christmas* [16] my noble and learned friend Lord Tucker said: "It is true that in some cases there "may be precautions which are so obvious that no evidence is "required on the subject." In *Morris* v. *West Hartlepool Steam Navigation Co.* [17] Lord Cohen said that he agreed with Parker L.J. that "folly" was not to be read as "ridiculous" and did not think that that was the sense in which Lord Dunedin used it. I refrain from quoting observations in a similar sense from others of their Lordships in the cases cited. Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case

[13] [1951] A.C. 367, 382.
[14] 1951 S.C. 712, 716, 717, 718.
[15] [1951] A.C. 367, 382.
[16] [1953] A.C. 180, 198; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.
[17] [1956] A.C. 552, 578.

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the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care. It is immaterial, in my opinion, whether the alleged failure in duty is in respect of an act of omission or an act of commission. But where it is an act of omission that is alleged, I think it will be found, in the absence of evidence of practice, that the circumstances will rarely, if ever, lead judge or jury to hold that there was negligence unless the precaution which it is suggested should have been taken is one of a relatively simple nature which can readily be understood and commends itself to common intelligence as something to be required. Lord Dunedin was laying down, I think, no principle of law but stating the factual framework within which the law would fall to be applied.

I think the appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend Lord Tucker and only wish to add some observations on the use of phrases or formulas as superseding in particular circumstances the normal formula of "reasonable care in all the circumstances."

While the doctrine of common employment was part of our law fine distinctions were drawn as to the circumstances in which an employer might be held liable notwithstanding that doctrine. Now that common employment has been abolished those distinctions need no longer be drawn. I suggest, with all respect, that courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily if what I have called the normal formula—that is, reasonable care in all the circumstances—is applied whatever the circumstances. Lord Dunedin's observation was, in its context, clearly only intended to apply where the practice proved was clearly proved and where the circumstances covered by the practice were precisely similar to those in which the accident happened. There may be many cases in which although the circumstances are not precisely similar evidence of practice should be given some though less weight. In any case the formula seems to suggest, though this cannot have been intended, that if a plaintiff calls no evidence of practice he must establish folly in order to make out a prima facie case. In my view it would be unfortunate if courts had to consider what amounted to folly. I do not pretend to have considered every gloss on "reasonable care" which may from time to time have been cited as helpful, but speaking for myself I think the fewer the formulas the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another.

LORD JENKINS. I concur with the opinion of my noble and learned friend Lord Tucker, with which I am in complete agreement.

I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Neil Maclean & Co. for D. P. Marrinan, Belfast; Goldingham Wellington & Co. for Henry J. Catchpole, Belfast.*

J. A. G.

[COURT OF APPEAL.]

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June 3, 4, 5, 8; *July* 2.
Lord Evershed M.R., Romer and Pearce L.JJ.

[1958 J. No. 3887.]

Landlord and Tenant—Business premises (security of tenure)—Landlord's intention to occupy for own purposes—Purchase within five years—Meaning of "purchased"—Meaning of "created"—"Termination of the current tenancy"—Meaning—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 24, 25, 30 (1) (*g*), (2), 31, 33, 64.

By an underlease of 1933, business premises were demised for a term expiring on March 22, 1959. That lease had become vested in the applicants, the tenants. By a lease date March 10, 1952, the premises were demised to S. Ltd. for the term of 99 years subject to the underlease of 1933. By an agreement dated June 30, 1954, entered into between S. Ltd. and the present landlords of the premises, after reciting that S. Ltd. had agreed "to sell" and the landlords had agreed "to purchase" the goodwill of the business carried on by S. Ltd. together with certain freehold and leasehold premises it was provided that the consideration for the sale should be attributed between the freehold and leaseholds, which latter included the business premises, as therein provided. No sum was attributed to certain of the leasehold properties which included the business premises. Pursuant to that agreement by a transfer of November 1, 1954, the business premises were transferred to the landlords. No consideration was expressed for the transfer but it contained a declaration that the covenants implied under section 77 (1) (*c*) of the Law of Property Act, 1925, should be deemed to be incorporated in it. That transfer was registered at the Land Registry on November 13, 1954. On March 28, 1958, the landlords served on the tenants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating their tenancy on March 22, 1959, and stating that they would oppose an application for the grant of a new tenancy on the ground that, on the determination of the tenancy, the landlords intended to occupy the premises for the purposes of a business to be carried on by them, being ground (*g*) of section 30 (1)[1]. The tenants applied for a new lease contending

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a landlord may oppose an application under subsection (1) of section 24 of this Act are such of the following grounds . . . (*g*) subject as hereinafter provided, that on the termination of the current tenancy

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that the landlords were precluded from opposing the application for a new lease since the interest of the landlords was "purchased" or created" after the beginning of the period of five years which ended with the "termination" of the tenants' "current "tenancy":—

Held, (1) that in section 30 (2) of the Landlord and Tenant Act, 1954, the word "created" was referable to the creation of the landlord's interest and not to the creation of the landlord's title to it and, accordingly, that the reversionary interest of the landlords, expectant on the termination of the tenants' underlease, was created by the lease of March 10, 1952.

(2) That "purchased" in section 30 (2) meant "bought for "money" and did not include the acquisition of property in consideration of giving a covenant, and that the transfer to the landlords of the reversionary lease in consideration of the covenants moving from the landlords implied under section 77 (1) (*c*) of the Law of Property Act, 1925, if it stood alone, would not have constituted a "purchase" by the landlords of the reversion expectant on the tenancy.

H. L. Bolton (Engineering) Co., Ltd. v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624 followed; *Inland Revenue Commissioners* v. *Gribble* [1913] 3 K.B. 212 applied.

(3) That to understand the true nature of the transaction by which the landlords acquired the reversion it was permissible to look to the contract which preceded the transfer in order to see whether the reversionary interest was "purchased" by the landlords, and that the agreement of June 30, 1954, was one single agreement and could not be split into different parts and was a contract of sale and accordingly the landlords were purchasers.

(4) That the landlords "purchased" the relevant interest on June 30, 1954, the date of the agreement for sale.

(5) That the provisions of section 64 (1) of the Act (which extend a tenancy for a period of three months from the date when an application for a new tenancy is finally disposed

"the landlord intends to occupy the "holding for the purposes, or partly "for the purposes, of a business to "be carried on by him therein, or "as his residence.

"(2) The landlord shall not be "entitled to oppose an application on "the ground specified in paragraph "(*g*) of the last foregoing subsection "if the interest of the landlord, or "an interest which has merged in "that interest and but for the merger "would be the interest of the land-"lord, was purchased or created "after the beginning of the period of "five years which ends with the ter-"mination of the current tenancy, "..."

S. 64: "(1) In any case where—"(*a*) a notice to terminate a tenancy "has been given under Part I or "Part II of this Act or a request for "a new tenancy has been made under "Part II thereof, and (*b*) an applica-"tion to the court has been made "under the said Part I or the said "Part II, as the case may be, and "(*c*) apart from this section the effect "of the notice or request would be to "terminate the tenancy before the "expiration of the period of three "months beginning with the date on "which the application is finally dis-"posed of, the effect of the notice or "request shall be to terminate the "tenancy at the expiration of the "said period of three months and not "at any other time.

"(2) The reference in paragraph "(*c*) of subsection (1) of this section "to the date on which an application "is finally disposed of shall be con-"strued as a reference to the earliest "date by which the proceedings on "the application (including any pro-"ceedings on or in consequence of an "appeal) have been determined and "any time for appeling or further "appealing has expired, except that if "the application is withdrawn or any "appeal is abandoned the reference "shall be construed as a reference to "the date of the withdrawal or aban-"donment."

of) had not to be read into section 30 (2), and that the phrase "the termination of the current tenancy" was referable to the date specified in the landlords' notice under section 25 and, accordingly, that the landlords' interest had been purchased within five years of the termination of the tenants' current tenancy and the landlords were not entitled to oppose the tenants' application for the grant of a new tenancy.

In Re 88 *High Road, Kilburn* [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527 considered.

Decision of Roxburgh J. affirmed.

APPEAL from Roxburgh J.

By an underlease dated December 30, 1933, J. Sears & Co. (True Form Boot Co.) Ltd. (hereinafter called "Sears Ltd.") demised to F. J. Cartwright Ltd. business premises known as 167/169 High Street, Camden Town, for a term expiring on March 22, 1959. That term was by an assignment of November 29, 1934, vested in the applicants, Frederick Lawrence Ltd., the present tenants. By a reversionary lease of March 10, 1952, the premises were demised to Sears Ltd. for a term of 99 years subject to the tenancies affecting the premises.

By an agreement dated June 30, 1954, it was recited that Sears Ltd. had carried on business as manufacturers and retailers of footwear for many years and that in relation to that business they were the owners of various freehold and leasehold properties. It was further recited that Sears Ltd. had agreed to "sell" and Freeman, Hardy & Willis Ltd. to "purchase" the business and certain freehold and leasehold premises (which included 167 and 169 High Street, Camden Town). The consideration for the "sale" and "purchase" was expressed to be for the freehold properties £480,050, for certain leasehold properties £149,000 and for other leasehold premises, which included 167 and 169 High Street, Camden Town, the covenant by Freeman, Hardy & Willis Ltd. to observe and perform the covenants contained in the leases under which the several properties were held.

Pursuant to that agreement by a transfer of November 13, 1954, that reversionary lease was assigned to Freeman, Hardy & Willis Ltd. the present landlords. No consideration was expressed in the transfer but it contained a declaration that the covenants implied by section 77 (1) (*c*) of the Law of Property Act, 1925 (being covenants to pay rent and observe the covenants of the lease and to indemnify the assignor) should be deemed to be incorporated therein. Upon the registration at the Land Registry of the transfer on November 13, 1954, the landlords became entitled to the leasehold reversion expectant upon the determination of the tenants' tenancy.

On March 28, 1958, the landlords served on the tenants a notice under section 25 of the Landlord and Tenant Act, 1954, terminating the tenancy on March 22, 1959. The landlords stated that they would oppose any application by the tenants for the grant of a new tenancy on the ground that the landlords intended to occupy the premises for the purposes of a business to be carried

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on by them being ground (*g*) in section 30 (1) of the Act. On July 18, 1958, the tenants applied for a new lease.

While it appeared from the evidence that the landlords had established their ground of opposition under section 30 (1) (*g*) of the Act of 1954, the tenants contended that the landlords were not entitled, having regard to the provisions of subsection (2) of section 30 to rely on that ground specified in (*g*) since the interest of the landlords had been " purchased " or " created " after the beginning of the five-year period which ended with the termination of the tenants' current tenancy.

Roxburgh J. held that the landlords' interest had been created within the five-year period and that section 30 (2) applied.

The landlords appealed.

Lionel Blundell Q.C. and *Ronald Bernstein* for the landlords.
John Arnold Q.C. and *Allan Heyman* for the tenants.

The following cases, which are not referred to in the judgment, were cited in argument: *Robshaw Bros. Ltd.* v. *Mayer*[2]; *Baker* v. *Lewis*[3]; *Powell* v. *Cleland*[4]; *Edward* v. *Longton*[5]; *Emberson* v. *Robinson*[6]; *Austin Reed Ltd.* v. *Royal Insurance Co. Ltd. (No. 2)*[7]; *Cornish* v. *Brook Green Laundry Ltd.*[8]; *Newton Abbott Co-operative Society* v. *Williamson and Treadgold Ltd.*[9]; *Caledonian Railway Co.* v. *North British Railway Co.*[10]; *Lucas* v. *Lineham.*[11]

Cur. adv. vult.

July 2. LORD EVERSHED M.R. The judgment which Romer L.J. will deliver is the judgment of the court.

ROMER L.J. This appeal arises out of an application by Frederick Lawrence Ltd., who are the tenants of No. 167 and the upper floors of No. 169, High Street, Camden Town, Middlesex, for a grant of a new tenancy of those premises for a period of 14 years from March 22, 1959. The application was made under section 24 of the Landlord and Tenant Act, 1954, and the respondents to the application were Freeman, Hardy & Willis Ltd. (hereinafter referred to as " the landlords "). The landlords opposed the application on the ground specified in paragraph (*g*) of section 30 (1) of the Act. The matter came before Roxburgh J., and by his order dated February 6, 1959, the judge declared that by virtue of section 30 (2) of the Act the landlords were

[2] [1957] 1 Ch. 125; [1956] 3 W.L.R. 1049; [1956] 3 All E.R. 833.
[3] [1947] 1 K.B. 186; 62 T.L.R. 716; [1946] 2 All E.R. 597.
[4] [1948] 1 K.B. 262; 63 T.L.R. 627; [1947] 2 All E.R. 672.
[5] (1901) 85 L.T. 650.
[6] [1953] 1 W.L.R. 1129; [1953] 2 All E.R. 755.
[7] [1956] 1 W.L.R. 1339; [1956] 3 All E.R. 490.
[8] [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; [1959] 1 All E.R. 373.
[9] [1952] 2 Ch. 286; [1952] 2 All E.R. 279.
[10] (1881) 6 App.Cas. 114.
[11] [1950] 1 K.B. 548; 66 T.L.R. (Pt. 1) 641; [1950] 1 All E.R. 586.

not entitled to oppose the tenants' application. The landlords appealed against that order.

The facts are not in dispute. By an underlease dated December 30, 1933, J. Sears & Co. (True Form Boot Co.) Ltd. (hereinafter referred to as "Sears Ltd.") demised the premises to F. J. Cartwright Ltd. for a term of 25 years (less the last three days) from March 25, 1934. On November 29, 1934, that lease was assigned to the tenants and remained vested in them on the expiry of the term on March 22, 1959. By a lease dated March 10, 1952, the premises were demised to Sears Ltd. for the term of 99 years, subject to the tenancies affecting them, and on November 1, 1954, the premises so demised were transferred (being registered land) to the landlords for the unexpired residue of the term. Upon the registration of this transfer on November 13, 1954, the landlords accordingly became entitled to the leasehold reversion in the premises expectant upon the termination of the applicants' underlease and were still so entitled on March 22, 1959.

On March 28, 1958, the landlords served on the tenants a notice under section 25 of the Act of 1954 terminating their tenancy on March 22, 1959, and intimating that they would oppose an application to the court for the grant of a new tenancy on the ground that, on the termination of the current tenancy, they (the landlords) intended to occupy the premises for the purposes of a business to be carried on by them. On July 18, 1958, the tenants applied for a new lease, and affidavit evidence was filed by both parties. As a result of this evidence, it was plain that the landlords had established their ground of opposition as stated in the notice which they had served on the tenants (which was, in fact, the ground specified in section 30 (1) (*g*) of the Act) and the tenants did not contend to the contrary. The tenants objected, however, that the landlords were precluded from opposing their application by the provisions of section 30 (2) of the Act, which are in the following terms: "The landlord shall not "be entitled to oppose an application on the ground specified in "paragraph (*g*) of the last foregoing subsection if the interest of "the landlord, or an interest which has merged in that interest "and but for the merger would be the interest of the landlord, "was purchased or created after the beginning of the period of "five years which ends with the termination of the current "tenancy, and at all times since the purchase or creation thereof "the holding has been comprised in a tenancy or successive "tenancies of the description specified in subsection (1) of "section 23 of this Act."

The tenants' contention was that the interest of the landlords was (in the formula of the subsection) purchased or created after the beginning of the period of five years which ended with the termination of the tenants' current tenancy. Their case was that the relevant five-year period commenced in November, 1954, when the landlords took a transfer of the reversionary interest, and that

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their own current tenancy terminated on March 22, 1959, which was the date of termination specified in the notice which the landlords had served on them pursuant to section 25 of the Act.

The judge decided the question in the tenants' favour. He did so on the ground that whether or not the landlords had "purchased" their interest within the five-year period (a point which he found unnecessary to decide) the interest had been "created" within that period and that section 30 (2) accordingly applied. On the appeal coming on before this court Mr. Arnold, for the tenants, intimated that he desired to support the judge's order on the ground that the landlords had "purchased" their interest within the five-year period, rather than on the ground that it had been "created" within that period. He conceded that the "interest" of the landlord, namely, the reversion expectant on the termination of the applicants' tenancy, had been "created" by the lease, hereinbefore referred to, of March 10, 1952, and, in our opinion, this concession was rightly made. It is true that the landlords did not acquire this interest until 1954 but that seems to us to be irrelevant. In our judgment the word "created" in section 30 (2) is referable to the creation of a landlord's interest and not to the creation of the landlord's title to it. The contrary view would appear to render the word "purchased," which appears as the alternative to "created," wholly redundant.

The arguments before us were, accordingly, addressed to the question whether the landlords were disqualified from opposing the tenants' application on the ground that their interest was purchased after the beginning of the period of five years which ended with the termination of the tenants' current tenancy, and that is the issue with which we have to deal.

The first question which arises upon this issue is whether the acquisition by the landlords from Sears Ltd. in 1954 of the leasehold interest in the premises dependent on the expiration of the tenants' tenancy constituted a "purchase"; for, if it did not, the disqualifying provisions of section 30 (2) do not apply. If this question were res integra there would, we think, be much to be said—particularly having regard to the dictionary definition of the word "purchase" to an example of which we later refer—for the view that the word "purchase" in the section under review should not be confined to a transaction of buying for money or (strictly) money's worth. For the limited construction of the word appears to involve serious anomalies. Thus, upon this limited construction, it might make all the difference to a case like the present whether the landlord, in acquiring his relevant interest, had in addition to giving covenants to his vendor paid also a monetary consideration however small. Moreover, in a case where the landlord's interest had been "created" rather than "purchased" it would be immaterial whether the landlord had or had not, upon the creation of his interest (for example, by the grant of a lease), paid a cash consideration or its equivalent.

But the question is not res integra; for this court in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[1] defined the word "purchased" in the Act of 1954 in a way which is, in our opinion, binding upon us. Denning L.J., in whose judgment Hodson and Morris L.JJ. concurred, expressed the conclusion that the word in section 30 (2) of the Act of 1954 "has the same meaning as in the Rent Acts. It has its popular meaning of buying for money and not the technical legal meaning of acquisition otherwise than by descent or escheat." What then is the popular meaning of "buying for money"? One of the definitions of "buy" in the Shorter Oxford English Dictionary is "to get possession of by giving an equivalent, usually in money; to obtain by paying a price." In *Inland Revenue Commissioners* v. *Gribble*[2] Buckley L.J. said: "'Purchaser' may, as it seems to me, mean any one of four things. First, it may bear what has been called the vulgar or commercial meaning; purchaser may mean a buyer for money. Secondly, it may include also a person who becomes a purchaser for money's worth, which would include the case of an exchange. Thirdly, it may mean a purchaser for valuable consideration, which need not be money or money's worth, but may be, say, a covenant, or the consideration of marriage. Fourthly, it may bear that which in the language of real property lawyers is its technical meaning, namely, a person who does not take by descent."

Buckley L.J.'s judgment was a dissenting judgment but the passage which we have quoted was in no way at variance with the judgments of the other members of the court. It is clear, we think, from what was said in *Bolton's* case,[3] that "purchased" in section 30 (2) of the Act of 1954 falls within the first of Buckley L.J.'s four categories, to the exclusion of the other three, and means "bought for money." "Money" in this context is not confined to cash in its strict sense, for a man who bought something and paid for it by cheque would popularly be said to have bought it for money. It would, however, exclude a covenant, for the acquisition of property in consideration of giving a covenant falls within Buckley L.J.'s third category. The relevance of this is that, in the transfer to the landlords of the property in question (together with other properties), the only consideration moving from the landlords to Sears Ltd. were the covenants implied under section 77 (1) (*c*) of the Law of Property Act, 1925, and which were incorporated in the transfer. If, therefore, the only relevant document for present purposes was this instrument of transfer it would not be possible, in our judgment, having regard to *Bolton's* case[3] and *Gribble's* case,[4] to say that the landlords "purchased" the reversion in the premises. Both Mr. Blundell, however, for the landlords, and Mr. Arnold, for the

[1] [1957] 1 Q.B. 159, 170; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.
[2] [1913] 3 K.B. 212, 218.
[3] [1957] 1 Q.B. 159.
[4] [1913] 3 K.B. 212.

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tenants, were agreed that in order to ascertain the true nature of the transaction between Sears Ltd. and the landlords under which the latter acquired their interest in the premises, it is permissible to look to the contract which preceded the transfer for the purpose of seeing whether the interest was "purchased" by the landlords. This agreement was dated June 30, 1954, and is a document of somewhat special character. The third recital in the agreement is that "Sears have agreed to sell and Freeman [the "landlords] have agreed to purchase the goodwill and certain "assets used by Sears in connection with (Sears') business and "certain freehold and leasehold premises and interests in certain "other premises short particulars of which are set out in the "First and Second Schedules hereto (such properties hereinafter "sometimes collectively called 'the said properties') on the "terms and conditions hereinafter set forth." In conformity with this recital, clause 1 of the agreement is expressed in terms of sale and purchase: "Sears sell and Freeman purchase as at "January 1, 1954 (hereinafter called 'the sale date')." The clause then describes the items of property which are to be transferred and these include as the third item the leasehold interests in the properties particularised in the Second Schedule, amongst which are the interests now in question. Clause 2 provides that "the consideration for the sale and purchase hereby agreed shall "be in respect of the properties First to Eighthly in clause 1 "hereof the amounts respectively attributable to such properties "in such order as follows." There then follow sums of money ascertained or ascertainable in respect of items 1 and 2 and items 4 to 8. Two of these sums are purely nominal amounts of £1 each. To the leasehold interests comprised in the Second Schedule, however, no "amount" is attributed at all. The consideration for those interests is expressed to be the covenant by the landlords to pay the rents reserved and to observe and perform the covenants and conditions contained in the leases under which the properties were held and to indemnify Sears Ltd. in respect of any breach thereof. Apart from this covenant and indemnity no cash consideration, even a nominal one, was attributed to the leasehold interests comprised in the Second Schedule. Accordingly, just as the subsequent transfer of these interests could not, as already stated, be regarded as a "purchase" of the interests if the instrument were taken by itself, so also the agreement to transfer them could scarcely be regarded as an agreement by the landlords to "purchase" them, if it were to be divorced from the other terms of the contract. Perhaps, indeed, the most attractive way of putting the landlords' case on this point, as Mr. Blundell in fact put it, was as follows: Look first, as one naturally would look, to the instrument of transfer of these legal interests and one finds that it was not a transfer for money. Look then to the agreement for the transfer of the interests to see whether the consideration was intended to be money. One finds that the agreement is in precise accordance

with the transfer in point of consideration. There is, therefore, no ground for suggesting that the consideration stated in the transfer was at variance with the intention of the parties. The landlords, said Mr. Blundell, were buying the business and paying for it, but were merely taking over the relevant leasehold interests.

We fully appreciate the force of Mr. Blundell's submission on this question but we are of opinion that it ought not to prevail. The third recital of the agreement and clause 1 and the opening words of clause 2 seem to show quite clearly that the transaction embodied in the agreement was intended by the contracting parties to be one of sale and purchase and nothing else. It is quite true that it would be difficult to say how much the landlords "paid" for the relevant interests if the amount had to be assessed in terms of money. But to an inquiry whether the landlords bought Sears Ltd.'s leaseholds, along with its business and other assets, the answer, we think, must surely be "Yes." This would, in our judgment, be the ordinary commercial view of the transaction and it could only be negatived by splitting up what is one single and indivisible agreement into different parts and treating each part as having an existence independent of the others. This would appear to us to be an illegitimate approach to the matter. If at the instance of either contracting party the court had been asked to decree specific performance of the agreement, and had done so, the subject of the decree would have been the contract as an entirety; and the contract as a whole is, in our judgment, a contract of sale. That the ordinary or "business" view of the transaction is that which we have indicated is we think supported by the terms of clause 9 (b) of the contract, which, as regards the property in the second Schedule, expressly stated that the landlords "shall be "deemed to *purchase* with full notice of the terms contained in "the leases under which such properties are held"; and by clause 10 of the contract, which reads: "Sears are *selling* and "will convey grant transfer and assign as beneficial owners."

We cannot refrain from adding upon this part of the case that the (by no means easy) question involved may, if this case should go to the House of Lords, have then become wholly academic if Mr. Blundell's argument be accepted upon the last question with which we later deal.

If, therefore, as we think, the landlords did purchase their interest in the Camden Town leaseholds, the next question which arises is, when they did so. As to this, there would seem to be three possible dates, videlicet: June 30, 1954, when the agreement between Sears Ltd. and the landlords was signed; or November 1, 1954, when the instrument of transfer was executed; or November 13, 1954, when the transfer was registered under the Land Registration Act, 1925. The "interest of the landlord" with which section 30 (2) of the Act of 1954 is concerned is presumably the interest by virtue of which the landlord opposes a tenant's application for a new lease. That interest in the

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present case was a legal interest in reversion expectant on the termination of the tenancy, and in our opinion the landlords "purchased" this interest on the date when the agreement with Sears Ltd. was signed, namely, June 30, 1954. They did not acquire the position or status of landlords until November 1 (or perhaps more strictly November 13), 1954, when the purchase was completed and registered; but it seems to us that the relevant date for the purposes of section 30 (2) is when a landlord purchased his interest and not when he filled the character of landlord. If so, the only question in the present case is as to the date on which the landlords, as between them and Sears Ltd., became the purchasers of the interest. As to this it is well settled (see, for example, *Lysaght* v. *Edwards* [5]) that in equity a purchaser is treated for all practical purposes as the owner of the property sold upon the signing of the contract of sale and the vendor becomes a trustee for him of the legal estate. There is nothing in the agreement of June 30, 1954, to displace this conception; and indeed it is expressly provided by clause 12 (a) thereof that until Sears Ltd. should obtain licence to assign the relevant interest (amongst others) they would "hold "and retain the legal possession thereof upon trust for Freeman "[the landlords]." We are accordingly of opinion that the landlords "purchased" the relevant interest on June 30, 1954. We would add that this view is consistent with the conclusion at which this court arrived upon a similar point under the Rent Acts in *Emberson* v. *Robinson*.[6]

The third and final question which was argued before us was as to the date of the termination of the current tenancy for the purposes of section 30 (2). The tenants' contractual tenancy expired by effluxion of time on March 22, 1959, and inasmuch as that was also the date specified in the notice which the landlords served on the tenants on March 28, 1958, terminating the tenancy one would suppose prima facie that that was the date on which the current tenancy terminated. Having regard, however, to the provisions of section 64 of the Act the position is by no means as simple as that. The landlords served their notice under section 25 (1) of the Act and that subsection provides, in effect, that the notice is subject to the provisions of section 64 as to the interim continuance of tenancies pending the disposal of applications to the court. Under those provisions, where a landlord has served a notice terminating a tenancy and the tenant makes an application to the court for a new tenancy (and both these elements exist in the present case) and "apart "from this section the effect of the notice . . . would be to "terminate the tenancy before the expiration of the period of "three months beginning with the date on which the application "is finally disposed of, the effect of the notice . . . shall be to "terminate the tenancy at the expiration of the said period of

[5] (1876) 2 Ch.D. 499.

[6] [1953] 1 W.L.R. 1129.

"three months and not at any other time"; then section 64 (2) goes on to explain what is meant by "the date on which an "application is finally disposed of" and it does so in language which suggests that an application may not be finally disposed of until it has at the end of all been adjudicated upon by the House of Lords. In view of these provisions and especially of the words "and not at any other time" Mr. Blundell submits that the tenants' current tenancy cannot have terminated on the date specified in the landlords' notice under section 25 (1), namely, March 22, 1959. If the impact of section 64 on section 30 (2) is that for which Mr. Blundell contends, the result would be truly remarkable, as the following illustration will show. A. (a landlord) serves on B. (the tenant) a notice terminating the tenancy on a specified date, and stating that he would oppose an application by the tenant for a new tenancy on the ground mentioned in section 30 (1) (*g*). B. thereupon applies to the court under section 24 (1) for the grant of a new tenancy. On the matter coming before the court it is shown that A. only purchased his interest four years previously and is therefore disqualified from opposing the tenant's application because of section 30 (2). An order for a new lease is made, against which A. appeals. The appeal is heard six months later, that is to say four years and six months after A. purchased his interest. By reason of this (and in spite of the period of three months added by section 64 (1)) A. is still precluded by section 30 (2) from opposing and his appeal is therefore dismissed. A. appeals to the House of Lords and his appeal comes on for hearing one year later. By that time five years and six months will have elapsed since A. purchased his interest, and accordingly section 30 (2) no longer presents an obstacle to his opposition. If such a result as this emerges from the relevant sections of the Act of 1954 the court has no option but to give effect to it; but it is hardly one that commends itself to common sense. Mr. Blundell sought to mitigate this absurdity to some extent. He said that for the purpose of fixing the date of termination of a current tenancy the court should only deal with the known position and with certainties as distinct from possibilities. That principle, if sound, as applied to the present case would result in the termination of the Camden Town leases three months after the judgment of this court has been delivered on this appeal and without regard to the possibility of a further appeal being taken to the House of Lords. We cannot accept this suggestion, which seems to us to distort the language of section 64 (2) beyond recognition. If section 64 has, as it were, to be incorporated for all purposes in section 30 (2) it is clear that the possibility of all appeals and further appeals has to be taken into account. The question is, however, whether in fact the provisions of section 64 do so apply to section 30 (2). A point which is of some cogency at first sight in favour of the view that they do emerges from section 37 of the Act. That section

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provides for the payment of compensation to a tenant in cases where the court is precluded from making an order for the grant of a new tenancy by reason of certain of the grounds specified in section 30 (1). The amount of such compensation depends on whether or not the premises have been occupied for business purposes "during the whole of the 14 years immediately preceding the termination of the current tenancy" (section 37 (3)) and by subsection (7) it is provided that "in this section the reference to the termination of the current tenancy is a reference to the date of termination specified in the landlord's notice under section 25 of this Act or, as the case may be, the date specified in the tenant's request for a new tenancy as the date from which the new tenancy is to begin." Mr. Blundell naturally fastened on this as showing that where the legislature in a particular case wished to displace the general application of section 64 they expressly did so; and that as they did not do so for the purposes of section 30 (2) then section 64 applies. There is some force in this argument, but it appears to us that there is a sufficient answer to it. The tenant is to be entitled to the compensation "on quitting the holding." That event might occur either as a result of the landlord terminating the tenancy or as the result of the tenant asking under section 26 for a new tenancy (which ex hypothesi the court is precluded from ordering) to start from a date which he specifies in his request. The expression, therefore, in section 37 (7) "the date of termination specified in the landlord's notice" is, we think, no more than a convenient and natural introduction to the alterative "or, as the case may be, the date specified in the tenant's request for a new tenancy"; it is indeed difficult to see how else the first limb of the alternative could have been expressed. In our opinion, accordingly, section 37 has not the importance in this respect which Mr. Blundell sought to attribute to it.

Then Mr. Blundell says that whenever the words "the current tenancy" appear in section 30 of the Act they are to have the meaning assigned to them by section 46, which is referential to section 26 (1). In that subsection the phrase is defined as meaning the tenancy under which the tenant holds for the time being. That tenancy, however, cannot be brought to an end by the landlord except subject to the proviso in section 25 (1), which incorporates, in effect, the provisions of section 64. It follows, therefore, upon this argument that in each instance in which reference is made in section 30 to the "termination of the current tenancy" those provisions are to be regarded as also operating. Consequently, so Mr. Blundell contends, in each of the grounds of opposition stated in section 30 (1) (*e*), (*f*) and (*g*) the "termination of the current tenancy" means when the tenancy in fact comes to an end, that is, after the termination of the current tenancy as extended by section 64: in other words, the expression is referable to some future point of time, after

all litigation has been exhausted, when the landlord in fact succeeds in recovering possession of the property. We are unable, however, to accede to this submission.

In our judgment there are sufficient indications to be found in sections 30 and 31 of the Act, and in certain other provisions as well, that the phrase in section 30 (2) "the termination of "the current tenancy" is referable to the date specified in the landlord's notice served under section 25 and to that alone. It appears to us that the opening words of section 30 (2), "The "landlord shall not be entitled to oppose an application," are directed to a particular point of time, namely, the time when the tenant makes his application for a new lease. If at that time, the landlord can establish any of the grounds specified in section 30 (1), then, subject to section 30 (2), the court is precluded from ordering the grant of a new tenancy (section 31 (1)). One of the grounds of opposition specified in section 30 (1) is (*f*), "that on the termination of the current tenancy" the landlord intends to demolish or reconstruct the demised premises as therein mentioned; and it is well settled that he must establish that he entertains that intention at the time when the tenant's application is heard. It is by no means easy to see how he could establish such intention, or take any immediate and effective steps to implement it, if by reason of an appeal to this court and a possible further appeal to the House of Lords the current tenancy will or may not terminate until some two years later. Accordingly, it seems to us that the words "the termination of "the current tenancy" in sub-paragraph (*f*) are referring to a definite and certain point of time and not a point of time which is indefinite and uncertain; and that that point of time can only be the date specified in the notice, which the landlord has served on the tenant, or (at the latest) the date of the original hearing of the tenant's application. Very similar considerations apply to sub-paragraph (*g*) and we can only conclude from them that in neither of those sub-paragraphs were the provisions of section 64 of the Act intended to be incorporated so as to postpone the termination of the tenancy. It seems to us that the terms no less than the general sense of paragraphs (*f*) and (*g*) (and equally of paragraph (*e*)) of section 30 (1) postulate that the landlord, when he formulates the grounds (as he must) on which he will oppose the tenant's application for a new tenancy, must intelligibly express his intention as referable to a certain or ascertainable point of time. If we are right in that view it would be inconsistent with elementary principles of construction to attribute a different meaning to the words where they appear in subsection (2) of the same section; from which it follows that the words in that subsection also fall to be construed without reference to section 64.

The matter does not, however, rest there. Section 31 (2) provides (inter alia) that if a landlord opposes on the ground specified in section 30 (1) (*f*) but does not establish it to the

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satisfaction of the court "then if the court would have been "satisfied of [that ground] if the date of termination specified "in the landlord's notice . . . had been such later date as the "court may determine, being a date not more than one year "later than the date so specified,—(*a*) the court shall make a "declaration to that effect, stating of which of the said grounds "the court would have been satisfied as aforesaid and specifying "the date determined by the court as aforesaid, but shall not "make an order for the grant of a new tenancy; (*b*) if within "14 days after the making of the declaration, the tenant so "requires the court shall make an order substituting the said "date for the date specified in the said landlord's notice . . . "and thereupon that notice . . . shall have effect accordingly." It seems plain that in this subsection the draughtsman was focusing his attention on the date specified in the landlord's notice, "the date of determination" under section 25, as being for the purposes of section 30 (1) (*f*), the termination of the current tenancy. This must be so; for if the current tenancy would not, by reason of section 64, terminate until after the tenant's application for a new tenancy had been finally determined (possibly by the House of Lords) the court could not substitute a date not more than one year later than the date specified in the landlord's notice which would be the subject of a declaration and, if the tenant so required, the termination of the current tenancy. The intention was that in the circumstances contemplated by section 31 (2) the current tenancy should determine in accordance with the landlord's notice, subject to the substitution of a deferred date for that specified in the notice. This, as we think, affords further ground for the view that the expression "the termination of the current tenancy" in section 30 is to be read without regard to the provisions as to the interim continuation of tenancies pending determination by the court which are to be found in section 64. Those provisions would, of course, operate whenever a question arose, for example, as to a landlord's right to recover possession of the demised premises after he had served a notice under section 25; but they have no relevance, in our opinion, to the ending of the five-year period with which section 30 (2) is concerned. Reference may also be made to Part I of the Act, which contains in section 12 (1) (*a*) and section 13 (3) provisions which correspond respectively to section 30 (1) (*f*) and section 31 (2) in Part II. It is clear, we think, that the reference in section 12 (1) (*a*) to the "termination of the tenancy" cannot have been intended to incorporate section 64; for a landlord who wishes to obtain possession of premises on the ground that he proposes to demolish or reconstruct must, under section 13 (2) (*b*), satisfy the court that he has made preparations to that end, and this would be reasonable and intelligible if the landlord had a definite date in mind when he could undertake the work but which would be

quite impracticable if the provisions as to appeals in section 64 applied.

A further relevant section in Part I of the Act is section 4. Subsection (1) of that section is for relevant purposes similar to section 25 (1), including the proviso regarding the interim continuation of tenancies. Subsection (3) of the section provides that a notice under subsection (1) shall not be effective, unless it fulfils one of two alternative requirements, the first being that it contains proposals for a statutory tenancy (to take effect on termination of the tenancy) and the second being that, if the tenant is not willing to give up possession of the property "at the date of "termination of the tenancy," the landlord intends to apply for an order for possession on one or more of the grounds there referred to. If Mr. Blundell's argument is well founded, the date of the "termination of the tenancy" would appear to differ according to the alternative selected by the landlord. Moreover, by virtue of subsections (2) and (3) of section 7 the proposal for a statutory tenancy must include (inter alia) a proposal as to what rent is to be the standard rent of the premises. It is difficult to believe that Parliament was intending to impose on a landlord the obligation to specify the rent payable under a new tenancy, which would not commence until a wholly uncertain date possibly two years later.

It is unnecessary to specify in any detail the scope of section 64 in relation to the other provisions of the Act of 1954, and we will not attempt to do so. It is enough for present purposes to say that, in our judgment, and for the reasons which we have indicated, it is not to be regarded as being incorporated in section 30 (2) for the purpose of ascertaining the termination of a current tenancy. In other words, it seems to us that the terms of the proviso to section 25 (1) do not have, for present purposes, the effect of postponing the termination of the tenancy (when a landlord has given a valid notice under the Act) to the wholly uncertain and unascertainable date involved by reference to section 64; but only have the effect of saying that the termination of the tenancy, which remains determined by the landlord's notice, is to be without prejudice to its interim continuance, for relevant purposes, which do not include the ascertainment of the period specified in section 30 (2) as provided by section 64. It has frequently been pointed out, and was made plain by Lord Reid in *Coutts & Co.* v. *Inland Revenue Commissioners*,[7] that if two constructions of statutory language are reasonably possible that will be adopted by the court which would avoid an absurdity resulting from the other. That absurdities would arise from the construction of section 30 (2) for which Mr. Blundell has contended cannot be open to question. The construction which Mr. Arnold, for the tenants, has submitted avoids these absurdities, and as, in our opinion, it is a reasonably possible construction it should be preferred.

[7] [1953] A.C. 267, 281; [1953] 1 All E.R. 418.

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In *In re 88, High Road, Kilburn*,[8] tenants of business premises applied under section 24 of the Act for the grant of a new lease. The landlords did not object to a new lease being granted but there was a dispute between the parties as to (among other things) the date on which it should commence. Wynn-Parry J. held (in the terms of the headnote): "that the grant of a new "tenancy which would begin at the end of the current tenancy "by virtue of section 33 of the Act of 1954 was governed by "section 64 (1) of the Act and, accordingly, the new lease would "not commence until the expiration of a period of three months "after the termination of all proceedings relating to the applica-"tion, notwithstanding any injustice which might result to the "landlords by the continuation of the rent payable under the old "lease." The judge in the course of his judgment considered section 33 in conjunction with section 25 and with the proviso thereto and said [9]: "The effect of the proviso to section 25 appears "to me to be the same as if section 64 (1) had been written in at "the end of the first paragraph of section 25 (1) instead of the "proviso. I am quite unable, in view of the force of the "language used, to come to any conclusion other than that, once "the conditions stated in paragraphs (*a*), (*b*) and (*c*) of section 64 "(1) are fulfilled, the notice given by the landlord under section "25 (1) ceases to be of any effect so far as terminating the "tenancy at the date specified in his notice is concerned, and "that the tenancy will be continued and will only be terminated "under section 64 (1)." The decision, accordingly, was that in the joint context of section 33 and section 25 (1) the words "end of the current tenancy" were controlled by section 64 (1).

We do not suggest that the decision of the judge was wrong. But the Act of 1954 is not a model either of lucidity or consistency, and the fact that the expression "on the coming to an end "of the current tenancy" in section 33 has the meaning which Wynn-Parry J. attributed to it does not necessarily show that the words "the termination of the current tenancy" are to have a similar meaning in the context in which they appear in section 30 (2). As we have already pointed out, there are indications in sections 30 and 31 and elsewhere in the Act that the words were not intended to have that meaning in section 30 (2), and those reasons are not applicable to section 33. We do not, therefore, regard the decision in *In re 88, High Road, Kilburn* [9] as being inconsistent with the view which we have expressed as to section 30 (2).

For the above reasons, the appeal must, in our judgment, be dismissed.

Appeal dismissed with costs.
Leave to appeal to House of Lords.

Solicitors: *Titmuss, Sainer & Webb; Isadore Goldman & Son.*

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[8] [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527.

[9] [1959] 1 W.L.R. 279, 282.

[COURT OF APPEAL.]

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[Plaint 1956 B. No. 80.]

Lord Evershed M.R., Romer and Pearce L.JJ.

Vendor and Purchaser—Defective title—Right to rescind contract—Law Society's General Conditions of Sale—Power for vendor to rescind—Agreement for sale of unincumbered fee—Property subject to mortgages—Failure of vendor to obtain consent of mortgagees to sale before contract—Refusal of mortgagees to release security—Vendor not entitled to rescind.

A vendor agreed to sell certain freehold land to a purchaser. The contract incorporated the Law Society's Conditions of Sale, 1953, which by condition 10 (1) provides: "If a purchaser takes "or makes any objection or requisition as to title, conveyance or "otherwise which the vendor is unable or, on the grounds of "unreasonable expense, unwilling to remove or comply with, and "does not withdraw the same within ten days after being required "in writing so to do, the vendor may . . . . rescind the contract by "notice in writing delivered to the purchaser or his solicitors."

At the date of the contract the land was, together with other land, subject to a first mortgage to a building society and to a second mortgage. The vendor did not, before he signed the contract to sell, inquire of the mortgagees whether they would concur in the sale but he did ask his solicitor to communicate with the building society. At the time of the signing he inquired as to the position and was told that his solicitor "had the matter in hand." The vendor knew that his solicitor had not then in fact communicated with the society. The vendor was in arrear with the instalments payable under the mortgage and the society refused to concur in the sale. The purchaser having refused to take a conveyance of the property subject to the mortgages, the vendor served a notice under condition 10 purporting to rescind the contract. The purchaser claimed specific performance:—

Held, assuming that for the purposes of this contract that the purchaser's objection was an objection within condition 10 of the Law Society's General Conditions, 1953 (observations of Henn Collins M.R. in *In re Jackson and Haden's Contract* [1906] 1 Ch. 412, 422, and of P. O. Lawrence J. in *Merrett* v. *Schuster* [1920] 2 Ch. 240, 255, considered), that, while on its face condition 10 appeared to be unqualified in its terms, it was nevertheless subject to the qualification that the vendor must not have been guilty of conduct which, while falling short of fraud or dishonesty, might be described as reckless; and that, on the facts, the vendor had been reckless in signing the contract without being certain that his mortgagees would concur in the sale and, accordingly, he was not entitled to rescind the contract under the power conferred by condition 10.

In re Jackson and Haden's Contract, supra, followed.

Quaere, whether a vendor could rely on condition 10 if his own solicitor had recklessly assured him that the necessary consents of the mortgagees had been obtained, when they had not.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

By an agreement in writing, dated August 29, 1955, and made

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between the defendant William Tweddle, as vendor, and the plaintiff John William Baines, as the purchaser, the vendor agreed to sell to the purchaser a freehold plot of land, being plot 422, comprising 5·805 acres known as "Low Dormerstiles," situate at Heighington, Durham, for £580. That agreement incorporated the Law Society's Conditions of Sale, 1953, which by general condition 10 (1) provides: "If a purchaser takes or "makes any objection or requisition as to title, conveyance or "otherwise which the vendor is unable or, on the ground of "unreasonable expenses, unwilling to remove or comply with, "and does not withdraw the same within ten days after being "required in writing so to do, the vendor may . . . rescind the "contract by notice in writing delivered to the purchaser or his "solicitors."

At the time when the vendor signed the contract the property, together with other property, was subject to a first mortgage dated May 13, 1952, to the Darlington Building Society to secure £3,500 and interest and to a second mortgage dated March 27, 1953, to Solomon Abrahams to secure the sum of £600 and interest. At the date of the contract the vendor was in arrear with the instalments payable to the building society. When the sale was in course of negotiation the vendor instructed his solicitor to get in touch with the building society about the sale. Before he signed the contract he asked the solicitor's clerk whether the building society would consent and he was told that his solicitor "had the matter in hand." The vendor then signed. The purchaser paid a 10 per cent. deposit and on September 19, 1955, paid the balance of the purchase money into the joint names of the solicitors of the vendor and purchaser and went into possession.

The vendor could not induce the building society to join in the sale. The purchaser refused to accept a conveyance subject to the building society's mortgage and required the vendor to convey free from incumbrances. By letter of August 16, 1956, the vendor's solicitors required the purchaser to withdraw his objection within ten days. The purchaser having failed to do so, by letter dated August 31, 1956, the vendor purported to rescind the agreement pursuant to the power conferred by condition 10 of the Law Society's Conditions of Sale.

By this action the purchaser claimed specific performance of the agreement for sale, alternatively, damages. The vendor by his defence alleged that when he entered into the agreement he reasonably believed that the society would join in conveying the property to the purchaser and he relied on the notice of rescission and counterclaimed for a declaration that such agreement for sale had been duly rescinded on August 31, 1956, and for possession. The purchaser had, before the appeal was heard, given up possession and no further question arose with regard to that part of the counterclaim.

Vaisey J. dismissed the purchaser's action, holding that the

agreement had been rescinded by the vendor's notice under condition 10 and awarded to the vendor £100 agreed damages in respect of the purchaser's occupation.

The purchaser appealed.

The evidence is more fully stated in the judgment of Lord Evershed M.R.

John E. Vinelott for the purchaser.
A. C. Sparrow for the vendor.

The following cases were cited in argument in addition to those referred to in the judgments: *Duddell* v. *Simpson* [1]; *Jared* v. *Clements* [2]; *In re Des Reaux and Setchfield's Contract.* [3]

LORD EVERSHED M.R. This appeal, which has arisen in an action for specific performance of a contract for the sale of land, has raised some points of no little difficulty. The actual question, with which alone we must deal, may, however, be shortly stated; it is whether in the circumstances the defendant (the respondent), who was the vendor under the contract, was entitled to rescind that contract in the way in which, and at the time when, he did. It will be necessary to lay the foundation for what follows with some statement of the facts.

The contract was dated August 29, 1955, and it related to a piece of land, plot number 422, which was part of a larger area owned by the vendor; and it was required by the purchaser to be used by him in connection with his other land for agricultural purposes. The sale, judged by the purchase price, was not one of very great substance; for that price was £580, of which, in accordance with normal practice, £58 was paid by way of deposit. The property is described as: "All that close or parcel of ground "containing according to the ordnance map" a certain area which is identified on the plan "together with a right of way" and so on. Then: "Except and reserved unto the Church Com- "missioners for England their successors and assigns the mines "quarries and minerals in or under the said hereditaments," etc.; "and also except and reserved unto the vendor and his "successors in title and his or their servants workmen and others "authorised by him or them the right to enter the said close or "parcel of land" for limited purposes.

The contract, after stating the root of title, said further: "The property is sold subject to (a) a proportionate part of a "Tithe Redemption Annuity of £1.6.8." There was no statement of the nature of the interest which the vendor was to convey, but, in the circumstances, it cannot be doubted that the bargain was for the sale of the fee simple of the land, unincumbered, subject only to the reservations and qualifications which I have stated. Mr. Sparrow, for the vendor, has not

[1] (1866) 2 Ch.App. 102.
[2] [1903] 1 Ch. 428; 19 T.L.R. 219.
[3] [1926] 1 Ch. 178.

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contended—indeed he could not possibly have contended—otherwise.

At the time when this bargain was made the vendor had, in fact, executed two mortgages which affected this plot; the first was to the Darlington Building Society, and the total amount outstanding on the mortgage was £2,900-odd. Not only so, but it also emerged that the vendor had fallen into serious arrears with the instalments payable under that mortgage, five instalments then being outstanding, a total of some £105. In addition, there was a second mortgage or equitable charge on the property, and I assume (although I do not exactly know) other property also, for £600; that mortgage was in favour of one Solomon Abrahams. It will be appreciated that neither of these incumbrances was referred to in the contract and if, therefore, the vendor was to perform the contract according to these terms, it would be necessary for him either to discharge the mortgages (or discharge them as far as related to plot 422) or to procure the mortgagees and chargee to join in the conveyance to the purchaser.

I must finally state, because it is of great importance, that the situation between the vendor and the building society, namely, the fact that he was five instalments in arrears, was obviously one which he in his own mind thought might possibly make the building society not entirely amenable to every suggestion which he might make. It appears to have been in his mind somewhat vaguely that Abrahams would get a small percentage, and that the total purchase price to be received, namely £580, would go to the building society. To jump ahead in my introduction, it must be said that, when the building society were asked if they would assist the vendor by joining in the conveyance, they flatly refused and from their refusal they have never since, so far as I know, resiled at all.

It is, I think, not entirely insignificant to state that the refusal of the building society to assist the vendor became, according to the pleadings, known to the vendor within a very few days after the contract, namely, on September 1. We were informed that the purchaser was told of this particular difficulty a month after the contract. But I note that on September 19 the vendor allowed the purchaser to pay the entire balance of the purchase price, which was put on deposit in the joint names of the two solicitors concerned, and the purchaser thereupon, in accordance with a clause in the conditions of the contract, went into possession. As things have turned out, I need not say anything more about that aspect of the case. I understand it was an argument in the court below that, even though the vendor should be disentitled to rescind, he did rightly determine his licence to the purchaser to occupy the land, so as to give him the right to a claim for damages for trespass which is a subject-matter of the counterclaim; but as it has now transpired, it can

be taken that if the right to rescind was not available, then no such right for damages subsists in favour of the vendor.

I must now turn to the contract to refer to the particular clause which gives rise to this question. There was incorporated into the contract the Law Society's Conditions of Sale, 1953. That is a substantial document, and clauses 8, 9 and 10 relate to the matter of "Abstract, Requisitions and Power to Rescind." In particular, clause 10 reads as follows: "(1) If a purchaser "takes or makes any objection or requisition as to title, con- "veyance or otherwise which the vendor is unable or, on the "ground of unreasonable expense, unwilling to remove or "comply with, and does not withdraw the same within ten days "after being required in writing so to do, the vendor may "rescind" subject as therein stated "the contract by notice "in writing delivered to the purchaser or his solicitors." Sub-paragraph (2) deals with certain consequences to which I need not allude.

It became unfortunately, but quite clearly, manifest that this vendor would not be able to obtain the mortgagees' concurrence in the conveyance. It therefore followed that the best he could do by way of compliance with his bargain was to offer to the purchaser a conveyance of the equity of redemption, subject to the building society mortgage of nearly £3,000 and to Abrahams' second charge; in other words he could not convey that which he had contracted to convey, namely, the unincumbered fee simple. Not only so, but instead of something which I assume would have been worth £580 or thereabouts, the equity of redemption, the subject of these charges, quite clearly would not be worth a penny piece. It is, therefore, not to be wondered at that the purchaser was unwilling to accept as a completion of this bargain a conveyance of the equity of redemption. Accordingly, after the passage of a good deal of time, when, I do not doubt, great efforts were probably made by the vendor to see if he could persuade the mortgagees to help, the vendor's solicitor wrote the letter which the condition requires, calling upon the purchaser to withdraw the objection within ten days. It will be observed that, in order to bring himself within the condition, the vendor has to say that the purchaser is taking or making an objection to the title, conveyance or otherwise, and that if the vendor is unable or, for the reasons stated, unwilling to comply with the objection and thereupon calls upon the purchaser to withdraw it, then if the purchaser does not withdraw it, his contractual right to rescind arises.

I confess that I felt some doubt whether the situation which arose here between these two contracting parties fits within the scope of this condition at all. This, after all, was not in the ordinary sense an objection or requisition of the kind that arises when requisitions on title are delivered; it went to the root of the whole subject-matter of the contract. But I shall

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assume for the purpose of this judgment that since an incumbrance is clearly something affecting the title, it should be properly said that a refusal by the purchaser to accept a conveyance of the equity of redemption, instead of the unincumbered fee simple which the vendor had promised to convey, did constitute an objection within clause 10.

Upon that point I should, perhaps, add this: We were referred—and it is, for present purposes, really the foundation of the case law on the whole subject-matter of this appeal—to the case in this court of *In re Jackson and Haden's Contract*.[1] In that case the vendor had contracted to sell to the purchaser a villa residence and the terms of the contract made it quite plain that he was contracting to sell the entire interest in the villa, and the land on which it stood, including mines and minerals thereunder. In point of fact, he did not have the mines and minerals, they had been reserved in the conveyance to the vendor and therefore he was quite unable to hand them on to the purchaser. He said that he thought it was a matter of such notoriety in the district that the mines and minerals were reserved that the purchaser knew it and was not expecting them. It was therefore a case in which he could not convey that which he had promised to convey, because he could not include the minerals. There was a rescission clause comparable to that with which we are concerned and Buckley J. had in the first instance, as I understand it, taken the view that the objection which the purchaser took to having the purchase conveyed sans minerals was not within the condition at all. In this court Henn Collins M.R., as I read his judgment, thought that prima facie it was. I felt, and I confess I still feel, some slight doubt in my mind whether Romer or Cozens-Hardy L.JJ. were as clear as the Master of the Rolls upon that point; but, however that may be, in *Merrett* v. *Schuster*,[2] heard by P. O. Lawrence J., he clearly expressed the view that the scope given by Henn Collins M.R. to a condition of this kind should now be accepted. For the purposes of this case, therefore, I am willing to assume that the objection of the purchaser in this case was an objection within the scope of clause 10. It is clear that the necessary procedure was adopted within the terms of the condition, so that, if there is no other defect in the vendor's claim, he has exercised a contractual right of rescission.

On the face of this condition the right appears to be unqualified; if a purchaser takes or makes any objection which the vendor is unable, or on the grounds of unreasonable expense, unwilling to remove, etc., then the vendor may rescind the contract. Naturally enough it has been the main burden of Mr. Sparrow's argument for the vendor that this was the bargain which the purchaser made. It gave the vendor this apparently

[1] [1906] 1 Ch. 412. [2] [1920] 2 Ch. 240, 255.

unqualified right of rescission and the purchaser must, accordingly, accept the consequences. I only venture, by way of comment on that, to remind the vendor that he on his part contracted to sell an unincumbered fee simple and nearly three weeks after doing so allowed the purchase money to be paid into the joint account.

But this condition, which is one of considerable ancestry, though quite unqualified in terms, nevertheless has had a qualification undoubtedly imposed upon it by decisions of the court. I refer again to *In re Jackson and Haden's Contract*.[3] In that case the qualification was expressed first in this language by Henn Collins M.R.[4]: "As I have already said, numerous "cases have been most carefully set before us, which I have "had the opportunity of examining as they were read, and "it seems to me that, in every case where the vendor was "allowed to avail himself of a stipulation like this, there was "always absent that element of shortcoming on his part which, "though falling short of fraud or dishonesty, might be described "as 'recklessness.'" Romer L.J., at the end of his judgment, said,[5] quoting from the earlier case of *In re Deighton and Harris's Contract*[6]: "As Rigby L.J. said" in that case "it would not, "in my opinion, be right here to enable the vendor to 'ride off "'upon a condition to rescind which was obviously not framed "'with reference to any such case as' that which has arisen."

I should add that in *In re Jackson and Haden's Contract*,[7] the court came to the conclusion that the defendant could not rely upon this condition for rescission. In the present case, when the purchaser challenged the vendor's right so to rescind, the answer of the vendor was that at the time he signed this contract to convey the unincumbered fee simple he reasonably believed that the building society would be willing to join in conveying to the purchaser the property comprised in the agreement. I do not omit to notice that he did not think fit even to refer to any views which he held about Solomon Abrahams; but still that was his plea. No particulars were asked of it and he therefore set forth to prove that he did so reasonably believe. I think there may be no doubt that if, for example, he, the vendor, had before signing this contract, been given an assurance of some sort by the building society—I will not refer again to Abrahams—that they would join in conveying this property and then the building society changed its mind, then on the authorities the vendor would be entitled to rely upon the power to rescind; in other words, I accept, in the language of the Master of the Rolls in *In re Jackson and Haden's Contract*,[7] that, if the vendor here is to be disabled for asserting his contractual right to rescind, he must be shown to have had that shortcoming, which, although not amounting to anything in the nature of

[3] [1906] 1 Ch. 412.
[4] Ibid. 422.
[5] Ibid. 424.
[6] [1898] 1 Ch. 458, 464.
[7] [1906] 1 Ch. 412.

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dishonesty, could be described as recklessness. I must say at once—it is right that I should do so—that there is no shred of a suggestion that the vendor was dishonest or acted otherwise than in perfect and good faith. What he said in support of his plea of reasonable belief was that he had asked his solicitor whether it would be all right and that he relied on what he understood to be the solicitor's assurance.

That raises another point of some difficulty. Assuming that the vendor was assured by his own solicitor, who was acting for him in the sale, that all would be well, is that necessarily sufficient for the purpose of the condition? To put the matter in its strongest form, supposing that the solicitor, though giving that assurance, was himself grossly reckless or (although it is not of course the case here) quite dishonest and the solicitor had not taken any steps at all about it or knew perfectly well that the building society would not join, what then is the position? If the matter were one in which the general law of principal and agent was in all respects applicable, there would obviously be a very strong case for saying that the vendor could not shelter behind his solicitor and that, if his solicitor is reckless, then he, as his solicitor's principal, must be regarded as reckless too; and our attention was directed to the case where a party to a contract, via a solicitor, may be held to have constructive notice of charges or other defects of title. Moreover, there may be on this matter a question whether the same result should necessarily apply if the agent, whose advice was sought, was not a solicitor but was, say, a bailiff or some other servant, whom the vendor asked to make inquiries and by whom he was told, I am assuming falsely, that the inquiries had been made and were satisfactory. As I have said, the argument is a strong one for the view that the principal in this matter must be liable for any relevant defects in the acts of an agent in the performance of his duty.

But the question here is whether this is a case in which the general principles of agency must be applied. As I have said, we are here concerned with a condition which, on the face of it and according to its language, is quite unqualified. Given the facts, then the vendor may rescind the contract; no qualification whatever is expressed in the condition, or at any rate no qualification that is relevant to this argument. But the courts having put the qualification upon the condition which I have illustrated by my reference to *In re Jackson and Haden's Contract*,[7] the true question, therefore, is: how far does that qualification go? If in truth it be established that the vendor goes to a competent solicitor, a professional man and an officer of the court, asks his advice, and, on getting the advice that he honestly and reasonably believes that all is well, has he, the vendor, sufficiently cleared his conscience, so to speak, that he can then invoke, if he wishes, his powers under this condition? That point is one which has,

[7] [1906] 1 Ch. 412.

I confess, troubled me, but I find it unnecessary to decide it, and I shall therefore leave it to be decided when it has to be decided. For the moment, I will assume that if the vendor here did establish that he had obtained advice and the advice was such that he was reasonably entitled, without recklessness or shortcoming which could be called recklessness, to assume without more ado that his question of the title was all right, I will assume, as I say, that he is then entitled to invoke this power of rescission. But was he so entitled? I have come to the conclusion, on the facts, after careful consideration of them with the assistance of Mr. Vinelott and Mr. Sparrow, that this vendor, notwithstanding what passed, according to his own evidence, between himself and his solicitor cannot be acquitted of that shortcoming which can be called recklessness. I must, therefore, return to the facts.

I have already said—and this is a not unimportant matter—that the vendor, at the relevant time just before this contract, had fallen seriously, or at any rate appreciably, into arrears with his instalment payments with the building society, five of these being in arrears. That was a matter to which the judge alludes at the end of the evidence, but the vendor plainly knew that he might not find the building society very amenable.

In his evidence in chief two questions—and they were the only two relevant questions—were put to the vendor and answered as follows: "(Q.) Did you tell them"—that is the solicitors—"that it"—that is the land—"was subject to a mortgage? "(A.) Yes, and I asked my solicitor to contact the building "society and see what they had to say about it. He said he "thought it would be all right, but he would contact them." The actual date of this conversation was very shortly before the contract was presented for signature. On August 29 the contract was presented to the vendor for signature. The name of the partner of the firm of solicitors concerned was Freeman.

The second question and answer to which I want to refer was as follows: "(Q.) Was that permission"—that is the permission of the building society—"obtained so far as you knew? (A.) As "far as I knew, no, because I was asked to sign the contract on "the 29th and Freeman was not there himself. His clerk asked "me to sign—a Mr. Scott—and before signing I said to him: "'This is all right with the building society?' He said: 'Oh, "'yes, Mr. Freeman has that in hand,' so I signed the contract." —and that is all.

I cannot refrain from saying again that no reference whatever was made to the second mortgagee, Solomon Abrahams.

On that evidence in chief the matter rested, so far as the vendor's case was concerned. On those answers, the vendor, thought that in all the circumstances he might take the risk on what the clerk had said. But he must have been perfectly well aware that he was taking a risk and a real risk because, according to the information which Scott had given him, the solicitor had

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not done that which he, the vendor, had asked him to do, namely, to contact the building society. That seems to be the inevitable inference from the answer beginning "As far as I knew, no"—that is, the permission had not been obtained. But I must add another thing, namely, that if you are going to say that you asked advice and that you were acting reasonably in accepting it, I should have thought that the first thing you must show is that in asking the advice you gave your adviser all the material information. There is no suggestion in this evidence that the vendor ever told Freeman that the real trouble might turn out to be that he, the vendor, was five instalments in arrears with the building society. It may be—I know not—that there had been some passages of arms with the building society. If, in the ordinary case, you say to your solicitor: "I am selling a "bit of land which is subject, with other land, to a mortgage; "do you think the mortgagee will join?" the solicitor may reasonably say: "Oh, that will be all right." But here there was a large sum owing and the vendor was seriously in arrears, and that might very well affect the complaisance of the mortgagees. However, the matter was, not unnaturally, taken up by Mr. Vinelott in cross-examination. It is always a question for debate, being wise after the event, whether you might be well advised to let the matter stand where it is; but at any rate Mr. Vinelott did ask further questions and it is upon one of the answers given that Mr. Sparrow has particularly relied. It will be noted that in the second answer I read, the clerk is not alleged to have said: "It is all right" or anything of that sort; what he said, when the vendor asked if it was all right with the building society, was "Oh, yes, Mr. Freeman has that in "hand." In cross-examination, Mr. Vinelott asked the vendor: "Did you ask if they had actually obtained that consent?" and the answer was: "I understood they had obtained it"—which, I observe, is inconsistent with the other answer. Then the answer in cross-examination goes on: "The clerk said Mr. Free-"man had it in hand. He said it would be all right, and I "took that for granted."

Let me repeat that I am not suggesting for a moment that the vendor has been guilty of any lack of candour or perfect good faith. He had been in the witness-box for some time but it is to be noted that this answer is not entirely consistent with the one he had given before. Still, if the matter had rested there, Mr. Sparrow might have said: "Well, on the whole I "had been told by the solicitor's clerk that it would be all "right"—that is, that the building society would concur.

But the cross-examination proceeded and one of the other answers of some importance which came out was in answer to the judge: "Did you ask your solicitors if they had interviewed "the building society?" Now observe the answer: "Yes, I "asked the clerk"—that is Scott—"He did not seem to know."

Then he repeated: "He said Mr. Freeman had it in hand and "it was all right."

Later again, he said the same thing about Freeman having it in hand and it was at this stage, in answer to a question by the judge, that there emerged the facts about the arrears of the instalments.

Finally, I come to some questions on the next page where Mr. Vinelott took up the tale about Abrahams: it will suffice if I read one question and answer: "What did this clerk say" —that is Scott—"about the steps that Mr. Freeman had taken "to get the consent of Mr. Abrahams." The answer was: "He "did not tell me he had taken any steps at all. He said he "had it in hand."

The impression that that evidence gives to my mind is quite plain and it is this: Scott, when he was asked on the vital day, namely, the day when the contract was signed, what the situation was about the building society, clearly did not himself know at all; he told the vendor that Freeman, the solicitor, "had the "matter in hand," obviously meaning that he was "dealing with "it" (and therefore, plainly, had not yet reached a conclusion); and the inference I draw is—and it happens to be in accordance with the facts as we know them—that Freeman had not then contacted the building society at all. For, if he had done so, he would have been bound as a competent solicitor to have told Scott that he had done so, and that the building society were unwilling to join: and to have advised a postponement of the signing of the contract. But, of course, it is said that I did not see the witnesses and it is asked whether I should draw that conclusion. I am happy to say, however, that the judge, who did see them, drew, so far as I can see, exactly the same conclusions. He said to the vendor, who was still in the witness-box: "You really had no "ground at all to suppose that the building society were going to "do exactly what you asked. It would have been very surprising "if they had, considering that your instalments were in arrear "over £100"; and I respectfully entirely endorse that expression of view by the judge, which coincides exactly with the impression I formed on the evidence. But there then followed an argument, and certainly I am not surprised that Mr. Sparrow was more persuasive than his client; and, eventually, the judge came to the conclusion that the vendor was reasonably entitled to suppose that the building society situation had been dealt with. The vital passage in the judgment is this: "It is the whole point of the "power to rescind that, if it happens before the matter is "completed, he is in some way protected"—"he" being the vendor—"from giving effect to his bargain: he does what an "honest man would have done and says, 'I am sorry, but I find "'I cannot do what I meant to do under this contract, but here "'is a provision which enables me to get out of it and to be "'relieved of my obligation under it, and I propose to do that'"; and that is what he did. "Now the defence to this case is really

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" simply this: ' You ought not to have believed what your solici-
" ' tors told you when they assured you it would be all right
" ' and they had the matter in hand; indeed it was unfortunate
" ' that you accepted what the solicitors told you.' But I
" cannot imagine any man in the position of this vendor, who,
" as they have said, was by profession a district meat agent
" under the Ministry of Food, telling his solicitor, ' What do you
" ' tell me that for; is it true? ' " If the solicitor had told the vendor and assured him, inter alia, that it would be all right, and that the building society would join in the conveyance, then (on the assumption I am making about the vendor not in that respect being bound by the recklessness of his agent, the solicitor) I would agree, on that assumption, with the conclusion that the judge reached in favour of the vendor.

But I regret to say that I am unable to accept the view here expressed that the solicitor did ever so advise the vendor. I have been at some pains to refer to the relevant passages in the transcript and I repeat, as the judge himself expressed it when the vendor was still in the witness-box: " You really had no ground " at all to suppose that the building society were going to do " exactly what you asked " and so on. I think it is quite clear that what Scott, the clerk, told the vendor, on the day when the contract was signed, fell very far short of any such assurance as the judge assumed in the passage I have read. I think it is plain that this vendor, who, I repeat, obviously got the impression that Scott really knew nothing about it at all, took a serious risk, and taking that risk (since, as he says, the other party must abide by the terms of the contract, including clause 10) so prima facie he must abide by his bargain in respect of the unencumbered fee simple.

So I think this case falls within the type of case in which this apparently unqualified condition is not available to protect the vendor; and with all respect, therefore, to the view of the judge, I think that in holding that the vendor had validly rescinded, he came to an erroneous conclusion. It is a narrow point, and it has raised with it these other questions of difficulty which in the circumstances I do not find it necessary to answer.

For the reasons I have tried to state I think there was here a shortcoming which could properly be described as " recklessness " on the part of the vendor, though it was not accompanied by the smallest lack of good faith or anything in the nature of dishonesty. There was obviously no great hurry over this matter; the contract was dated August 29, 1955, and it was not until after another year that he came to rescind. I cannot think that a man can be excused because he chose to take, as I think he undoubtedly did, a considerable risk when he signed the contract at a time when Scott obviously knew nothing about it, and the inference from what he said was that Freeman had not then done as the vendor had asked him to do, namely, contact the building society, let alone Abrahams.

I would, therefore, allow the appeal and hold that there having been no valid rescission, the purchaser in this case, who does not now, and cannot, ask for specific performance, is entitled to damages on the basis of a breach of contract.

ROMER L.J. I agree. It is quite clear that a vendor is under a duty to his purchaser to satisfy himself before he signs a contract of sale that he will be in a position to convey what he is contracting to sell, and that duty was recognised by Henn Collins M.R. in *In re Jackson and Haden's Contract*,[8] to which the Master of the Rolls has referred in his judgment.

Henn Collins M.R., after referring to a decision of Knight Bruce V.-C. in the case of *Nelthorpe* v. *Holgate*[9] said[10]: "Now, what is the element that the Vice-Chancellor is seeking for "there which determines the case? It seems to me to be an "element of something on the part of the vendor less than the "law requires of him in such cases. It may stop short of fraud, "it may be consistent with honesty; but at the same time, there "must be a falling short on his part—he must have done less "than an ordinarily prudent man, having regard to his relations "to another person, when dealing with him, is bound to do."

With the Master of the Rolls I decide this case on the narrow ground that the vendor here fell short of a proper discharge of that duty, the duty to which Henn Collins M.R. referred, both with regard to satisfying himself as to the building society concurring in the sale and releasing the property from their security, and similarly, with regard to Abrahams, the second mortgagee, doing the same. My Lord has already referred sufficiently to the evidence, which was called before the judge, and it seems quite clear to me that so far as the building society was concerned, the vendor was content to rely upon the somewhat shadowy assurance he received from Freeman and from Scott, the managing clerk, that the matter was "in hand," and that "everything would be all right."

Inasmuch as he was already in trouble with the building society in the matter of his instalments, I should have thought it behoved him in discharge of his obligations to the purchaser to make sure that the building society would not raise any trouble or difficulty about releasing this part of their security so that it could be conveyed to the purchaser free from their mortgage.

With regard to Abrahams, the evidence would seem to show that he really gave no thought to Abrahams' mortgage at all, despite the fact that the second mortgage stood as security for a sum that was greater than the proposed purchase price of this property. It was not as though there was any real hurry about

[8] [1906] 1 Ch. 412.
[9] (1844) 1 Coll. 203.
[10] [1906] 1 Ch. 412, 421.

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the transaction; as far as I know, the contract could have been signed the next day or the day after that without any harm or trouble coming to anybody; and I think that in discharge of his duty to the purchaser, the vendor, before signing the contract, ought to have made perfectly sure either over the telephone with Freeman, or in some other way, not only that the matter was in hand but that these mortgagees would in fact concur in the sale so that the purchaser would get what he contracted to get, namely, the unencumbered fee simple of this property.

But no, he did not. He was content to rely on those rather vague and unsubstantial assurances from Freeman and Scott, and it seems to me that in these circumstances he really brings himself within the passage from the judgment which P. O. Lawrence J. delivered in the case of *Merrett* v. *Schuster*,[11] to which the Master of the Rolls has already made reference.

There the judge said [12]: "In my judgment the cases establish "that a vendor ought not to be held disentitled to exercise a clear "and unambiguous power of rescission reserved to him in the "contract because he has made an untrue statement of fact "concerning the property agreed to be sold in a case where the "statement has been made under the bona fide belief that it is "true and there exists some substantial ground for such belief. "Such a case, in my judgment, differs materially from a case in "which the vendor either knows that the statement is untrue (as "in *Jackson and Haden's* case [13]), or has no belief in the truth "of the statement (as in *Nelthorpe* v. *Holgate* [14]), and differs "also from the case where the vendor though believing the "statement to be true has no ground, or only a fanciful and "unsubstantial ground for such a belief."

I think it is very likely that the vendor did believe that everything would be all right, and that these mortgagees would concur; but it seems to me that the evidence shows that, in the language of P. O. Lawrence J., he had "only a fanciful and "unsubstantial ground for such belief," and, accordingly, he cannot rely on the contractual right to rescind the contract conferred upon him by condition 10 of the General Conditions of Sale.

As I say, that is the ground on which I myself prefer to deal with this appeal, and, in particular, I desire to express no conclusion on what I think is the difficult question of whether, if the vendor had asked for an assurance from his own solicitors that the mortgagees would in fact concur, and the solicitor wrongly and negligently had given him that assurance, he would have been precluded from relying on this condition 10. The courts have put

[11] [1920] 2 Ch. 240.
[12] Ibid. 255.
[13] [1906] 1 Ch. 412.
[14] 1 Coll. 203.

a gloss on conditions couched in such terms as that; and the answer to the question would depend on the extent of the restriction which the decisions have imposed upon the exercise by vendors of their legal rights in this regard. It may be that a vendor would only be affected by his own personal default or failure of duty; on the other hand, it may be that he would be equally affected by the default of his solicitors acting as his agents, though he himself was blameless. That is a point which I think does not arise for decision on this present appeal and I prefer to express no view upon it.

For the reasons the Master of the Rolls has stated, and which I have endeavoured to state, I agree that the appeal must be allowed.

PEARCE L.J. I agree with what my Lords have said. The vendor was well aware of the mortgages, although in his own words he had asked his solicitor to see what the building society had to say about it, and the solicitor "thought it would be all "right." The vendor knew that his ability to sell depended on his being able to come to some arrangement both with Abrahams and with the building society with whom he was substantially in arrears, and with whom he probably expected to have some difficulty. This was not a matter of legal complexity; it was a matter of making some practical working arrangement with the mortgagees. To sign the contract without being sure that some arrangement had been made was extremely rash. Although the vendor raised the question with his solicitor's clerk before signing, he got no satisfactory answer from the clerk, who "did "not seem to know." He was not told that any steps had been taken but merely that "the matter was in hand."

A reasonably prudent man would, I think, have said: "I "cannot sign until you have found out for certain that an arrange-"ment has been made and that I can convey the property."

In my opinion there has been something of the nature of recklessness on the part of the vendor; he has certainly "done "less," to quote the words of Henn Collins M.R. to which my Lord has already referred,[15] "than an ordinarily prudent man, "having regard to his relations to another person, when dealing "with him, is bound to do."

For that reason, he is not, on the authorities, entitled to rescind under clause 10. Indeed, where the defect in title is, in view of all the circumstances, so radical and extensive, I would myself feel some doubt whether clause 10 applied at all. If the vendor is for this purpose responsible for the failure of the solicitors in respect of the matter which he entrusted to them, his failure is clear beyond argument; but I agree with my Lords that it is not necessary to decide that point now.

[15] [1906] 1 Ch. 412, 421.

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Whilst I appreciate the matters which weighed with the judge, I agree that the appeal must be allowed.

Appeal allowed with costs; costs on the counterclaim in the court below and costs on the claim up to date of payment in; after payment in, further costs below to await inquiry as to damages.

Solicitors: *Corbin, Greener & Cook for Dowling & Hewitt, Bishop Auckland; Butt & Bowyer for Latimer, Hinks, Marsham & Little, Darlington.*

B. A. B.

[COURT OF APPEAL.]

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Husband and Wife—Maintenance—Justices—Wilful neglect to maintain—Wife living apart from husband on medical grounds—Forced separation — Effect on husband's liability to maintain — Whether neurotic wife justified in refusing to return—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

The parties were married in 1948. In 1952 a child was born; the confinement was difficult, and thereafter the wife suffered from a mental or nervous disorder, and developed an invincible repugnance not only to marital intercourse but even to the company of her husband. She was for some time a voluntary inmate in a mental hospital, and for some time visited her husband occasionally in an unsuccessful attempt to get rehabilitated; she was at no time of unsound mind, but according to the medical evidence her condition was incurable and a resumption of cohabitation would endanger her health.

The husband, against whom a maintenance order had been made by a stipendiary magistrate in 1954 on the ground of desertion, made attempts at reconciliation which were rejected; the wife informed him by letter in 1957 of her unalterable decision never to return: thereupon the magistrate, on the husband's application, discharged the maintenance order. Thereafter for a time the husband made a voluntary allowance, which he later discontinued. The wife made a fresh application for maintenance which the magistrate dismissed on the grounds (1) that the husband had no legal liability to maintain the wife as he had not been guilty of any matrimonial offence; (2) that the wife was herself in desertion and therefore not entitled to maintenance. On appeal, the Divisional Court affirmed the order on the first ground while rejecting the second. On an appeal by the wife:—

Held, dismissing the appeal, (1) that in proceedings between husband and wife, a husband could not be found guilty of wilful neglect to maintain unless he was a wrongdoer; such wrongdoing might consist of the very fact of failure to maintain.

Baker v. *Baker* [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81 applied.

(2) That the obligation of a husband to maintain his wife was not affected by an enforced separation, so that unless the wife in the present case was herself in desertion the husband would have committed the offence charged, subject to consideration of the relative means of the parties.

Observations of Singleton L.J. in *Keeley* v. *Keeley* [1952] W.N. 496; [1952] 2 T.L.R. 756, 760 applied.

(3) That, notwithstanding the danger to the wife's health if she resumed cohabitation, as there was a de facto separation all that was needed to make the wife into a deserter was the intention to desert, which she had evinced by declaring her intention never to return: a rational but neurotic wife could not in law justify a refusal ever to return; accordingly, the wife was in desertion, and the husband was not liable to maintain her.

Observations of Greene M.R. in *Pardy* v. *Pardy* [1939] P. 288, 302; 55 T.L.R. 1037; [1939] 3 All E.R. 779; *Drew* v. *Drew* (1888) 13 P.D. 97; *Crowther* v. *Crowther* [1951] A.C. 723; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131; and *Leng* v. *Leng* (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590 applied.

Decision of the Divisional Court ([1958] 3 W.L.R. 728; [1958] 3 All E.R. 528) affirmed in the result.

Appeal from the Divisional Court.[1]

The parties were married on October 2, 1948. A child was born on March 13, 1952. The wife's confinement was a difficult one, and thereafter she suffered from a mental or nervous disorder which was either caused or gravely aggravated by the birth of the child, developing an invincible repugnance to sexual intercourse and even to the presence of her husband which was in no way attributable to wilfulness on her part. On October 2, 1952, she was admitted as a voluntary patient to a mental hospital. She made several unsuccessful attempts to rehabilitate herself by returning home for short periods, the parties occupying separate rooms without attempting sexual intercourse. In June, 1956, she left the hospital and went to live with her mother and the child.

On October 12, 1954, the wife was granted by the stipendiary magistrate for Kingston-upon-Hull a maintenance order of £2 per week with £1 for the child on the ground of her husband's desertion, the wife being given custody. After she had left the hospital the husband wrote on several occasions suggesting a reconciliation, but the wife in April, 1957, wrote stating that a return was impossible and that that was her final answer. On August 23, 1957, the magistrate discharged the maintenance order on the ground that the husband was not a deserter, but made an order under the Guardianship of Infants Acts giving the wife the custody of the child and ordering the husband to pay 30s. per week for its maintenance. For some time the husband continued to pay £3 per week, but on September 6, 1957, he ceased paying anything beyond the 30s. in respect of the child.

[1] [1958] 3 W.L.R. 728; [1958] 3 All E.R. 528.

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On January 4, 1958, the wife made a complaint to the magistrate of wilful neglect to maintain. Medical evidence was given that it might be disastrous to her mental health if she returned to her husband, even on a sexless basis. The magistrate dismissed the complaint on two grounds: (1) that the husband had no legal liability to maintain the wife because he had not been guilty of matrimonial misconduct; (2) that the wife was herself in desertion and therefore was not entitled to the order sought. On appeal, the Divisional Court affirmed the decision on the first ground while rejecting the second. The wife appealed. The facts are more fully stated in the judgment of the court.

Rudolph Lyons Q.C. and *R. H. Hutchinson* for the wife.
Walter Raeburn Q.C. and *Keith McHale* for the husband.

The following cases which were cited in argument are not referred to in the judgment: *Thomas* v. *Thomas* [2]; *Thomas* v. *Thomas* [3]; *Morton* v. *Morton (No. 2)* [4]; *Millichamp* v. *Millichamp* [5]; *Morton* v. *Morton* [6]; *Jones* v. *Jones* [7]; *Whitaker* v. *Whitaker* [8]; *Timmins* v. *Timmins* [9]; *Scott* v. *Scott* [10]; *Jones* v. *Guardians of Newtown and Llanidloes* [11]; *Papadopoulos* v. *Papadopoulos* [12]; *Read* v. *Legard* [13]; *Russell* v. *Russell* [14]; *Dyson* v. *Dyson*. [15]

Cur. adv. vult.

July 30. HODSON L.J. The judgment which I am about to read is the judgment of the court.

This is an appeal from a decision of the Divisional Court of the Probate, Divorce and Admiralty Division dismissing an appeal from the stipendiary magistrate of Kingston-upon-Hull, who had dismissed a summons taken out by the appellant, the wife of the respondent, alleging that he had been guilty of wilful neglect to maintain her. The summons now before this court was issued on January 4, 1958, and was determined by the magistrate on February 26, 1958, when he dismissed it on two grounds: (1) that the husband had no legal liability to maintain the wife because he had not been guilty of matrimonial misconduct; (2) that the wife is herself in desertion and therefore not entitled to the order sought. The Divisional Court affirmed the decision on the first ground while rejecting the second.

[2] (1946) 62 T.L.R. 166; [1946] 1 All E.R. 170.
[3] [1924] P. 194.
[4] [1954] 1 W.L.R. 737; [1954] 2 All E.R. 248.
[5] (1931) 146 L.T. 96.
[6] (1942) 58 T.L.R. 158; [1942] 1 All E.R. 273.
[7] [1924] P. 203; 46 T.L.R. 33.
[8] [1939] W.N. 332; 55 T.L.R. 1070; [1939] 3 All E.R. 833.
[9] [1953] 1 W.L.R. 757; [1953] 1 All E.R. 187.
[10] [1951] P. 245; [1951] 1 All E.R. 216.
[11] [1920] 3 K.B. 381; 36 T.L.R. 758.
[12] [1930] P. 55; 46 T.L.R. 44.
[13] (1851) 6 Ex. 636.
[14] [1897] A.C. 395; 13 T.L.R. 516.
[15] [1954] P. 198; [1953] 3 W.L.R. 1141; [1953] 2 All E.R. 1511.

The argument for the wife before us has been that if, as the Divisional Court has found, she is not in desertion of her husband, and there is no allegation of adultery against her and no agreement to live apart without the support of her husband, he is obliged to maintain her although she cannot live under his roof and has expressed her fixed intention not to do so. The husband, on the other hand, has argued—and this is his main contention—that the magistrate was right in holding that the wife was in desertion, and that for this reason his obligation to maintain his wife is suspended, and he cannot during that suspension be held guilty of wilful neglect to maintain her. In the alternative, he has sought to support the decision of the Divisional Court that even if she is not in desertion he is not liable to maintain her in the circumstances of this case because he is not guilty of wilful neglect.

The magistrate had had the parties before him on two earlier occasions. First, on October 12, 1954, he had made an order in the wife's favour on her application, on the ground of the husband's desertion, together with an order for the custody of the child of the marriage. Secondly, on August 23, 1957, on the husband's application, he discharged the order of 1954, and at the same time made an order under the Guardianship of Infants Acts giving the wife the custody of the child and an order for the child's maintenance at the rate of 30s. a week. Nevertheless, for a time, the husband continued voluntarily to pay the wife maintenance for herself as well as the child at the rate of the previous order; but on September 6, 1957, he ceased to pay anything over and above the amount of the order of 1957 made in respect of the child, and eventually, the husband having discontinued his voluntary allowance, this summons was issued.

The wife was at the time of the hearing of the summons (in February, 1958) living with her mother and had been earning by part-time work as a secretary £3 10s. to £4 10s. a week since September or October, 1957. The magistrate found that she was receiving a salary of £4 10s. a week at the time of the hearing. No evidence was given as to the husband's means, and it is not clear that an order for maintenance would in the circumstances existing have been made, for the husband elected to call no evidence and to stand on his submission that whatever his means might be no order could be made since he was not guilty of the offence with which he was charged. The case has, however, been argued on the footing that the wife is or may be, having regard to the respective means of the parties, entitled to an order for her maintenance if she can prove that her husband has, in the words of the Summary Jurisdiction Act, 1895, been guilty of wilful neglect to maintain.

The parties were married on October 2, 1948, and on March 13, 1952, a child was born. The confinement was a difficult one, and thereafter the wife suffered from some mental or nervous disorder either caused or aggravated by the birth of the child. In

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particular she developed an invincible repugnance to sexual intercourse. She had no sexual intercourse with her husband after February, 1952—that is, before the birth of the child. On October 2, 1952, her condition was such that she was admitted as a voluntary patient to a mental hospital, the Delopole Hospital at Hull, where Dr. Hendy, who was called as a witness in the case, was the assistant psychiatrist and had the wife under his care. She left the hospital in August, 1953, and returned home to her husband, but had to return to hospital on September 15, 1953, where she remained, subject to short absences, until June, 1956, when she went to live with her mother and the child. Thereafter she visited the hospital regularly as an out-patient and was seen by Dr. Hendy every two or three weeks.

Between April, 1954, and the week-end of June 24–25, 1954, in an attempt to get herself rehabilitated, the wife went home for week-ends on the footing that she and her husband occupied separate bedrooms and that there would be no sexual intercourse. When the wife left the last time it was expected that she would return, but she did not do so, and in July, 1954, Dr. Hendy told the husband that in his opinion the wife's condition was incurable.

The husband then consulted solicitors, and on their advice wrote a letter dated August 2, 1954, to the wife threatening proceedings for divorce, upon which the magistrate found him to be in desertion and made the order of October 12, 1954, already referred to. The next year there was a meeting between the parties with a view to reconciliation, after which the wife wrote to the husband a latter dated September 8, 1955, in the following terms: "After seeing you and knowing how things stand between "us, I have to say that there is no chance of a reconciliation "between us. We are legally separated and under the court "order you are allowed to see Margaret, and I shall not stop you "from doing so. You know why this has happened and I ask "you not to judge me too harshly. I am sorry to have caused "you any unhappiness but remember I have suffered too."

After the wife left hospital in June, 1956, the husband made further efforts at reconciliation in the hope and belief that the wife had recovered, but his letters were not answered. On April 1, 1957, the husband wrote to the wife again on the assumption that she had recovered. Her reply, dated April 3, 1957, was as follows: "I received your letter yesterday. There was no "need to send me a registered letter because I receive *all* mail "sent to me. As regards my mother being unco-operative, that "is because I told her not to answer questions asked about me. "I object to people wanting to know where and what I am doing. "I have my own life to live and I don't go around asking ques-"tions about you. Many are times I have heard you questioning "Margaret, would you please refrain from doing it. Margaret is "only a child and she does not understand what is going on. You "know how I feel about coming back to you. I wrote you and "gave you a definite answer when I last saw you at the hospital.

"My answer is still the same. You know the reasons why. "From a medical point of view it is impossible. If you doubt my "word you need only ask Dr. Hendy and he will confirm this. "Even though I am out of hospital the reasons are still the same "and always will be. Please do not bring Margaret into our "differences. She is very happy. I am devoted to her and she "loves me and her life is a normal, healthy, happy one. If I "have to starve she will not want. I am sorry to hear you are "not well and hope you will soon recover. Please accept this as "a final answer." The husband replied on April 17 by a letter asking her to reconsider her refusal and making it plain that if she returned she could come back on the same conditions as before, meaning thereby that there would be separate bedrooms and no sexual intercourse.

The wife did not accede to this request, and accordingly the order of October 12, 1954, was discharged on August 23, 1957, on the ground that the husband had ceased to be in desertion. The wife has never appealed against this order, and when she issued her present complaint conceded, and still concedes, that the husband is no longer in a state of desertion.

If the wife is in desertion that is the end of the matter; but since both questions to which we have referred have been fully argued it is right to express an opinion on them. The first question depends on the effect of the Summary Jurisdiction (Married Women) Act, 1895, which provides a remedy in the courts of summary jurisdiction for wives whose husbands have wrongfully failed to maintain them. Formerly a wife had no direct remedy in the common law courts, although she could, if she were able to do so, pledge her husband's credit for the necessaries of life. Since the passing of the Matrimonial Causes Act, 1884, a wife has been able to obtain periodical payments in cases where her husband has disobeyed orders for restitution of conjugal rights. The existing statutory duty was stated in the Summary Jurisdiction (Married Women) Act, 1895, as follows: By section 4: "Any married woman . . . whose husband shall have been "guilty of . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable "to maintain, and shall by such . . . neglect have caused "her to leave and live separately and apart may apply to "any court of summary jurisdiction for an order under this "Act." By section 5: "The court of summary jurisdiction to "which any application under this Act is made may make an "order or orders containing all or any of the provisions following, "videlicet . . . (*c*) A provision that the husband shall pay to the "applicant personally, or for her use, to any officer of the court "or third person on her behalf, such weekly sum not exceeding "two pounds as the court shall, having regard to the means both "of the husband and wife, consider reasonable." By section 7: "A court of summary jurisdiction . . . may, on the application

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" of the married woman or her husband, . . . from time to time " increase or diminish the amount of any weekly payment ordered " to be made. . . . If any married woman upon whose application " an order shall have been made . . . shall voluntarily resume " cohabitation with her husband, or shall commit an act of adul- " tery, such order shall upon proof thereof be discharged."

There can be no doubt that this was intended to give a remedy in support of the wife's common law right to maintenance at the hands of her husband. The common law right was not a right to an allowance but to be supported by being given bed and board, and under the statute a wife could not complain of wilful neglect to maintain because the husband was foolish enough to take the housekeeping out of her hands any more than she could have done at common law. (See *Jackson* v. *Jackson*.[1]) The remedy for wilful neglect to maintain was at first available only when such neglect in the joint home had driven the wife to leave the husband. This was remedied by an amendment of the statute in 1925 in order to deal with the case where the wife had nowhere to go and needed immediate relief: see section 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which also, by section 2 (2), provided that if she went back and lived with her husband the separate allowance ceased to be payable as from the date of resumption of cohabitation.

The offence charged is that as between husband and wife there has been a dereliction of that duty of maintenance, and questions have often arisen as to the circumstances in which the husband may be properly found guilty of the offence, which is in itself a form of matrimonial misconduct. In most cases where the spouses are living apart from one another the question of whether there has been wilful neglect to maintain the wife depends on the same facts as the question whether or not there has been desertion on the part of either, and there is no point in taking proceedings on both grounds. We have said " most cases " for where there is a separation deed containing provisions for the support of the wife she will not be left to sue her husband under the deed if he defaults in payment, but can apply for an order on the ground of his wilful neglect to maintain her. Even if he complies with his obligations under the deed, the wife may show a change of circumstances since the execution of the deed and apply for an order: see *Tulip* v. *Tulip* [2] where the earlier authorities are reviewed, particularly in the dissenting judgment of Harman J.

Nevertheless, where the parties are living apart by agreement the husband is not necessarily guilty of wilful neglect to maintain his wife: see *Baker* v. *Baker*,[3] approved by the Court of

[1] (1932) 48 T.L.R. 206; 146 L.T. 406.

[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[3] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

Appeal in *Chapman* v. *Chapman* (unreported) but cited in *Pinnick* v. *Pinnick*[4] and *Starkie* v. *Starkie* (*No. 2*).[5]

In several cases in the Divisional Court of the Probate, Divorce and Admiralty Division, including this case, the President has pointed out the difference between the cases where the duty to maintain a wife has been enforced under the Summary Jurisdiction Act and those cases where the obligation has been enforced by the National Assistance Board under the National Assistance Act, 1948. The same distinction has been drawn in the last type of case by Lord Goddard C.J. in the Divisional Court of the Queen's Bench Division in *National Assistance Board* v. *Parkes*.[6]

It has been decided in the last-mentioned case, and the decision was affirmed on appeal to this court, that having regard to the language of sections 42 and 43 of the Act of 1948 a husband is liable to maintain his wife as against the National Assistance Board notwithstanding an agreement to live apart without maintenance. Thus, under that Act the right to maintain subsists independently of the fault of the husband: see *National Assistance Board* v. *Parkes*[7] where it was held in this court that since section 42 (1) of the Act provides that a man shall be liable to maintain his wife the board may bring any husband of an assisted wife before the court under section 43 (1), but once he is before it the court by section 43 (2) "shall have "regard to all the circumstances" including any circumstance recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife. It was further held that desertion or adultery by the wife is a highly relevant circumstance —and it may be a conclusive circumstance—against making an order.

The authorities, in our opinion, are consistent only with the view of the law repeatedly enunciated by the President and his predecessor Lord Merrivale—that whatever may be the position as against the public authority, nevertheless, as between the husband and the wife he cannot be found guilty of wilful neglect to maintain her unless he is a wrongdoer. The wrongdoing may, however, consist of the very fact of a failure to maintain. There need be no other matrimonial offence imputed to the husband.

The way the court has interpreted the National Assistance Act, 1948, seems to be in accordance with practical sense, because otherwise a husband and wife might agree together to part without maintenance with the intention that the wife might receive her maintenance from the community through the hands of the National Assistance Board without the husband suffering any diminution of his income.

In our judgment the authorities are consistent on this point,

[4] [1957] 1 W.L.R. 644, 650; [1957] 1 All E.R. 873.

[5] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.

[6] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.

[7] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.

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for the dissenting opinion of Denning L.J. as expressed in *Price* v. *Price* [8] and in *National Assistance Board* v. *Parkes* [9] to the effect that the Probate, Divorce and Admiralty Division has at all times misunderstood the liability of husbands to maintain wives in making orders under the relevant statutes has not, so far as we know, found support. The authorities are discussed fully in the judgment of the President in *Pinnick* v. *Pinnick*.[10]

There is in this case no agreement to live apart, but there is a de facto separation which is explained by the wife's state of neurosis, because of which, as the stipendiary found, the wife would be risking grave consequences to her mental health if she returned to her husband at the present time. She maintains that in the circumstances if he does not maintain her apart from him he is guilty of wilful neglect to maintain just as much as if she were separated from him by necessity. Examples of separation by necessity come readily to mind where the occupation of the husband makes it necessary for him to spend long periods apart from his wife by reason of his absence at sea or otherwise away from his home. The changes and chances of life may often, where there is a separation of necessity, put upon the husband the obligation to support his wife when she is separated from him, and if he does not do so he will be guilty of the offence with which he is charged. This duty must surely subsist if separation is forced upon the parties by illness which compels residence in hospital, and this would be the same whatever the nature of the illness, even if it be mental disorder, provided always that the intention of the absent spouse to return to the other continues. Compare the observations of Singleton L.J. in *Keeley* v. *Keeley*.[11]

We see no reason why the obligation to maintain which exists when the husband and wife are living together should be affected by an enforced separation. If the husband does not maintain his wife while in the home he is clearly in default under the statutes, and an enforced separation of itself can make no difference. We would, therefore, with all respect to the opinion expressed by the Divisional Court and by the stipendiary magistrate, have been of opinion that if the wife was not in desertion the husband must, in the circumstances of this case, have committed the offence with which he is charged, subject to consideration of the relative means of the parties.

The remaining question is, therefore, whether the wife is in desertion since she failed to respond to the husband's request to return contained in his letter of April 17, 1957. Accepting the finding of the learned stipendiary, confirmed by the Divisional Court, that because of her neurosis the wife would be risking grave consequences to her mental health if she returned to her husband at the present time, the fact remains that there is a

[8] [1951] P. 413; [1951] 2 All E.R. 580n.
[9] [1955] 2 Q.B. 506, 517.
[10] [1957] 1 W.L.R. 644.
[11] [1952] W.N. 496; [1952] 2 T.L.R. 756, 760.

de facto separation between the parties and that all that is necessary to make the wife into a deserter is the intention to desert. Compare *Pardy* v. *Pardy* [12] where a separation which began consensually was altered so as to put the husband in desertion by proof of a supervening animus deserendi. Sir Wilfrid Greene M.R. said: "The first question which arises is whether "or not it is possible in law for a separation which began by "being consensual to acquire the character of desertion without "a previous resumption of cohabitation. Looking at this question "on principle and apart from authority, I can see no reason why "the answer to it should not be in the affirmative. The word "'desertion' may describe an act or it may describe a state. "For the act of desertion both the factum of separation and the "animus deserendi are required. A de facto separation may "take place without there being an animus deserendi, but, if "that animus supervenes, desertion will begin from that moment, "unless, of course, there is consent by the other spouse. Thus, "a husband who leaves his wife for a business voyage may, "nevertheless, become guilty of desertion without the necessity "of a previous return. All that is required to establish desertion "in such a case is the presence of a supervening animus deserendi "(a matter to be inferred from the words and conduct of the "deserting spouse), a continuance of the de facto separation, "and the absence of consent by the other spouse."

That there may be physical inability to end the desertion does not prevent it remaining desertion: see *Drew* v. *Drew*,[13] where the deserting husband was in prison. This case was cited with apparent approval by Lord Porter in *Crowther* v. *Crowther* [14] where the question was whether a husband was in desertion who during part of the material time was detained under a reception order in a mental hospital. It had been held in the courts below that a person of unsound mind could not have the intention to desert, but their Lordships were of opinion that it was nevertheless open to the petitioner to prove if she could that the respondent notwithstanding that unsoundness of mind was capable of having an intention to desert his wife.

In this case the only medical evidence called was that of Dr. Hendy, who expressly said that the wife's condition was neurotic rather than psychotic, and we think that her evidence as well as that of Dr. Hendy went to show that she was capable of making a rational decision to desert. The letters which she wrote to her husband support this view. So also does her own evidence given at the hearing before the stipendiary. The following questions and answers are taken from the transcript of her evidence: "(Q.) At any rate, you are determined that you "cannot live with him at the present time? (A.) Yes. (Q.) And "never can? (A.) Definitely not. (Q.) Do you accept that he

[12] [1939] P. 288, 302; 55 T.L.R. 1037; [1939] 3 All E.R. 779.
[13] (1888) 13 P. 97.
[14] [1951] A.C. 723; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131.

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" wants to live with you? (A.) Yes. (Q.) That he has a home " for you to go into? (A.) Yes. (Q.) That he has kept the home " in the hope that you will go back to him? (A.) I have re- " peatedly told him I can't go back. Surely, he should have " accepted that by now. (Q.) And whatever promises he made " to you with regard to how he would treat you if you came " back to him, you still would not have him back? (A.) No. " (Q.) Do you think, under those circumstances, it is fair to ask " him to maintain you? (A.) Yes." She then gave reasons in support of her contention that it was fair to ask for maintenance.

As to the wife's capacity to make a rational decision, the stipendiary said: " It is clear from the evidence and indeed in " no way in dispute that the wife is capable of making a rational " decision and of forming an intention to desert." The President did not, however, consider that this finding was justified by the evidence. He based his decision on an answer given to the court in cross-examination by Dr. Hendy. The question was in this form: " As I understand it, you say that this lady is rational " and in normal mental health except so far as it relates to her " husband? (A.) Yes, and as I said just now, to other men." This question was phrased in an unfortunate form, for it contains two questions. The answer " Yes," if taken to apply to both parts of the question, no doubt qualifies in an important respect the doctor's evidence that the wife was rational, but having regard to the rest of his evidence and the express finding of the stipendiary already read that the rationality of the wife was not in dispute, we cannot regard this answer as sufficient to destroy the effect of Dr. Hendy's evidence in this essential matter, consistent as it is with the view which the magistrate must have formed of the effect of the evidence of the wife herself, and of her letters and her demeanour in court. As Lord Greene said in the passage cited, the animus deserendi must be inferred from the words and conduct of the deserting spouse. In the present case we are of opinion that the conclusion of fact reached by the stipendiary upon this issue was amply justified by the evidence before him. The attitude of the wife went far beyond saying " I cannot return to you at present." She added in effect " and I never will." This expression of her fixed intention appears both from the letters and her statements in court. It had all the appearance of a rational conclusion: it was reached, as is shown by her letter of April 3, 1957, upon the advice of the psychiatrist, in whom she trusted. She is not a person of unsound mind, as was for a time the husband in *Crowther's* case.[15] She has made a deliberate choice for all time, and she cannot properly complain of the natural consequences of her act.

This is no doubt a strong case, for the neurosis of the wife is severe and may be incurable. It may appear hard, therefore, that she should be guilty of desertion if she expresses herself as

[15] [1951] A.C. 723.

unwilling ever to return to her husband, but we think that the conclusion that she is in desertion is inevitable on the evidence as it stands at present. We think, moreover, that there is support for the view which we have formed in the decision of the Divisional Court, consisting of the President and Byrne J. in *Leng* v. *Leng*.[16] It was there emphasised that the neurotic condition of a husband and nothing more is not in law sufficient ground for a wife's refusal to live with him. The President pointed out that unless that were so the ultimate result of a justices' order might in effect be a divorce on the ground of neurosis. In this case we do not think that the neurotic wife can in law justify a refusal ever to return to cohabitation now that the state of desertion for which her husband was responsible has been terminated. From this it follows that she is herself in desertion.

In the result, although for different reasons from those expressed by the Divisional Court, we would dismiss the appeal.

Appeal dismissed. Costs of both parties to be taxed under Third Schedule, Legal Aid and Advice Act.

Solicitors: *Dawson, Loncaster & Co.; Smith & Hudson, for Williamson, Stephenson & Hepton, Hull.*

F. R. D.

[16] (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590.

[HOUSE OF LORDS.]

HUDSON'S BAY CO. . . . . APPELLANTS;

AND

THOMPSON (VALUATION OFFICER) . . . RESPONDENT.

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July 1, 2, 29.

Rates and Rating—Industrial hereditament—Adapting for sale—Fur sorting and auction premises—Mixed parcels of skins received from individual sellers—Sorted into auction lots of identical grade and species irrespective of ownership—Sold on commission on behalf of sellers — Whether "adapted for sale" — Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1)—*Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.

The appellant company's premises were used for the sorting and grading of skins, and their subsequent sale by auction to furriers. About 25 per cent. of the skins belonged to the company, the remainder being consigned by a number of different owners in the form of bales comprising a number of different species and qualities. Before sale the skins were sorted and graded into auction lots

† *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

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suitable for sale, each comprising a number of skins of the same species and quality, a process requiring great skill and experience. Each lot would contain skins which had been consigned by a number of different owners, and were identified throughout, the price bid being so much per skin, and the proceeds being credited to the respective owners. The company contended that this operation constituted an "adapting for sale" of the skins, so that their premises constituted a "workshop" within the meaning of section 149 of the Factory and Workshop Act, 1901, with the consequence that they qualified as an "industrial hereditament" within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.[1]

The Lands Tribunal and the Court of Appeal held that the premises did not qualify as an industrial hereditament. On appeal:—

Held, (1) that for the purposes of section 149 of the Factories and Workshop Act, 1901, the "article" in question was a single lot and not a single skin, and that the grading and sorting of the skins into individual lots constituted an "adapting for sale" of such "article" within the meaning of the section.

Dictum of Lord Dunedin in *Grove* v. *Lloyd's British Testing Co. Ltd.* [1931] A.C. 450, 467; 47 T.L.R. 308 considered.

But, (2) that as there had been no finding by the Lands Tribunal as to whether any manual labour was exercised for the purpose of such adapting for sale, the case must be remitted to the tribunal for determination of that question.

Decision of the Court of Appeal [1958] 1 W.L.R. 955; [1958] 3 All E.R. 243 reversed.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal (Jenkins, Parker and Pearce L.JJ.), dated July 25, 1958, dismissing an appeal by the appellant ratepayers, the Hudson's Bay Co., by way of case stated from a decision of the Lands Tribunal (Sir William Fitzgerald Q.C., President), dated October 2, 1957, who had dismissed an appeal by the appellants from a decision of the Central London Local Valuation Court dated October 3, 1956.

The question raised by this appeal was whether the hereditament occupied by the appellants and described in the rating

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a heredita- "ment . . . occupied and used . . . "subject as hereinafter provided, as "a factory or workshop: Provided "that the expression industrial "hereditament does not include a "hereditament occupied and used as "a factory or workshop if it is "primarily occupied and used for the "following purposes or for any com- "bination of such purposes, that is to "say— . . . (c) the purposes of dis- "tributive wholesale business; (d) "purposes of storage; . . . (f) any "other purposes . . . which are not "those of a factory or workshop. "(2) . . . save as aforesaid, the "expressions 'factory' and 'work- "'shop' have respectively the same "meanings as in the Factory and "Workshop Acts, 1901 to 1920."

Factory and Workshop Act, 1901, s. 149: ". . . The expression 'work- "'shop' means . . . (b) any "premises, room or place, not being "a factory, in which . . . any manual "labour is exercised by way of trade "or for purposes of gain in or inci- "dental to any of the following pur- "poses, namely . . . (ii) the altering, "repairing, ornamenting, or finishing "of any article; or (iii) the adapting "for sale of any article . . ."

valuation list as "Warehouses, Offices and Cold Stores, Great "Trinity Lane, 26–30, Little Trinity Lane, 1–13, Garlick Hill, "1–6, Sugar Loaf Court, 'Beaver House,'" was an "industrial "hereditament" as defined by section 3 of the Rating and Valuation (Apportionment) Act, 1928. The answer to this question turned on whether or not the activities carried on by the appellants at the said hereditament amounted to "the "adapting for sale" of any article within the meaning of the definition of "workshop" contained in section 149 (1) of the Factory and Workshop Act, 1901. The Local Valuation Court, the Lands Tribunal and the Court of Appeal had held that the said hereditament was not an "industrial hereditament."

The facts were set out in the decision of the Lands Tribunal annexed to the case stated and amplified in the latter. Reference was made in those documents to "Beaver Hall" and the carpenter's workshop, as to which no question arose on the appeal.

The decision of the tribunal read as follows: "The essential "facts are these. Beaver House and Beaver Hall were both "built about 1925 to 1927 by the company: the workshop is "considerably older. An agreed site plan was tendered. On "that site plan Beaver House is coloured pink, Beaver Hall "green, and the carpenter's workshop blue. All these properties "have common walls and common services, but there is no "actual intercommunication between them. Since 1940 the "company's headquarters were at Bishopsgate, but in that year "their headquarter administration moved into Beaver House: "the object of the move being to get proper accommodation "in the heart of the fur trade area centred on Garlick Hill. "Beaver Hall is commonly known as the 'Fur Trade Sale "'Room.' The sales that are conducted in the hall are run "by a committee which is known as the Committee of London "Public Fur Sales. This committee operates under an agree-"ment of 1957 made between the Hudson's Bay Co. and certain "other companies and partnerships and it recites that the "objects of the committee are the holding of public sales of "furs upon the premises and their regulation, management and "control as between members of all such sales. The enforce-"ment and performance of rules are set out in the second "schedule. It provides that the committee shall in its absolute "and exclusive discretion manage and control all public sales "of furs held on the premises and shall permit sales of furs "by auction to be held on the premises on convenient days and "at convenient hours. The general effect of the agreement is "that the main function of Beaver Hall is concerned with the "holding of fur sales. Its control and management has been "given to this committee in which is vested entire management "of such sales, and which can decide when such sales are to take "place and how many there shall be, and although the Hudson's "Bay Co. remain the owners and normally the occupiers, the

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" committee is the de facto body in running the fur sales. " There is another agreement relating to Beaver Hall which " concerns a company known as the Little Ship Club. This " provides that the two rooms lying at the south end of the " entrance hall, and the two small store-rooms, shall be avail- " able for the club all the year round. Another part of Beaver " Hall is known as the Strathcona Room, which is let for " ' company, public and society meetings, trade exhibitions, " ' dances, etc.' "

The decision went on to describe the use to which Beaver Hall was put, and by way of introduction stated the company's contention to be that Beaver House was primarily occupied and used by the company for the sorting and grading of furs; that by means of that sorting and grading bales of unsorted and ungraded skins sent in by trappers and breeders from various parts of the world were changed into saleable lots of assorted and graded skins.

The decision continued: " It may be said, therefore, that the " real issue upon which this case will depend is whether what is " done to those skins is or is not adapting for sale within the " meaning of the Factory Act. Mr. Rowe, with his usual " candour, has admitted that if it is not an adapting for sale " then he cannot see how he can win. The total area of Beaver " House amounts to some 114,000 sq. ft. in round figures. The " company's headquarter administrative offices occupy some " 4,253 sq. ft. and the basement part of the premises, occupying " some 17,873 sq. ft., are used during the summer months for " the storage of furs for private owners. At this point it may be " convenient to describe in detail the various processes carried " on at Beaver House from the arrival of the fur skins to their " disposal at the auction held in the auction room there. Bales " of skins are addressed from almost all parts of the world except " the Soviet Union. They arrive in lorries at the reception base- " ment. There they are unloaded on to lifts and conveyed to " the first floor where the bales are opened and are sorted " according to types—the bales consist of mixed skins of various " animals. The sorted bundles are then passed up to the next " floor; some of the skins which may be dusty or gritty are put " in drums with clean sawdust and whirled round. This " eliminates the dust and grit. This process is necessary only " in the case of very few, indeed almost a negligible quantity of " the skins that come in. Next comes the process on which the " appellants mainly rely to establish their contention that there " is an adaptation for sale. The skins are passed along in trolleys " to the sorters' counters. The counters extend along the room " which is specially lighted with artificial light and large windows. " The sorters are men who have been specially trained in the art " of sorting. It is said that it takes about ten years to make a " man an entirely efficient sorter. The sorter takes the skin and " grades it either by its feel or visual appearance. Immediately

" behind the sorter is a trolley with various shelves. Each shelf " represents the class which the sorter assigns to the skin. These " grades of skin are then conveyed to another sorting room where " there are sorters who can be described as final specialists. " These sorters examine the skins and either confirm the grading " or up- or down-grade the skins again. After this final grading " the skins are catalogued and passed down to the display room. " There they are displayed for some days and prospective buyers " come along to examine them and bid for them at the auctions " which are held about three times yearly. The skins are still " in a raw state in the sense that they could not be used as furs. " They have to undergo a highly technical process which converts " them from skins into saleable furs. This process is not under- " taken at Beaver House. It is carried out by the furriers who " buy the skins at the auction."

In the case stated the facts were thus amplified: " 3. At the " hearing before me the facts, which were proved or admitted, " and the contentions put forward by the parties, are contained " in my decision, a signed copy of which is annexed hereto and " forms part of this case, save that the following further facts " were admitted although not referred to in my decision: " (a) The carpenter's workshop is used exclusively for purposes " connected with Beaver House and Beaver Hall, namely, the " making and repairing of things for use on those premises, and " the storing of furniture surplus to the current requirements of " those premises; (b) very approximately 25 per cent. of the " skins coming into Beaver House are owned by the appellant " company and 75 per cent. are owned by other persons; but " these are variable figures; (c) each skin (except musquash) is " labelled on arrival in Beaver House with the object of making " that skin identifiable as the property of a particular customer " at all stages. Large numbers of musquash are dealt with but " their value is small, both individually and collectively, in " relation to the appellant company's turnover. Usually one " bale of musquash will provide one or two satisfactory lots, and " the identity of these lots can be preserved without individual " ticketing; (d) some furs are sold by private treaty in Beaver " House; nobody comes to buy furs at the auctions except with " a view to resale, and the Committee of London Public Fur " Sales does not regard a private individual as an authorised " trader."

J. Ramsay Willis Q.C. and *W. L. Roots Q.C.* for the appellants.

J. P. Widgery Q.C. and *J. Raymond Phillips* for the respondent valuation officer.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Acton Borough*

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Council v. *West Middlesex Assessment Committee* [2]; *Jobling (James A.) & Co. Ltd.* v. *Sunderland County Borough Assessment Committee* [3]; *Cockram* v. *Tropical Preservation Co.* [4]; *East Kent Packers Ltd.* v. *Buncombe.* [5]

Their Lordships took time for consideration.

July 29. VISCOUNT SIMONDS. My Lords, this appeal from an order of the Court of Appeal affirming a decision of the Lands Tribunal upon an appeal from the Central London Local Valuation Court raises the question whether a certain hereditament in the city of London occupied by the appellants, the Hudson's Bay Company, is "an industrial hereditament" as defined by section 3 of the Rating and Valuation (Apportionment) Act, 1928. It is common ground between the parties that it is such a hereditament if, and only if, it is a workshop as defined by section 149 of the Factory and Workshop Act, 1901, the relevant part of which I set out:

"The expression 'workshop' means— . . . (*b*) any premises "room or place, not being a factory, in which premises room or "place . . . any manual labour is exercised by way of trade or "for purposes of gain in or incidental to any of the following "purposes, namely: . . . (iii) the adapting for sale of any "article, and to or over which premises room or place the "employer of the persons working therein has the right of "access or control."

The question therefore involves two considerations, first, whether upon the hereditament in question any manual labour is exercised in the manner indicated in the section and, secondly, whether it is exercised for the purpose of adapting any article for sale. Unfortunately, the first of these considerations has been lost sight of in the course of the case and their Lordships have therefore found it impossible to dispose finally of the matter. They have, however, found it possible to deal conclusively with the second and perhaps more difficult question, viz., whether the activities of the appellants, whether or not they can properly be called manual labour, were exercised for the purpose of adapting an article for sale.

The case came before the Court of Appeal upon case stated by the Lands Tribunal at the request of the appellants, the question upon which the decision of the court was desired being whether there was any evidence upon which the tribunal could make the findings of fact set out in paragraph 5 of the case and whether upon those findings it came to a correct decision in law. It will be remembered that under section 3 of the Lands Tribunal Act, 1949, the decision of the tribunal is final except that any

[2] [1949] 2 K.B. 10; 65 T.L.R. 168; [1949] 1 All E.R. 409.

[3] [1944] W.N. 126; 60 T.L.R. 330; [1944] 1 All E.R. 500.

[4] [1951] 2 K.B. 827; [1951] 2 T.L.R. 814; [1951] 2 All E.R. 520.

[5] (1951) 45 R. & I.T. 151.

person being aggrieved by the decision as being erroneous in point of law may require the tribunal to sign and state a case for the decision of the court. The contention of the appellants was that there was no evidence upon which the tribunal could make the said findings of fact to support their decision that the hereditament in question was not an " industrial hereditament " and that upon the facts set out in the case and the annexures thereto it was in law an " industrial hereditament."

The materials before the court were not only the case stated, to which as a separate document was appended the lengthy decision of the tribunal, itself containing a further statement of facts, but also the oral and other evidence which had been before the tribunal. In view of the form of question and the contention of the appellants no other course was open, but it involves a detailed consideration of facts which is not altogether appropriate to the procedure by way of case stated. I will be as brief as I can, but I see no alternative to setting out the facts first as set out in the formal case, then as supplemented in the decision and finally as explained or amplified in the evidence.

The hereditament in question is described as Warehouse Offices, and Cold Store, Great Trinity Lane, 20–30, Little Trinity Lane, 1–13, Garlick Hill, and 1–6, Sugar Loaf Court " Beaver " House," and is entered in Part I of the Valuation List for the Rating Area of the City of London at gross value £15,818 and rateable value £13,178. Your Lordships are not concerned with the question which was at one time raised, whether the hereditament which in fact consists of three parts, known as Beaver Hall, the carpenter's workshop and Beaver House, should be assessed as three separate hereditaments. The sole question is whether the activities carried on at Beaver House are such as to constitute it an industrial hereditament. If they are, the necessary adjustment and apportionment of the rate must be made.

The question in the case refers specifically to the findings in paragraph 5 thereof and I cannot fairly abbreviate them. They are as follows:

" 5. I am informed that the appellants desire to contend that " there was in point of law no evidence to support my findings of " fact set out hereunder:

" (A) ' I put it this way—without the sorting and grading the " ' buyer, unless he were himself an expert, would be taking a " ' risk but the skins are still saleable . . . the conclusion I have " ' come to is that the only effect of the sorting and grading was " ' to certify that the skins were of such a quality as to merit " ' being placed in the category in which they appear in the " ' auction catalogue.'

" (B) ' What is emptied out of the bales that come into the " ' Hudson's Bay Company is not a huge amorphous mass. It is " ' a bundle of easily identifiable individual skins. They are sent " ' in bundles merely for the convenience of dispatch. It is not " ' like the rag case or the seed case in that it is not what has

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" ' come to be known as a " bulk " case at all. It is not the " ' intention that the skins should be made into a bulk and sold " ' as a bulk. Each skin is sent to the Hudson's Bay Company " ' to be sold as a skin, in fact the owner might send only one " ' skin although admittedly this would be unusual. It is also " ' bought as a single skin although the bidder bids for a lot that " ' are matched. In a word selling in lots is only for the con- " ' venience of the buyer.'

" (C) ' All that has been done here was to arrange the skins. " ' In my view the process carried out in Beaver House, highly " ' technical as I concede it is, is merely an identification of skins " ' and their arrangement in price classes for sale. Nothing has " ' been done to any skin which in any way makes it a little " ' different to what it was before—I ignore the cleaning of the " ' skins in the drum because it applied to a negligible number " ' of the skins dealt with in Beaver House. There has therefore " ' been no adapting for sale.' "

At an earlier stage the tribunal had referred to certain additional facts which were admitted though not referred to in its decision. They were (so far as now material) (1) that very approximately 25 per cent. of the skins coming into Beaver House are owned by the appellants and 75 per cent. by other persons (but these are very variable figures); (2) that each skin (except musquash) is labelled on arrival at Beaver House with the object of making that skin identifiable as the property of a particular customer at all stages, that large numbers of musquash are dealt with but their value is small both individually and collectively in relation to the appellants' turnover, usually one bale of musquash providing one or two satisfactory lots, the identity of which can be preserved without ticketing; (3) that some furs are sold by private treaty at Beaver House; and (4) that no one buys furs at the auctions except with a view to resale and the Committee of London Public Fur Sales does not regard a private individual as an authorised trader. It appeared at the hearing before your Lordships that the facts admitted under (2) as to identification were not strictly accurate but I do not think anything turns upon this.

I must next at the risk of some repetition state some of the further facts as found in the decision of the tribunal which forms part of the case. It is necessary to refer only briefly to that part of the hereditament known as Beaver Hall. It is there that auction sales of fur are carried on under the conduct of a committee known as the Committee of London Public Fur Sales which operate under an agreement made between the appellants and certain other companies and partnerships. Nor need I mention further the carpenter's shop. It is upon the activities carried on in Beaver House that the issue turns. They are described by the tribunal as follows:

" Bales of skins are addressed from almost all parts of the " world except the Soviet Union. They arrive in lorries at the

" reception basement. There they are unloaded onto lifts and " conveyed to the first floor where the bales are opened and are " sorted according to types—the bales consist of mixed skins of " various animals. The sorted bundles are then passed up to the " next floor, some of the skins which may be dusty or gritty are " put in drums with clean sawdust and whirled round. This " eliminates the dust and grit. This process is necessary only " in the case of very few, indeed almost a negligible quantity of " the skins that come in. Next comes the process on which the " appellants mainly rely to establish their contention that there " is an adaptation for sale. The skins are passed along in trolleys " to the sorters' counters. The counters extend along the room " which is especially lighted with artificial light and large " windows. The sorters are men who have been specially " trained in the art of sorting. It is said that it takes about ten " years to make a man an entirely efficient sorter. The sorter " takes the skin and grades it either by its feel or visual appear- " ance. Immediately behind the sorter is a trolley with various " shelves. Each shelf represents the class which the sorter " assigns to the skin. These grades of skin are then conveyed " to another sorting room where there are sorters who can be " described as final specialists. These sorters examine the skins " and either confirm the grading or up- or down-grade the skins " again. After this final grading the skins are catalogued and " passed down to the display room. There they are displayed " for some days and prospective buyers come along to examine " them and bid for them at the auctions which are held about " three times yearly.

" The skins are still in a raw state in the sense that they could " not be used as furs. They have to undergo a highly technical " process which converts them from skins into saleable furs. " This process is not undertaken at Beaver House. It is carried " out by the furriers who buy the skins at the auction."

Upon these findings the tribunal came to the conclusion after a consideration of certain cases to which I must refer that " the only effect of the sorting and grading was to certify that " the skins were of such a quality as to merit being placed in the " category in which they appear in the auction catalogue." The tribunal further held (distinguishing cases called " the seed case " and " the rag case " which I must examine) that the bales of skins that come to the appellants are bundles of easily identifiable individual skins, being sent in bundles merely for the convenience of dispatch, that it is not the intention that the skins should be made into a " bulk " and sold as a bulk, that each skin is sent to the appellants to be sold as a skin—in fact the owner might send only one skin, although admittedly this would be unusual—that it is also bought as a single skin, although the bidder bids for a lot of skins that are matched, in a word that selling in lots is only for the convenience of the buyer. I conclude my reference to the decision of the tribunal by citing its penultimate

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paragraph: "In my view the process carried on in Beaver House, "highly technical as I concede it is, is merely an identification "of skins and their arrangement in price classes for sale. "Nothing has been done to any skin which in any way makes "it a little different to what it was before—I ignore the cleaning "of the skins in the drum because it applied to a negligible "number of the skins dealt with in Beaver House. There has "therefore been no adapting for sale."

Before I examine the conclusions of the tribunal, which were in effect adopted by the Court of Appeal, I must refer to some further facts which appeared plainly from the evidence and were relied on by the appellants. The furs, which are sent to the appellants from a great many countries in the world, are sent "to be graded and presented to the fur trade in such a manner "as to command for them, the producers, the best possible "market price. They enjoy the careful . . . handling of the "furs to suit the requirements of various fur purchasers all over "the world, which is such that the producer will get a great deal "more money for his goods than if he sold his merchandise in "an unassorted condition." The bales of fur do not always have the same sort of fur. For instance, a bale from Canada will contain practically every kind of wild fur, and even where a bale consists predominantly of one type of fur, e.g., of mink or Persian lamb, there would be a great variety in the type. There are, for instance, 250 recognised main grades and 880 sub-grades of Persian lamb, and in a single bundle of the same type from a consignor there would be a large number of different grades. Thus the components of one bale when sorted and graded would find their place in a number of different lots in which they would be matched with skins coming from a number of other bales. It may be emphasised that the job of sorting, grading and matching is a highly skilled one, the top sorters being paid a basic wage up to £12 2s. 0d. In the result an individual skin arrives in a bale which has to be sorted and graded as described: it goes out in a lot consisting of a bundle of evenly matched similar skins. By this means it realises a price which it otherwise could by no means have realised. I think it desirable to set out certain questions put to the appellants' witness, Mr. Frayling, in cross-examination and his answers:

"Q. From the moment you receive the skins to the moment "you sell them, would it be fair to say the object of what you "do is to achieve the best possible sale price for each individual "skin? A. Most certainly. Q. That is what you are trying to "do? A. Exactly what we are trying to do, yes. Q. As you "indicated yesterday, the skin may vary enormously in value in "one consignment. Your job is to try and get the best price, "skin per skin? A. Yes, by means of putting them with skins "of equivalent value. Q. And the way you do that is, whether "the skin is good or bad in itself, you sell it to the greatest "advantage by selling in company with other skins as near as

" possible identical with it? A. That is the object of the process " putting like and like together."

I set out these questions and answers at length because it appears to me that a misunderstanding of them has been the vital factor in leading the tribunal and the court to a wrong decision. For though no doubt it was possible to know how many of a lot of (say) 100 mink skins had been consigned by a particular consignor and perhaps also to know, though this was not wholly clear, which of those skins had been consigned by that consignor, the price paid at an auction for that lot was a lump sum which was apportioned among the several consignors according to the number of skins consigned by them respectively which were in that lot. The skins were not sold skin by skin, though they were sold in a lot at a price per skin. If they had been sold skin by skin, they would not have realised a comparable price. In fact the whole object of the process was to get a price which could not be got by individual sales. It is therefore, in my opinion, wholly unrealistic to treat as the article which has to be adapted for sale a single mink skin which has arrived in a bale with other skins, whether of mink or other animals. This is, to my mind, the decisive consideration in the case. For it might well be that, if one regards each skin as a single unit arriving at and departing from the premises, it would be difficult to say in the words of Lord Dunedin in *Grove's* case [1] that anything is done to it upon the premises " which in some way makes it in itself a little " different from what it was before." It is, I think, just because this is what I have called an unrealistic way of looking at such a transaction that a principle has been established which in my opinion governs the present case. It is that where the process can fairly be regarded as a dealing with a collection or agglomeration of single things, then the scope for adaptation for sale may be wider—I here use the language of Lord MacDermott in his very valuable judgment in *Valuation Commissioner* v. *McAllister*.[2] That learned judge there decided that premises to which eggs are delivered in bulk for the purposes of testing, grading, stamping and packing are premises used for the purpose of adapting articles for sale and therefore are industrial hereditament within the meaning of the Northern Ireland Act. He had already expressed the opinion that, if in the words of the section the " adapting " for sale of any article " means the adapting for sale of each egg, there had been no such adaptation, but was able to come to a conclusion which I would say plainly accords with the common sense of the matter, viz., that the premises were used not for the receipt of single eggs and their subsequent sale egg by egg but for the receipt of a collection of eggs in crates and their subsequent sale in lots which, since they had undergone the process of testing, grading, stamping and packing, differed widely from the original collection. He held in effect that the " article "

[1] [1931] A.C. 450, 467; 47 T.L.R. 308.

[2] [1954] N.I. 54.

in such a case is the collection and that it is that to which one must look to see whether there has been adaptation for sale. If so, the process to which the collection of eggs was subjected was an adaptation for sale. In coming to this conclusion the learned Lord Chief Justice was amply supported by the authorities that he cited to some of which I will refer. In doing so I find myself adopting much that he has said.

My Lords, it appears to me upon an examination of the facts in the present case that there is as little justification for regarding a single skin as the article whose adaptation for sale is required as there was in *McAllister's* case [3] for so regarding a single egg, or in *Burrows'* case [4] for so regarding a single rag, or in *Hines'* case [5] for so regarding a single seed. The words of Scrutton L.J. in the seed case,[6] cited with approval by Lord Dunedin,[7] are precisely apposite: "In my view there was both alteration of "substance and adapting for sale in sorting, making a sub-"stantially different article in bulk from that which existed "before the processes were applied. In my opinion, you cannot "deal with the case by saying there was a seed before the process "and the same seed after the process. The process has altered "the bulk and made it legally and commercially saleable." The word "bulk" has crept into these cases and it is useful as signifying that the "article" may be something more than a single unit in a collection of more or less similar units. But the word is not in the Statute and should not be used to limit the cases in which something other than a single unit can qualify as the "article" which must be adapted. I am led to this observation by the reiteration in the decision of the tribunal and in the judgment of the Court of Appeal that this is not to be regarded as a "bulk case." As has often been said, each case must depend on its facts. The processes which adapt the contents of crates of eggs, bales of furs, and "amorphous masses" of rags for sale are widely different, but in all alike something takes place which transforms an unsaleable article into one that is legally and commercially saleable. (I interpolate that, when the statute speaks of adapting for sale, it must mean for commercial sale: presumably even an "amorphous mass" of rags or an unsorted bale of furs might be saleable at some price to somebody.) But I must repeat that the primary facts as found by the tribunal or disclosed in the annexures to the special case lead not to the conclusion that the *only* effect of the sorting and grading was to certify the quality of particular skins nor that the skins are sent in bundles merely for the convenience of dispatch nor that it was not the intention that the skins should be made into a bulk and sold as a bulk, if by that was meant that the consignor did not

[3] [1954] N.I. 54.
[4] [1931] A.C. 454, 477; 47 T.L.R. 308.
[5] [1931] A.C. 456, 477; 47 T.L.R. 308.
[6] [1931] 1 K.B. 446, 504; 46 T.L.R. 601.
[7] [1931] A.C. 477, 483.

intend his skins to be matched with other skins and sold in a lot with them, nor that each skin was sold as a single skin nor that selling in lots was only for the convenience of the buyer. This complete misconception of an activity, which in fact transformed a bale of unsorted and ungraded furs, itself commercially unsaleable, into the constituent parts of a number of saleable lots, in my opinion vitiates the conclusion of both the tribunal and the Court of Appeal. There was, in my view, no evidence which justified the findings of fact made by the tribunal. It follows that it came to a conclusion which was erroneous in law.

I have referred, my Lords, only briefly to some of the many cases which were cited to us. They illustrate on the one side of the line or the other the principle that must guide our decision and I do not think that any useful purpose would be served by a closer examination of them. That task has been performed better than I could do it by the Lord Chief Justice of Northern Ireland in *McAllister's* case,[8] and I respectfully endorse what he has said.

It remains, however, to say a word about an aspect of the case which has been ignored. The tribunal in its decision observed that counsel for the respondent submitted that the activity of the appellants was not what he called "a factory "operation" for two reasons, first, because it did not involve "manual labour" as correctly understood, and, secondly, that it did not involve an adapting for sale in accordance with the terms of the authorities. The tribunal, having decided in favour of the respondent on the second point, did not think it necessary to decide the first. The same course was followed by the Court of Appeal. A different view being taken on the second point by this House, the respondent by his counsel fairly enough contends that he is entitled to have a finding of fact made and a decision given by the tribunal on the first point. This is not to be gainsaid. Therefore your Lordships should, in my opinion, allow the appeal with costs here and below in regard to the adapting for sale of the furs which arrive at Beaver House but remit to the tribunal for further determination the question whether in the words of the Statute any manual labour is exercised upon the premises for the purpose of the adapting for sale.

LORD REID. My Lords, the appellants carry on business at Beaver House, London, and they claim that, by reason of the operations which they carry on there, this is an industrial hereditament entitled to derating under the Act of 1928. Under section 3 it is an industrial hereditament if it is occupied and used as a factory or workshop. No question arises under the proviso to section 3 and the premises are not said to be a factory, so the question is whether they are a workshop within the meaning of section 149 of the Factory and Workshop Act, 1901. The relevant parts of that section are: "149.—(1) Subject to the

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"provisions of this section, the following expressions have in "this Act the meanings hereby assigned to them; that is to "say:— . . . The expression 'workshop' means—(*a*) . . . "(*b*) any premises, room, or place, not being a factory, in which "premises, room, or place, or within the close or curtilage or "precincts of which premises, any manual labour is exercised "by way of trade or for purposes of gain in or incidental to "any of the following purposes, namely—(i) the making of any "article or of part of any article; or (ii) the altering, repairing, "ornamenting, or finishing of any article; or (iii) the adapting "for sale of any article; and to or over which premises, room, "or place the employer of the persons working therein has the "right of access or control."

The appellants contend that these premises satisfy the requirements of that definition and in particular that they are used for "the adapting for sale of any article." Two questions arise under this definition: not only must it be shown that premises are used for one (or more) of the stated purposes, but it must also be shown that manual labour is exercised in or incidental to that purpose.

The Central London Local Valuation Court decided against the present appellants, and this decision was affirmed by the Lands Tribunal (Sir W. Fitzgerald Q.C., President). A stated case was asked for, and I must quote the following passages from the case:

"3. At the hearing before me the facts, which were proved "or admitted, and the contentions put forward by the parties, "are contained in my decision, a signed copy of which is annexed "hereto and forms part of this case, save that the following "further facts were admitted although not referred to in my "decision": [Then follow certain further findings of fact.]

"'5. I am informed that the appellants desire to contend "'that there was in point of law no evidence to support my "'findings of fact set out hereunder:

"(A) 'I put it this way—without the sorting and grading "'the buyer, unless he were himself an expert, would be taking "'a risk but the skins are still saleable . . . the conclusion I "'have come to is that the only effect of the sorting and grading "'was to certify that the skins were of such a quality as to "'merit being placed in the category in which they appear in "'the auction catalogue.'

"(B) 'What is emptied out of the bales that come into the "'Hudson's Bay Company is not a huge amorphous mass. It "'is a bundle of easily identifiable individual skins. They are "'sent in bundles merely for the convenience of dispatch. It "'is not like the rag case or the seed case in that it is not what "'has come to be known as a "bulk" case at all. It is not "'the intention that the skins should be made into a bulk and "'sold as a bulk. Each skin is sent to the Hudson's Bay Com-"'pany to be sold as a skin, in fact the owner might send only

" ' one skin although admittedly this would be unusual. It is " ' also bought as a single skin although the bidder bids for a " ' lot that are matched. In a word selling in lots is only for " ' the convenience of the buyer.'

" (C) ' All that has been done here was to arrange the skins. " ' In my view the process carried out in Beaver House, highly " ' technical as I concede it is, is merely an identification of skins " ' and their arrangement in price classes for sale. Nothing has " ' been done to any skin which in any way makes it a little " ' different to what it was before—I ignore the cleaning of the " ' skins in the drum because it applied to a negligible number of " ' the skins dealt with in Beaver House. There has therefore " ' been no adapting for sale.'

" An extract from the transcript of the shorthand notes con- " taining the evidence relating to these matters (marked A) is " annexed to and forms part of this case."

It appears from the learned President's decision that counsel for the present respondent argued two points: first, that the appellants' operations did not " involve manual labour as correctly " understood," and, secondly, that they did not " involve an " adapting for sale in accordance with the terms of the autho- " rities." The learned President decided against the appellants on the latter question and made no further reference to the first question—no doubt because that was unnecessary once he had decided the other question against the appellants. But there can be no decision that this is an industrial hereditament unless both questions are decided in favour of the appellants. The respondent still maintains his first point, and, accordingly, if your Lordships are disposed to allow this appeal on the question of adapting for sale, either the first question must now be decided by this House on such material as is available or the case must be sent back to the Lands Tribunal so that the learned President may decide the point. I agree with your Lordships that the latter course should be adopted.

But in considering whether there was " adapting for sale " the definition of " workshop " must be read as a whole and, while I express no opinion of any kind as to whether manual labour was exercised in this case, I must, I think, consider the general question of the meaning of " adapted for sale " on the footing that I am only dealing with cases where manual labour is being exercised: so I must leave out of account cases where there might seem to be " adapting for sale " without the exercise of manual labour.

The first question which we have to decide is whether there was evidence to support the findings which I have quoted. For reasons which I shall give in a moment, I am of opinion there was not. But I do not think that we can stop there. The second part of the question in the case is " and whether upon " the findings of fact I came to a correct decision in law." If we reject these findings of the tribunal, we must, I think, come

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to our own conclusions on these matters and then determine whether there was "adapting for sale"—assuming, as I have said, that manual labour has been exercised in or incidental to the process.

I take first the facts other than those set out above. I think that they can be summarised in this way. Parcels of skins are sent to the appellants from all parts of the world with a view to each skin in the parcel being graded and then matched with and made up into a lot with skins sent by other consignors so that the lot can be sold by auction. The skins in any one lot, which may contain perhaps 70 to 100 skins, are held to be of equal value. So the price, after deducting commission, etc., is divided in equal shares among those consignors whose skins form part of the lot. If only one skin in the lot came from a particular consignor, he gets one share; if, say, 10 skins in the lot came from him, he gets 10 shares. In fact it appears that the lot is bid for and sold at a price per skin, but I can attach no importance to that. The price paid by the buyer is a single sum, the number of skins in the lot multiplied by the sum bid per skin. And the buyer has no concern with and may have no knowledge of who were the consignors of the various skins in the lot.

When a consignment is received the appellants label each skin in it to show from whom it came. This is necessary so that when lots are made up a record can be kept of how many skins in the lot came from a particular consignor. In the case of mink skins these identifications remain until the lot is sold: in the case of other skins the identifications are removed when they are made up into lots, and thereafter it is impossible to tell which skin in the lot came from which consignor.

For a complete picture I must notice three other kinds of consignments. They are not dealt with specially by the tribunal for the good reason that they are relatively unimportant. A number of the skins coming to these premises already belong to the appellants, having been bought by them in Canada and elsewhere. Then musquash skins are dealt with in a somewhat different way. And it appears that some skins have already been graded before arrival. I shall say no more about these cases.

Grading and matching are highly skilled operations, and grading is done in stages. The miscellaneous skins which come in are separated on inspection into, say, six or ten groups. Then each of these groups is again inspected and subdivided into smaller groups, and so on. This may entail five successive inspections of each skin and this is necessary because there are no less than 250 main grades of persian lamb and 468 main grades of mink. The importance of these operations may be seen from the fact that the appellants charge a commission of 6 per cent. on skins sent in in the ordinary way, whereas they only charge 1½ per cent. in the few cases in which skins have been sorted and graded before arrival.

The reason why consignors send in skins to be dealt with in

this way is that they get a much better price for each skin than they could get if they sold ungraded and unmatched parcels or single skins. It appears that there is no market in London for ungraded and unmatched skins. They get a much better price because buyers can rely on the grading, matching and cataloguing done by the appellants: they appear to require matched skins, and in this way they get what they want. Buyers come to these sales from many countries.

I can now return to the findings in fact which are challenged. In (A) it is said that "the only effect of the sorting and grading "was to certify that the skins were of such a quality as to merit "being placed in the category in which they appear in the auction "catalogue." But the skins never appear in the auction catalogue. What appears in the catalogue and what is sold is a matched set of skins. No doubt the sorting and grading do certify the merit of each skin but on my reading of the evidence this is far from being its only effect. The real purpose of the sorting and grading is to enable individual skins to be assembled into matched lots such as buyers wish to buy.

In finding (B) it is said: "It is not the intention that the "skins should be made into a bulk and sold as a bulk. Each skin "is sent to the Hudson's Bay Company to be sold as a skin." To my mind, the evidence contradicts that, and shows clearly that the intention was that the skins should be assembled into aggregates or matched sets, that no skin should be sold as a separate skin, but that all should be sold as parts of sets. I think that this was the intention, whether a consignor sent a single skin or a parcel of skins. Then it is said that the skin is also bought as a single skin, but the whole evidence is to the effect that what the buyer wants and buys is not single skins but matched sets. If each skin were sold and bought as a single skin, then a buyer who buys a lot of 100 skins must enter into 100 contracts. That seems to me an impossible interpretation of the facts. Suppose a lot does not conform to the description in the catalogue or to the sample shown before the auction because one or two skins have not been properly graded and matched. It was not disputed by counsel for the respondent that the buyer would be entitled to reject the whole lot. How could he reject those skins in the lot which conform to the description and sample if there were 100 different contracts. As regards the skins to which no objection could be taken, there would be no breach of the contracts under which they were sold. Then it was argued that there might not be 100 different contracts, but that if the lot contained skins coming from, say, 20 different consignors, there would be separate contracts with each consignor, each contract including all the skins in the lot which came from him. That, in itself, would make little difference. But then it was said that each contract, whether for a single skin or for several skins in a lot, must be deemed to contain a condition that if the buyer were entitled to reject any of the other skins in the lot

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he could also reject the skins comprised in the contract, although no exception could be taken to them individually. This appears to me to be a wholly artificial conception. Moreover, a buyer may have no means of knowing who the consignors were and whom he is to sue if he finds it necessary to raise an action. Is he to sue a number of defendants in respect of a number of contracts with different people whose names he could only obtain from the appellants? In my opinion the skins in the lot were clearly sold as one lot under one contract. We do not have either the conditions under which consignors sent their skins to the appellants or the conditions governing the sales by auction. I would be very surprised if there were anything in them to bear out this finding, and in the absence of these conditions I think that we must hold that these operations have been conducted in a reasonable manner, and that no such complications as are suggested have been introduced. They might well make the whole scheme unworkable. I see no difficulty in law in the consignors making agreements with the appellants, under which the appellants are entitled to sell their skins, together with skins belonging to others, to a buyer who buys the lot under a single contract. But I would not like to try to draft conditions which resulted in the fall of the hammer creating 100 different contracts with the buyer.

Finding (C) adds nothing new to the findings in fact but perhaps it gives a clue as to how the learned President came to make these findings. He appears to have thought that because the skins were readily identifiable when received by the appellants, and also identifiable when sold to the buyers, a lot which was sold could not in law be regarded as anything other than a number of separate skins, and so he may have thought that in fact they were sold as separate skins. I shall have to deal with the legal position later, but it may be that the learned President's understanding is in accordance with some practice which has prevailed in the past and should not be imputed to him as a serious error.

Do the facts which I have summarised involve "adapting for "sale" or not? That depends on the proper construction of those words in the Act of 1901, and on that matter we find authoritative guidance in the series of cases reported as *Bailey* v. *Potteries Electric Traction Co. Ltd.*[8a] and *Sedgwick* v. *Watney, Combe, Reid & Co.*[9] I get most help from that part of the judgment of Scrutton L.J.[10] which deals with what he calls processes roughly described as sorting, parts of which were expressly approved in this House,[11] and no part of which was disapproved. We are construing words in the Factories Acts and Scrutton L.J.[12] began by pointing out that if we deprive the occupier of the benefit of derating we are also depriving the workers of the protection of these Acts, and that in construing

[8a] [1931] 1 K.B. 385.
[9] [1931] A.C. 446.
[10] [1931] 1 K.B. 385, 492–495.
[11] [1931] A.C. 446, 483, 484.
[12] [1931] 1 K.B. 385, 492.

these Acts the courts have given a wide meaning to their words, e.g., "putting chocolates into a decorated box, in *Fuller's* "case [13]" has "been treated as 'adapting for sale' to protect "the work-people employed in that occupation."

In reading this judgment and Lord Dunedin's speech in this House, it should be borne in mind that they did not have to deal with a case where individual things were assembled into an aggregate which was saleable when the individual things were not, or which at least fetched a much better price than the total of any sums which could have been got by selling the things separately. They were dealing with cases where things (rags and seeds) came in in bulk. Scrutton L.J. said [14] that these cases "cannot be "determined simply by saying: "no sorting is adaptation for "'sale.' The original bulk may be such that it cannot be sold "either legally, as in mixed seeds, or commercially, because an "unsorted bulk is not wanted, and the process of sorting may "be so complicated and mechanical as to deserve the title of a "manufacturing process, i.e., of 'adapting for sale.' On the "other hand, the bulk and the article to be sold may be so "similar and of such a nature, such as taking a quarter of a "pound of bulls-eyes out of a bulk in a bottle, that the separation "or sorting may well be regarded as an entirely minor incident "of the sale or distribution." When he used the words "mechanical" and "manufacturing process" he was dealing with a question whether premises were a factory. The question here is whether they are a workshop, and I find in section 149 (4) of the Act of 1901 reference to "the manufacturing process or "handicraft carried on in the factory or workshop," so it would, I think, be legitimate to adapt his words and ask whether this process deserves the title of "a handicraft."

Then Scrutton L.J. continued [15]: "Where substantial changes "are made in the article, as in the seed-cleaning case, I see no "difficulty in holding the process to be adapting for sale. But "in view of the fact that 'adapting for sale' is a separate head "from altering I see no reason for requiring alteration of sub-"stance to make 'adapting for sale.' If this were necessary, "there would be no need to insert 'adapting for sale.' Where the "process of separation or sorting is complicated and substantial, "again I think there is adapting for sale. In many cases, it is a "question of degree, which is in my view fact and not law, and "not properly the subject of a special case. Further, the section "in the Factory Act, 1901, deals with an 'article' which I think "means an article to be sold." I may say in passing that it is unnecessary to deal in this case with the vexed question of what is fact and what is law, because if the findings in fact of the tribunal cannot stand the whole matter is open for us. I shall return to the rest of the quotation when I come to the so-called bulk principle.

[13] [1901] 2 K.B. 209.
[14] [1931] 1 K.B. 385, 494.
[15] Ibid. 495.

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Following the line of that judgment I would think the question in this case to be whether things which cannot be sold commercially because they are not wanted (individual skins or miscellaneous parcels of skins) have been made into articles readily saleable (matched sets of skins) by a process sufficiently complicated and substantial to deserve the title of "handicraft." And I would further think that there can be adapting for sale without alteration of substance, for the reason given in the passage I have quoted.

But this is said to be in conflict with the view of Lord Dunedin in the cable testing case (*Grove's* case [16]): "I think 'adapting for 'sale' points clearly to something being done to the article in "question which, in some way, makes it in itself a little different "from what it was before." In the cable testing case the cable came in unassociated with any other article and it went out unassociated with any other. Lord Dunedin had set out the conflicting views between which he had to choose. Slesser L.J. had said: "the testing of the cables was part of the process of making "them fit for sale," and Scrutton L.J. had said: "The cables "are not adapted for sale but tested to see if they are fit for "sale." Lord Dunedin's apt illustration was [17]: "If a horse is "passed sound by a veterinary surgeon it becomes saleable in a "way it was not before he was so passed, but no one would dream "of saying that the veterinary surgeon by his certificate adapted "the horse for sale." Certainly testing or certifying is not adapting, and where there is no question of association with other things I wholly agree that adapting must involve some physical change—some alteration of the article. But I do not think that Lord Dunedin meant to say that, commercially at least, the whole can never be greater than or different from the sum of its parts. He was not dealing with any such question, and I think it worth noting that at the end of his speech he said [18]: "It may be "difficult or impossible to identify the essential quality of the "operation described in section 149 of the Factory and Workshop "Act, 1901, as 'the adapting for sale of any article,' nor in my "view is it necessary for the purposes of this case to do so. The "phrase was probably introduced to secure somewhat more "flexibility than is to be found in the immediately preceding "terms—namely, 'the altering, repairing, ornamenting or finish-"ing of any article.'" I do not think that Lord Dunedin could have said that if he had intended his words in the cable testing case to be universally applicable. Making an article "in itself a "little different from what it was before" is simply altering it, and the introduction of the phrase "adapting for sale" would have failed to introduce any more flexibility if adapting necessarily involved such alteration.

The respondent's argument was that if there has been no alteration of individual things there can be no adapting for sale

[16] [1931] A.C. 450, 467.
[17] Ibid. 468.
[18] Ibid. 493.

unless the case can be brought within the "bulk principle." This so-called principle appears to have been evolved by taking observations of Lord Dunedin and Scrutton L.J. made in cases where the things to be adapted were "bulks" or aggregates (rags or mixed seeds), and regarding them as equally applicable where the process is the adaptation of individual things by combining them into readily saleable sets or aggregates. I see no justification for this. It would seem that the theory behind this so-called principle is that you must always have an article at the beginning of the process, and the same article altered or adapted at the end. Where there is a bulk at the beginning and another bulk at the end you are entitled to regard the original bulk as persisting and merely emerging in a different form. This appears to me to be in many "bulk" cases nothing but a fiction. If six "bulks" of rags came in from different consignors, and each is first sorted into 10 different heaps, and then the corresponding heaps from each bulk are mixed together for further sorting, surely the six original bulks have ceased to exist as bulks. And if 100 bales, each different from the others, are produced at the end of the sorting process, it seems to me rather fantastic to say that any of the original bulks has continued to exist throughout the process. The individual rags have continued to exist physically unaltered but they emerge different from what they were at the beginning: they were originally parts of mixed aggregate and of little value, but they are now parts of matched aggregates of much greater value.

I said a few moments ago that I would return to the rest of a quotation from the judgment of Scrutton L.J.[19]: "The bulk "bought at one price is altered or adapted for sale into a bulk "of a smaller size and different character which can be sold "because of the alteration or adaptation at a much higher price. "It is this principle which I think should be applied to the "various cases involving sorting, which I consider seperately." That may be an adequate explanation where one bulk comes in and one goes out, and it may have been sufficient for the cases he was then considering, but I see no reason to deny adapting for sale in every case which it does not fit.

The opinion of Lord Sands on this matter in *Inland Revenue* v. *Easson Brothers* [20] was approved both in the Court of Appeal [21] and in this House.[22] He says [23]: "If what had happened was "that the paper maker had come into the premises saying 'I "'want a blue cotton rag' or 'a piece of brown paper,' I could "understand the argument that there had been no adaptation of "the particular article for sale. All that had been done was to "arrange the articles so as to avoid the trouble of having to "rummage through the heap whenever a paper maker came in

[19] [1931] 1 K.B. 385, 495.
[20] 1930 S.C. 480.
[21] [1931] 1 K.B. 385, 505, 509, 520, 521.
[22] [1931] A.C. 446, 481, 484.
[23] 1930 S.C. 480, 485.

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" and asked for something. But that is not the condition of the " problem. If one regards the whole mixed mass that comes into " the works, that mass has been adapted for sale, or made sale- " able, by laborious assortment. If one regards the final bale, its " contents have been adapted for sale by a process whereby each " rag or each piece of paper, in itself worthless, has been associa- " ted with a thousand similar ones laboriously picked out." The first of these two ways of regarding the matter may not fit the present case but the second does. If the " bulk principle " has concentrated attention on the first of these two ways then it is not, in my judgment, wide enough to comprehend all the cases where there can properly be said to have been adapting for sale.

It does not follow that every case where there is laborious picking out of similar articles will qualify as adapting for sale. In *Davis Cohen & Sons Ltd.* v. *Hall* [24] an example was given of picking out pairs of boots from a mixed heap. I would agree that that falls far short of what is necessary. But if there had been several hundred different qualities of boots in the heap, if a lengthy process and great skill had been necessary to separate them, and if customers had required matched sets of a dozen pairs the case might well have been different. Apart from the question of manual labour I am of opinion that, in the present case, there clearly was adapting for sale and, therefore, this appeal should be allowed.

LORD TUCKER. My Lords, I agree with the opinions expressed by my noble and learned friends that the appeal should be allowed.

LORD KEITH OF AVONHOLM. My Lords. This appeal is concerned with the assessment of certain premises in the City of London belonging to the appellants, whom I shall call " the " company," assessed at £15,848 gross value and £13,178 rateable value. The appeal comes to this House after unsuccessful appeals by the company to the Lands Tribunal and to the Court of Appeal against a decision of the Central London Local Valuation Court confirming the assessment. The contention of the company is that it is entitled to derating of its premises in whole or in part. The premises consist of three parts, known as Beaver Hall, Beaver House, and the Carpenter's Workshop respectively. In Beaver Hall auction sales of furs, prepared for auction in Beaver House, take place. It is with Beaver House that the appeal is primarily concerned.

I take the problem as stated by the Lands Tribunal. " It is " the company's contention that Beaver House is primarily " occupied and used by it for the sorting and grading of furs, " that by means of that sorting and grading bales of assorted " and ungraded skins sent in by trappers and breeders from

[24] [1952] W.N. 33; [1952] 1 All E.R. 157.

"various parts of the world are changed into saleable lots of "sorted and graded skins. It may be said, therefore, that the "real issue upon which this case will depend is whether what "is done to those skins is or is not adapting for sale within the "meaning of the Factory Act."

What takes place in Beaver House is set out by the Lands Tribunal in a short passage, which I shall find it necessary in a moment to amplify, as follows:—

"Bales of skins are addressed from almost all parts of the "world except the Soviet Union. They arrive in lorries at the "reception basement. They are unloaded on to lifts and con- "veyed to the first floor where the bales are opened and are "sorted according to types—the bales consist of mixed skins of "various animals. The sorted bundles are then passed up to "the next floor, some of the skins which may be dusty or gritty "are put in drums with clean sawdust and whirled round. This "eliminates the dust and grit. This process is necessary only "in the case of very few, indeed almost a negligible quantity of "the skins that come in. Next comes the process on which the "appellants mainly rely to establish their contention that there "is an adaptation for sale. The skins are passed along in trollies "to the sorters' counters. The counters extend along the room "which is especially lighted with artificial light and large win- "dows. The sorters are men who have been specially trained "in the art of sorting. It is said that it takes about ten years to "make a man an entirely efficient sorter. The sorter takes the "skin and grades it either by its feel or visual appearance. "Immediately behind the sorter is a trolly with various shelves. "Each shelf represents the class which the sorter assigns to the "skin. These grades of skin are then conveyed to another "sorting room where there are sorters who can be described as "final specialists. These sorters examine the skins and either "confirm the grading or up- or down-grade the skins again. "After this final grading the skins are catalogued and passed "down to the display room. There they are displayed for some "days and prospective buyers come along to examine them and "bid for them at the auctions which are held about three times "yearly.

"The skins are still in a raw state in the sense that they "could not be used as furs. They have to undergo a highly "technical process which converts them from skins into saleable "furs. This process is not undertaken at Beaver House. It "is carried out by the furriers who buy the skins at the auction."

The evidence relating to the processes carried out in Beaver House is annexed to and forms part of the case. And for a fuller understanding of these processes, I would expand the findings of the Lands Tribunal set out above as follows:—

Beaver House may be described as a sorting establishment. But it is a sorting establishment with a very definite object. The object is to sort the skins into lots so that every skin in

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the lot matches every other skin in the lot so nearly that every skin may be said to be identical with every other skin. They are so identical as to be indistinguishable. It is known how many skins belonging to any consignor go into any particular lot. The price realised for any lot is divided equally among the particular consignors in proportion to the number of skins he has contributed to the particular lot, each skin being treated as of equal value with every other skin in the lot. Thus each skin in a lot may be said to have the same value, the same quality, the same colour, the same size, the same pattern, and, of course, the same class of animal. At present the popular and largest classes of skin dealt with are Persian lamb and mink. Persian lamb is sorted first into size of curl—extra large, large, medium, small and extra small. These sizes, again, are divided into patterns of curl, of which there are a considerable number. Of one pattern, described as "A" pattern, in the highest class, it was said that out of 500,000 skins or thereby only 300 skins of that pattern might be obtained. There are no less than 250 main grades and 880 sub-grades of Persian lamb. Of mink, again, there are no less than 468 main grades, and of beaver, 60 main grades. Persian lamb skins are graded by sight and mink by touch and the process is a highly expert job. The lots vary greatly in value according to quality, with resulting differences in prices realised at the auction. It is of prime importance to the buyer that all the skins in a particular lot are precisely matched for they are bought to be made after processing into coats or other articles of attire. As stated in evidence: "It is "a mammoth undertaking to equalise these lots so that every "buyer knows he is going to get the same quality. That is "why there are so many sub-grades; it is equalisation really." A good sorter, it was said, would put out 1,000 to 1,500 skins a day.

This is a short resumé of the nature of the process. The result of it is that the prices obtained at auctions for the furs and skins sold greatly exceed the prices that could be obtained by the producers or owners of the skins if they were sold direct to the trade in a mixed or unsorted quantity. What in effect happens is that producers from all over the world put their skins into a vast pool, from which a sufficient number of skins can be made up into a great number of lots of matched skins of different value and quality suitable to the requirements and demand of the fur-making trade whether wholesale or retail. The owners of the skins do not lose the property in the skins until they are sold by auction. It would seem that they are treated as owners in common of the respective lots in proportion to the extent of their individual contribution to the lot and share in the price realised for each lot accordingly. In the case of Persian lamb the identity indeed of the separate skins making up a lot is lost. In the case of mink, the identity of the owners of the separate skins is, for some reason not explained, retained

by a tab on each skin. But if in each case the price realised is allocated in proportion to contribution, this difference would seem to be immaterial.

The question of law raised by the case is whether there has been such an adapting for sale of the skins that come into Beaver House as to make these premises an industrial hereditament within the meaning of section 3 of the Rating and Valuation (Apportionment) Act, 1928. That again turns upon whether the premises are occupied and used as a workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920. The relevant provision is section 149 of the Factory and Workshops Act, 1901, which defines "workshop." The material words for this case are: "The expression 'workshop' "means . . . any premises . . . not being a factory, in which "premises, . . . any manual labour is exercised by way of trade "or for purposes of gain in or incidental to any of the following "purposes, namely . . . (iii) the adapting for sale of any article, "and to or over which premises . . . the employer of the "persons working therein has the right of access or control: ".

This section has frequently been considered in connection with claims for derating and your Lordships had a full citation of the relevant authorities. I find it unnecessary to consider these in any detail. None of them, in my opinion, quite touches the problem in the present case. Those which were claimed as approaching the nearest to the circumstances of the present case were *Inland Revenue* v. *Easson Brothers* [25] and *Kaye* v. *Burrows* [26] (rag sorting); *Hines* v. *Eastern Counties Farmers' Co-operative Association* [27] (seed cleaning); and *Richardson (A.) & Son* v. *Middlesbrough Borough Assessment Committee* [28]; and *Valuation Commissioners* v. *McAllister* [29] (egg packing). I quote one passage from the judgment of Scrutton L.J. as indicating the general nature of the problem [30]: "In my view the question "whether sorting or separation of an article to be sold from a "bulk is an adapting for sale depends on the facts of each "particular case, and cannot be determined simply by saying: "'no sorting is adaptation for sale.' The original bulk may be "such that it cannot be sold either legally as in mixed seeds, "or commercially, because an unsorted bulk is not wanted, and "the process of sorting may be so complicated and mechanical "as to deserve the title of a manufacturing process, i.e., of "'adapting for sale.' On the other hand, the bulk and the "article to be sold may be so similar and of such a nature, such "as taking a quarter of a pound of bull's-eyes out of a bulk in "a bottle, that the separation or sorting may well be regarded "as an entirely minor incident of the sale or distribution."

[25] 1930 S.C. 480.
[26] [1931] A.C. 454, 477; [1931] 1 K.B. 469, 508 (C.A.).
[27] [1931] A.C. 456, 477; [1931] 1 K.B. 446, 502.
[28] [1947] K.B. 958; 63 T.L.R. 413; [1947] 1 All E.R. 884.
[29] [1954] N.I. 54.
[30] [1931] 1 K.B. 385, 494.

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At the risk of some repetition I would also quote a well-known passage from the opinion of Lord Sands in *Easson's* case,[31] in part quoted and approved by Lord Dunedin in *Hines's* case[32] and by Greer L.J.[33]: "On the counter emptied out of "the collecting carts there is a huge amorphous mass of waste "paper, rags, etc., mixed with dirt and rubbish, which no paper "manufacturer would look at. The workers produce a number "of orderly bales in eighty different classes which the paper-"makers readily buy for substantial sums. Can it reasonably "be said that there has been no adaptation for sale of the mass "of material which was emptied out of the carts, and which so "far as not discarded as dirt or rubbish, is now arranged in "orderly merchantable bales? I understand the argument to "be that, if you look at one particular rag or one particular "scrap of paper, that rag or that scrap of paper has not been "subjected to any treatment which alters it or adapts it for "sale. As it appears to me, this is an altogether artificial and "superficial argument. The papermaker is not buying one rag "or one piece of waste paper; he is buying a bale. If what "had happened was that the papermaker had come into the "premises saying, 'I want a blue cotton rag' or 'a piece of "'brown paper,' I could understand the argument that there "had been no adaptation of the particular article for sale. All "that had been done was to arrange the articles so as to avoid "the trouble of having to rummage through the heap whenever "a papermaker came in and asked for something. But that is "not the condition of the problem. If one regards the whole "mixed mass that comes into the works, that mass has been "adapted for sale, or made saleable, by laborious assortment. "If one regards the final bale, its contents have been adapted "for sale by a process whereby each rag or piece of paper, in "itself worthless, has been associated with a thousand similar "ones laboriously picked out." The last sentence in this passage is not in the excerpt quoted by Lord Dunedin and Greer L.J. but it has, I think, a significant relevance to the facts of this case.

My Lords, the view of the Lands Tribunal is expressed in the following passages, which are expressly challenged by counsel for the company as being inadequately supported by the evidence in the case:

"(A) I put it this way—without the sorting and grading "the buyer, unless he were himself an expert, would be taking "a risk but the skins are still saleable . . . the conclusion I "have come to is that the only effect of the sorting and grading "was to certify that the skins were of such a quality as to "merit being placed in the category in which they appear in "the auction catalogue.

[31] 1930 S.C. 480, 485.
[32] [1931] A.C. 456, 481.
[33] [1931] 1 K.B. 385, 520.

"(B) What is emptied out of the bales that come into the "Hudson's Bay Company is not a huge amorphous mass. It is "a bundle of easily identifiable individual skins. They are sent "in bundles merely for the convenience of dispatch. It is not "like the rag case or the seed case in that it is not what has "come to be known as a 'bulk' case at all. It is not the "intention that the skins should be made into a bulk and sold "as a bulk. Each skin is sent to the Hudson's Bay Company "to be sold as a skin, in fact the owner might send only one "skin although admittedly this would be unusual. It is also "bought as a single skin although the bidder bids for a lot "that are matched. In a word selling in lots is only for the "convenience of the buyer.

"(C) All that has been done here was to arrange the skins.

"In my view the process carried out in Beaver House, "highly technical as I concede it is, is merely an identification "of skins and their arrangement in price classes for sale. "Nothing has been done to any skin which in any way makes "it a little different to what it was before—I ignore the cleaning "of the skins in the drum because it applied to a negligible "number of the skins dealt with in Beaver House. There has "therefore been no adapting for sale."

The grounds on which the Court of Appeal upheld the findings of the Lands Tribunal would appear to be contained in the following passage [34]:—

"If on the facts the articles to be sold could properly be "regarded as a bulk of sorted, matched and graded skins pro- "duced by these operations from an aggregate of unsorted, "unmatched and ungraded skins, then there would be much to "be said for the view that there was here an adapting of the "skins for sale on the principle of the various 'bulk' cases "already quoted.

"But we cannot regard this as a 'bulk' case. We think "the article to be sold must on the facts consist of each in- "dividual skin belonging to each intending vendor. Each parcel "delivered at the hereditament for sale comprises individual "skins of the number and types particularised in the invoice, "and each of those skins is marked as the property of the "intending vendor and thenceforth dealt with as such. The "auctioneer employed by the company when he sells each lot "at so much per skin must be taken as selling each individual "skin comprised in it as agent for and on behalf of the vendor "to whom it belongs. We do not see how this can be treated "as a 'bulk' case consistently with the system of sale in fact "adopted. It is of the essence of the 'bulk' principle that "the components of the bulk should lose their identity in the "bulk, so that the bulk and not its individual components can "properly be regarded as the article to be sold. That is plainly

[34] [1958] 1 W.L.R. 955, 973.

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"impossible here. The whole system of sale depends on the "identity and ownership of individual skins being preserved. "The elaborate system of sorting, matching and grading enables "each individual skin to be sold to the best advantage as part "of a uniform lot, but we cannot regard it as an adapting for "sale."

My Lords, I would accept it that this is not what is generally understood as a "bulk" case. What comes in is a large collection of parcels of individual skins from a large number of owners who wish their skins to be sold by the methods known to be adopted by the company. They retain throughout the ownership of their skins until sale and the company is their agent to prepare these skins for sale. The skins are dealt with individually in the sense that they are picked out individually from their respective parcels, matched with other skins for fineness, quality, colour, size and pattern and put into lots for sale as lots in which each individual component of the lot is practically indistinguishable from its fellows. This results in an enhanced price for the individual skins which would otherwise be quite unobtainable. I have come to the view that in spite of the individual treatment accorded to each skin and the fact that each skin may be said to be the subject of sale though only as an item in a lot which must be bought as a whole, there is here an adaptation for sale. It was contended that this would go contrary to the dictum of Lord Dunedin in *Grove* v. *Lloyd's British Testing Co. Ltd.*[35]: "I think 'adapting for sale' points clearly to something being "done to the article in question which, in some way, makes it "in itself a little different from what it was before." In my view this must not be read too narrowly. The process here has enhanced the value of each individual skin and that is a change of a peculiar and unusual character. With the poet it may be said that each skin has suffered

". . . . a sea change
"Into something rich and strange."

The process by which this has been done may well be described in the words of the witness already quoted as "a mammoth "undertaking," though the process may be the easily understood one of selection and arranging. In the rag picking case,[36] different as it is, Lord Sands used words with reference to the process which might easily be adapted here: "The paper maker "is not buying one rag or one piece of waste paper; he is buying "a bale." Here the buyer is not buying one skin, he is buying a lot of matched skins. "If one regards the whole mixed mass "that comes into the works, that mass has been adapted for "sale, or made saleable, by laborious assortment." Here if one regards the collection of parcels of unmatched skins that come into Beaver House, that collection had been adapted for sale, or made saleable, by laborious assortment. Or again, in

[35] [1931] A.C. 446, 467. [36] 1930 S.C. 480, 485.

the words of Lord Sands, at the end of the passage already quoted, the skins "have been adapted for sale by a process "whereby each . . . has been associated with a thousand similar "ones laboriously picked out."

Though this is not, in my opinion, a "bulk" case it has many similarities to such a case. The Lands Tribunal was, I think, wrong in regarding the sorting and grading of the skins as a mere certificate of quality, or a mere arrangement of the skins. And the Court of Appeal, I think, went wrong in regarding the individuality of the skins and their continuing ownership until sale as a conclusive factor for refusing derating.

In the peculiar circumstances of this particular trade I am prepared to hold that there was an adapting for sale. I would accordingly allow the appeal.

LORD DENNING. My Lords, the question whether premises are a "workshop" depends, to my mind, on the nature of the work that is carried on therein. It does not depend on the ownership of the articles which are worked upon, nor upon the contracts that are made in regard to them. And it is not to be solved, I think, by asking whether the articles come in or go out in bulk. It is to be solved by asking two questions: 1. What is the purpose of the work being done? 2. How is that purpose being achieved? You must find the purpose to be one of three: Put shortly, these are (i) the making of any article or articles, (ii) the altering of them, (iii) the "adapting" of them "for sale." And you must find that the purpose is achieved "by means of manual labour," that is exercised by way of trade or for purposes of gain.

I ask myself, therefore, first, What was the purpose of the work done on these skins? It was, I think, clearly the adapting of them for sale. When they came into Beaver House, they were mixed up in bales containing skins of much variety. They varied according to the kind of animal, the place of origin, the size of skin, the length of hair, the thickness and density of fur, colour, pattern and durability. These skins, as mixed up, were virtually unsaleable in the London market. The work that was done on them consisted in splitting up the bales into the component skins, sorting them, grading them, matching them, and eventually making them up into lots in which each skin was the same as every other. As such they were readily saleable in the London market.

If it were a question of putting these skins into categories according to "bulk," I must say that I would not myself put these skins into the same category as heaps of waste paper, sacks of seeds or piles of stones—where it may truly be said that the identity of each particle is lost in the mass. I would put these skins more in the category of eggs which come in for grading, or sweets which have to be packed attractively in boxes—where each item retains its identity and has to be handled individually. But I do not find these categories to be of much help. No matter

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whether you consider the articles to be an amorphous mass or to be a group of items, you have still to answer the same question, What is the purpose of the work being done on them? Are they being adapted for sale? The answer in the case of these skins is clearly "Yes." They are being adapted for sale. So the first question must be answered in favour of the appellants.

But there still remains the second question: How is this purpose being achieved? Is it by means of manual labour? This question is not left to your Lordships by the case stated. The facts relating to it have not been found. The arguments for and against have not been put before your Lordships. The case must go back to the Lands Tribunal for the question to be determined.

I would allow the appeal accordingly.

Appeal allowed.
Case remitted to the Lands Tribunal.

Solicitors: *Linklaters & Paines; Solicitor, Inland Revenue.*

J. A. G.

[HOUSE OF LORDS.]

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PYX GRANITE CO. LTD. . . . . APPELLANTS;

AND

MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS . . . RESPONDENTS.

Town and Country Planning—Development—"Authorised by Act"—Private Act enacting that heads of agreement between parties "are "hereby confirmed and made binding" on parties—Whether provisions binding as a contract or as a statute—Whether permission required — Quarrying — Permission granted subject to conditions imposed by Minister — Whether conditions related to permitted development valid without provision for compensation — Malvern Hills Act, 1924 (14 *&* 15 *Geo.* 5, *c.* xxxvi), *s.* 54, *Sch.* 4—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14, 15, 17, 26, 27 — *Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I, Class XII.*

Town and Country Planning—Development—Conditions—Validity.

Practice and Procedure — Declaratory judgment — Town and Country Planning — Development — Declaration — Whether jurisdiction to grant declarations ousted by statute—Town and Country Planning Act, 1947, *ss.* 14, 15, 17.

Statute—Construction—Jurisdiction of High Court—Not to be taken away save by clear words.

Crown Practice—Certiorari—Inferior tribunal—Minister—Town and Country Planning—Development—Validity of conditions—Whether certiorari will lie—Town and Country Planning Act, 1947, *s.* 14.

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* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD OAKSEY, LORD KEITH OF AVONHOLM and LORD JENKINS.

A private Act of Parliament, the Malvern Hills Act, 1924, promoted to preserve the amenities of the hills against depredations by quarrying, provided by section 54[1] that "for the protection" of the appellant company (which carried on extensive quarrying operations in the area affected by the Act, both on their own freehold and over licensed land) "the following provisions shall unless "otherwise agreed in writing between the company and the Conservators and the Malvern Council have effect (that is to say):— "The heads of agreement as set forth in the Fourth Schedule to "this Act are hereby confirmed and made binding" on the parties "and the provisions of this Act shall only apply to and affect "the undertaking property or rights of the company subject to the "provisions of the said heads of agreement."

Paragraph 1 of the Fourth Schedule provided that "the company's rights of quarrying" were "to be limited (outside their "freehold property) to the quarryable area at North Malvern" defined on a plan therein prescribed.

The heads of agreement were incorporated, with some variation, in a deed executed in December, 1925, after the passing of the Act. Under the deed the company gave up their rights to quarry many acres of the licensed land in return for a promise by the conservators that the company's rights to quarry on their freehold land and on some 23 acres of licensed land should remain undisturbed.

The Town and Country Planning General Development Order, 1950,[2] made under the Town and Country Planning Act, 1947, provides, so far as material (by article 3 (1) read with Class XII of the First Schedule to the Order), that "development authorised "by any local or private Act of Parliament" may be undertaken without permission.

The company claimed declarations that the development which they proposed to carry out on their freehold and licensed land was "authorised" by the Malvern Hills Act, 1924, and that accordingly two ministerial decisions, in 1949 and 1953, refusing them permission in respect of part of their proposed development and granting permission subject to certain conditions in relation to other parts of their operations were of no effect; and, further, that the conditions imposed by the Minister, exercising his powers under section

[1] Malvern Hills Act, 1924, s. 54: "For the protection of the Pyx "Granite Company Limited (in this "section referred to as 'the com-"'pany') the following provisions "shall unless otherwise agreed in "writing between the company and "the Conservators and the Malvern "Council have effect (that is to say): "The heads of agreement as set forth "in the Fourth Schedule to this Act "are hereby confirmed and made "binding on the company and the "Conservators and the Malvern "Council and the provisions of this "Act shall only apply to or affect "the undertaking property or rights "of the company subject to the "provisions of the said heads of "agreement."

Sch. IV, para. 1: "The company's "rights of quarrying to be limited "(outside their freehold property) to "the quarryable area at North "Malvern defined on a plan . . . a "copy of which is to be supplied by "the Conservators to the company."

[2] Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), Article 3: "(1) Subject to the subsequent provisions of this Order, "development of any class specified "in the First Schedule to this Order "is permitted by this Order and may "be undertaken upon land to which "this Order applies, without the "permission of the local planning "authority or the Minister . . ."

Sch. I, Pt. I, Class XII: "Development authorised by any local or "private Act of Parliament or by any "Order approved by both Houses of "Parliament, being an Act or Order "which designates specifically both "the nature of the development "thereby authorised and the land "upon which it may be carried out."

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14 of the Act of 1947,[3] were invalid, as restrictions on the continuance of an existing use which could be imposed only under section 26 of the Act of 1947 with compensation as provided by section 27 of that Act.

The respondents raised preliminary objections that the court had no jurisdiction to grant the declarations asked for, since (a) by the combined effect of sections 15 and 17 of the Act of 1947 [3] the decision of the Minister on an application to determine whether permission was required "shall be final" and the only method of determining such a question was that provided by section 17 (1) (whereby a person "may . . . apply" to the local authority to determine it); and (b) the wide discretion conferred by section 14 on the Minister to impose conditions disentitled the company from coming to the court for a declaration that the conditions were invalid: —

[3] Town and Country Planning Act, 1947, s. 14: "(1) Subject to "the provisions of this and the next "following section, where application "is made to the local planning "authority for permission to develop "land, that authority may grant "permission either unconditionally or "subject to such conditions as they "think fit, or may refuse permission; "and in dealing with any such appli- "cation the local planning authority "shall have regard to the provisions "of the development plan, so far as "material thereto, and to any other "material considerations. (2) With- "out prejudice to the generality of the "foregoing subsection, conditions may "be imposed on the grant of permis- "sion to develop land thereunder— "(*a*) for regulating the development "or use of any land under the control "of the applicant (whether or not "it is land in respect of which the "application was made) or requiring "the carrying out of works on any "such land, so far as appears to the "local planning authority to be "expedient for the purposes of or "in connection with the development "authorised by the permission; (*b*) "for requiring the removal of any "buildings or works authorised by "the permission, or the discontinu- "ance of any use of land so author- "ised, at the expiration of a specified "period, and the carrying out of any "works required for the re-instate- "ment of land at the expiration of "that period; and any permission "granted subject to any such condi- "tion as is mentioned in paragraph "(*b*) of this subsection is in this Act "referred to as permission granted "for a limited period only."

S. 15: "(1) The Minister may give "directions to any local planning "authority . . . requiring that any "application for permission to "develop land, or all such applica- "tions of any class specified in the "directions, shall be referred to the "Minister instead of being dealt with "by the local planning authority, "and any such application shall be "so referred accordingly. (2) Where "an application for permission to "develop land is referred to the "Minister under this section, the "provisions of subsections (1) and (2) "of the last foregoing section shall "apply . . . in relation to the deter- "mination of the application by the "Minister as they apply in relation "to the determination of such an "application by the local planning "authority: Provided that before "determining any such application "the Minister shall, if either the "applicant or the local planning "authority so desire, afford to each "of them an opportunity of appear- "ing before and being heard by a "person appointed by the Minister "for the purpose. (3) The decision "of the Minister on any application "referred to him under this section "shall be final."

S. 17: "(1) If any person who "proposes to carry out any operations "on land or make any change in "the use of land wishes to have it "determined whether the carrying out "of those operations or the making "of that change in the use of the "land, would constitute or involve "development of the land within the "meaning of this Act, and, if so, "whether an application for permis- "sion in respect thereof is required "under this Part of this Act . . . he "may, either as part of an applica- "tion for such permission, or without "any such application, apply to the "local planning authority to deter- "mine that question. (2) The fore- "going provisions of this Part of this "Act shall . . . apply in relation to

Held, (1) that nothing in section 17 or in the Act excluded the jurisdiction of the court to grant declarations; section 17 merely provided an alternative method of having the question determined by the Minister.

Barraclough v. *Brown* [1897] A.C. 615; 13 T.L.R. 527 distinguished.

Decision of McNair J. in *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 2 Q.B. 136; [1957] 2 W.L.R. 627; [1957] 1 All E.R. 825 applied.

Per Viscount Simonds. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis* v. *Yiewsley and West Drayton Urban District Council* (supra), a "fundamental rule" from which I would not for my part sanction any departure.

(2) That by virtue of section 54 of the Malvern Hills Act, 1924, the heads of agreement were given statutory force, and that, accordingly, the company were "authorised" to continue quarrying operations within the limits prescribed, which included the company's freehold land, and did not require permission for carrying out the development in question.

Reg. v. *Midland Railway Co.* (1887) 19 Q.B.D. 540 distinguished.

(3) That, in the circumstances, it was unnecessary to determine the questions whether the Minister could lawfully annex conditions to the permission granted, and whether their legality could be challenged except by certiorari.

Per Lord Goddard. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

Decision of the Court of Appeal [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625 reversed.

APPEAL from the Court of Appeal (Lord Denning, Hodson and Morris L.JJ.).

This was an appeal from an order of the Court of Appeal (Lord Denning, Hodson and Morris L.JJ.) dated February 7, 1958, who, by a majority, allowed an appeal by the respondents, the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester, from a judgment of Lloyd-Jacob J. (sitting as an additional judge of the Queen's Bench Division) dated April 16, 1957, and wholly set aside the said judgment.

The questions raised by this appeal were: (*a*) whether the High Court of Justice had jurisdiction to grant the declarations

"any application under this section and to the determination thereof as they apply in relation to applications for permission to develop land and to the determination of such applications: Provided that where it is decided by the Minister under any of the said provisions that any operations or use to which an application under this section relates would constitute or involve development of the land, or that an application for permission is required as aforesaid in respect thereof, that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use."

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which were made by the judge; (*b*) whether the appellants, the Pyx Granite Co. Ltd., were entitled in law to carry out certain quarrying operations without obtaining planning permission; (*c*) whether certain conditions imposed by such permissions as were granted to the appellants were valid in law.

The facts, in chronological order, were as follows. In 1924 a private and local Act of Parliament, the Malvern Hills Act, 1924, was promoted on a Bill by the Malvern Hills Conservators, a body constituted and incorporated under earlier private Acts, to obtain greater powers to preserve the amenities of a place of great natural beauty. The preamble to the Act stated that "whereas in recent years the amenities of the Malvern Hills "have been seriously interfered with by quarrying operations "and by the erection of buildings sheds machinery and plant "and their operations are being extended in such manner as to "threaten to destroy the value of the Malvern Hills as objects "of public interest" the conservators asked for further powers of "protecting controlling and dealing with" the hills.

The Bill was opposed on its passage through Parliament by, inter alia, the appellant company, Pyx Granite Co. Ltd., an existing quarry undertaking with extensive vested interests in the area concerned. They were the owners in fee simple at all material times of 11 acres of the land (the "Tank Quarry"), five acres of which have never yet been quarried and contain stone sufficient to last 100 years; and they also had various licences to work other extensive quarryable areas. Negotiations took place during the passage of the Bill with various interested parties, and, by sections 26 and 27 of the Act, Parliament empowered the Minister of Health, on the application of the conservators, to make orders prohibiting quarrying on any particular part of the Hills, but provided that the conservators should pay compensation to the owners affected by such orders.

The particular negotiations between the appellant company, the conservators and the Malvern Council resulted in extremely detailed "heads of agreement" being drawn up and set out in the Fourth Schedule to the Act, and by section 54 of the Act [1] were "hereby confirmed and made binding" on the parties.

The heads of agreement contemplated that a formal agreement would be executed; and after some differences between the parties, which were only resolved after a decision of the Court of Appeal on June 24, 1925, a deed was executed on December 14, 1925, by the Malvern Council, the conservators, and the company, under which the company gave up their right to quarry on a considerable area of land in return for a promise by the conservators that the company's rights to quarry on their freehold property (the Tank Quarry) should not be prejudiced or affected by the deed and that the company should have the right to quarry on some 23 acres of land licensed to them by the council.

[1] For footnote 1 see p. 347.

On November 17, 1947, before the coming into force of the Town and Country Planning Act, 1947, the company applied to the Malvern Council for permission to develop the land for quarrying purposes. The provisions of the Town and Country Planning, England and Wales Interim Development Order (S.R. & O., 1946, No. 1621), made under the Town and Country Planning Acts, 1932 to 1944, were then in operation; and on January 14, 1948, the Minister of Town and Country Planning "called in" the company's application for decision. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948; and by a letter on September 5, 1949, the Minister granted the company permission to win and work the minimum amount of granite required to ensure safety on the North Quarry part of the licensed lands by removal of a sufficient weight of rock to secure stabilisation of a threatened slip, and to leave a trimmed face at a safe angle of repose, subject to three conditions.

In July, 1952, a public local inquiry was held by the Minister to inquire into the various applications for quarrying in the Malvern Hills. At the inquiry the appellant company informed the Minister that their quarrying operations were "development" within the meaning of the Act of 1947, which was permitted unconditionally by virtue of section 54 of the Malvern Hills Act, 1924, as "development authorised by any local or private Act "of Parliament . . ." and falling within the provisions of article 3 and Class XII of the First Schedule to the Town and Country Planning General Development Order, 1950 [2] (S.I. 1950, No. 728) (which revoked and replaced by identical provisions so far as material the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958)). The company accordingly invited a dismissal of their application by the Minister on the ground that no development permission was required.

By a letter dated September 30, 1953, the Minister stated that he was advised that notwithstanding the provisions of the Malvern Hills Act, 1924, and of the Order of 1950, permission was required by the company for the continuance of the operations in question and that he must deal with the application on its merits. He refused the company permission to win and work granite in respect of parts of the company's freehold land because he wished to preserve the skyline; and he also refused permission to work a spur of the licensed land because it screened the workings. He granted permission to win and work granite in a defined part of the freehold land until June 30, 1966, subject to conditions, which, so far as relevant, were (1) that crushing and screening should only be operated between such hours as might be agreed, and that steps should be taken to control the emission of dust therefrom, and (2) that all plant, machinery and foundations should be removed when they were no longer required, and that the site be left in a tidy condition.

[2] For footnote 2 see p. 347.

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On December 21, 1954, the company issued the writ in the present proceedings, claiming declarations (1) that the winning and working of stone by them in certain lands and quarries at Malvern was development within the meaning of the Town and Country Planning Act, 1947, for which there was unconditional planning permission; (2) that the purported decision of September 5, 1949, by the Minister of Town and Country Planning, and the purported decision dated September 30, 1953, by the Minister of Housing and Local Government, were of no effect and invalid and in no way affected the company's rights to win and work pursuant to the said unconditional permission; (3) alternatively, that certain conditions purported to be imposed by the purported decisions of the Minister were of no effect and invalid; and they also asked for an injunction to restrain the Worcestershire County Council (the second respondents) from acting as the local planning authority on the said decisions.

The respondents claimed by the defence, inter alia, on a preliminary objection, that as the combined effect of sections 15 and 17 of the Town and Country Planning Act, 1947,[3] provided statutory procedure for the determination of any question as to whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which permission would be required, and enacted that any decision of the Minister made on an application under section 17 (1) "shall be final," the court had no jurisdiction to grant the declarations asked for. Secondly, they claimed that the development sought by the company was not "authorised" by the Malvern Hills Act, 1924, and accordingly permission was necessary. Thirdly, they claimed that the discretion conferred on the Minister by section 14 (1) and (2) (*a*) entitled him to impose conditions, and the company was not therefore entitled to declarations in respect of those conditions.

Lloyd-Jacob J., in his judgment on April 16, 1957, held that he had jurisdiction to grant declarations, and granted declarations in favour of the company accordingly.

The respondents appealed, and on February 7, 1958, the Court of Appeal by a majority (Morris L.J. dissenting) allowed the appeal.

The appellants appealed.

J. Ramsay Willis Q.C. and *William Scrivens* for the appellants, Pyx Granite Co. Ltd.

G. D. Squibb Q.C., *J. R. Cumming-Bruce* and *Andrew Leggatt*, for the respondents, the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Grand Junction*

[3] For footnote 3 see p. 348.

Waterworks Co. v. *Hampton Urban Council* [4]; *West Derby Union* v. *Metropolitan Life Assurance Society* [5]; *Fawcett Properties Ltd.* v. *Buckingham County Council* [6]; *Reg.* v. *West Riding of Yorkshire County Council* [7]; *Reg.* v. *Bowman* [8]; *R.* v. *Sussex Confirming Authority, Ex parte Tamplin & Sons Brewery (Brighton) Ltd.* [9]; *Barnard* v. *National Dock Labour Board* [10]; *Cooper* v. *Wilson* [11]; *Herron* v. *Rathmines and Rathgar Improvement Commissioners* [12]; *Oppenheimer* v. *Minister of Transport* [13]; *Ealing Borough Council* v. *Minister of Housing and Local Government* [14]; *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill* [15]; *Ellis* v. *Dubowski.* [16]

Their Lordships took time for consideration.

July 6, 1959. VISCOUNT SIMONDS. My Lords, the relevant facts and instruments are so fully stated in the opinion of my noble and learned friend, Lord Jenkins, which I have been privileged to read, that I recall at once what are the questions which your Lordships have to decide in this case.

There are at least two questions of primary importance which must be determined, two further questions which have been fully argued but in the view that I take of the first two questions no longer arise, and finally a fifth question which has given me more difficulty than any other, largely because it was little, if at all, discussed in the Court of Appeal and we have not the advantage of the opinion of that court upon it.

The first question, my Lords, is this. The appellant company are entitled as freeholders, leaseholders or licensees to carry on quarrying operations for the working and winning of stone upon certain lands which I will call part of the Malvern Hills. I leave for future consideration the question whether that is an accurate description; it is, in substance, the fifth question that I have mentioned. It is indisputable that such operations constitute "development" within the meaning of the Town and Country Planning Acts. From this it follows that such operations cannot be carried on without the permission of the relevant authority, whether the local planning authority or the proper Minister, at first the Minister of Town and Country Planning and later the Minister of Housing and Local Government. The question is whether such permission has in fact been given and it is to be

[4] [1898] 2 Ch. 331; 14 T.L.R. 467.
[5] [1897] A.C. 647; 13 T.L.R. 536.
[6] [1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521.
[7] [1896] 2 Q.B. 386; 12 T.L.R. 454.
[8] [1898] 1 Q.B. 663; 14 T.L.R. 303.
[9] (1937) 54 T.L.R. 46; [1937] 4 All E.R. 106.
[10] [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113.
[11] [1937] 2 K.B. 309; 53 T.L.R. 623; [1937] 2 All E.R. 726.
[12] [1892] A.C. 498.
[13] [1942] 1 K.B. 242; 58 T.L.R. 86; [1941] 3 All E.R. 485.
[14] [1953] Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639.
[15] [1915] 2 K.B. 49; 31 T.L.R. 138.
[16] [1921] 3 K.B. 621; 37 T.L.R. 910.

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resolved by a consideration of two instruments, first, the Town and Country Planning (General Development) Order of 1948 made under the authority of the Act of 1947, which for this purpose may be read as one with a similar Order of 1950 (I will refer to it as "the Development Order"), and, secondly, a private Act known as the Malvern Hills Act, 1924. By article 3 of the Development Order, the validity of which has not been challenged, it was provided that, subject as therein mentioned, development of any class specified in the First Schedule thereto was thereby permitted and might be undertaken upon land to which the Order applied, without the permission of the local planning authority or the Minister. The First Schedule contains in Class XII the words material to the decision of this case. They are: "Development authorised by any local or private Act "of Parliament or by an Order approved by both Houses of "Parliament, being an Act or Order which designates specifically "both the nature of the development thereby authorised and "the land upon which it may be carried out." I will assume that the Malvern Hills Act, 1924, to which I will refer as the "private Act," designates specifically the nature of the development and the land upon which it may be carried out, and I turn to the question which has been the sole issue in this part of the case, namely: Was the development authorised by the private Act? Upon this question differing opinions have been expressed. Lloyd-Jacob J. thought it was authorised; in the Court of Appeal Lord Denning and Hodson L.J., largely relying on *Reg.* v. *Midland Railway Co.*,[1] thought it was not, while Morris L.J. distinguished that case and upheld the view of Lloyd-Jacob J. I think that Morris L.J. was right.

My Lords, in the year 1924 the Malvern Hills Conservators, a body appointed under earlier Acts whose duty it was to preserve and control the Malvern Hills for the benefit of the public, promoted a Bill for the extension and definition of their powers. It was opposed by the appellant company, whose interest lay in the quarrying of stone upon their land. As commonly happens in such cases, a compromise was reached. It was embodied in a clause which became section 54 of the Act and was in these terms: "For the protection of the Pyx Granite Company "Limited (in this section referred to as 'the company') the "following provisions shall unless otherwise agreed in writing "between the company and the Conservators and the Malvern "Council have effect (that is to say):—The heads of agreement "as set forth in the Fourth Schedule to this Act are hereby "confirmed and made binding on the company and the Con-"servators and the Malvern Council and the provisions of this "Act shall only apply to or affect the undertaking property or "rights of the company subject to the provisions of the said "heads of agreement."

[1] (1887) 19 Q.B.D. 540.

Postponing comment on a section which is in some respects remarkable, I turn to the scheduled heads of agreement and I find myself so fully in agreement with Morris L.J. in his description of their tenor and effect in conjunction with the Act that I take the liberty of quoting it and adopting it as my own. "That "Act," he said,[2] "was one which effected most carefully worked "out planning in regard to the Malvern Hills. The conservators "were given additional powers. The company agreed to a "limitation and fixation of their rights. From their previously "existing rights something was extracted, and to them some-"thing else was added. The company's rights were limited, "outside their freehold property, to a defined quarryable area. "It was implicit in the agreement made that the continuing "rights of the company to quarry on their freehold area were "recognised. The company were to supply the council with "stone for the repair of roads. The company were to put in "repair a quarry road between certain defined points, and were "to keep such road in repair. The company were to widen the "quarry road to permit of a footpath by the side of it. The "company were to be at liberty to make and use a tunnel under "the area of land dividing their freehold property from the "quarries which the council were handing over to the company. "All this elaborately worked out detailed planning was, in my "judgment, formally approved by Parliament when it provided "by section 54 that, for the 'protection' of the company, the "Act should only apply to or affect the undertaking, property or "rights of the company subject to the provisions of the heads "of agreement. It seems to me that formal approval and "sanction were given by Parliament to the activities of the "company as planned and arranged within the scope of the "agreement that was made. In this way the activities of "the company which constituted 'development' were, in a very "real sense, 'authorised' by the Act of 1924. Parliament "enacted that the specific arrangements (under which the range "of the company's activities was defined and limited) were "confirmed and made binding on the company, the conservators "and the Malvern Council. I feel impelled to the view that "Parliament authorised the arrangements which it confirmed "and made binding." I emphasise that, as the learned Lord Justice points out, the 54th section of the Act is expressed to be "for the protection of the company," and that no better protection from the obligations or liabilities that would otherwise be imposed on it could be provided than by the limiting words of the last lines of the section. But for this section and these words in particular quarrying would be subject to restriction. Their presence means that the company can claim the authority of Parliament to continue their operations. It would, I think, be taking too narrow a view of the meaning of the word

[2] [1958] 1 Q.B. 554, 584.

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"authorised" to exclude from its scope such a result. I do not think it necessary to refer to head 14 of the heads of agreement, or to the litigation to which it gave rise. They do not affect the single question for your Lordships' determination, namely, whether the proposed development is "authorised" by the private Act. It is, however, proper to note that in the year 1925 the parties entered into a formal agreement as contemplated by head 18. Grave difficulties might have arisen if there had been substantial departure from the terms of the heads of agreement, and I do not venture to say what then might have been the result of the words "unless otherwise agreed," etc., in section 54. Fortunately that question does not arise.

My Lords, I think that the other members of the Court of Appeal might have come to the same conclusion but for *Reg.* v. *Midland Railway Co.*,[3] to which I have referred. That case is not binding on your Lordships, but it is of respectable antiquity and I see no reason to challenge its correctness. But it is, for the reasons given by Morris L.J.,[4] clearly distinguishable. I would again respectfully adopt what he has said, but I would add that in the present case the confirmation of the agreement, the feature which it has in common with the agreement in the cited case, is attended by another feature which is wholly absent from that case, namely, the emphatic provision in the last lines of the section to which I have more than once referred.

I conclude, therefore, this part of the case by saying that the proposed development by the appellant company fell within Class XII of the Development Order and permission was, in my opinion, not required. I should add here that it was conceded by the respondents that in their submission to this effect the appellant company were not prejudiced by the fact that they made an application to the Minister which they subsequently asserted to be unnecessary.

I come now to the second question which must be decided. It was submitted by the respondents that the court had no jurisdiction to entertain the action. It was urged that section 17 of the Act supplied the only procedure by which the subject could ascertain whether permission is necessary for the development of his land. That section enacts that if any person who proposes to carry out "any operations on land . . . wishes to "have it determined . . . whether an application for permis- "sion in respect thereof is required under this Part of this Act "having regard to the provisions of the development order, he "may . . . apply to the local planning authority to determine "that question." This matter is somewhat complicated by the fact that under other sections of the Act the Minister may "call in" the application for his own determination. But nothing turns on this, for, whether the application is heard in the first place by the local planning authority and then on appeal

[3] 19 Q.B.D. 540. [4] [1958] 1 Q.B. 554, 585–588.

by the Minister or is heard in the first place upon a "call in" by the Minister, his determination is expressed to be final. The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. Obviously it cannot altogether be excluded; for, as Lord Denning has pointed out,[5] if the subject does what he has not permission to do and so-called enforcement proceedings are taken against him, he can apply to the court of summary jurisdiction under section 23 of the Act and ask for the enforcement notice to be quashed, and he can thence go to the High Court upon case stated. But I agree with Lord Denning and Morris L.J. in thinking that this circuity is not necessary. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[6] a "fundamental rule" from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away. And it appears to me that the case would be unarguable but for the fact that in *Barraclough* v. *Brown*[7] upon a consideration of the statute there under review it was held that the new statutory remedy was exclusive. But that case differs vitally from the present case. There the statute gave to an aggrieved person the right in certain circumstances to recover certain costs and the expenses from a third party who was not otherwise liable in a court of summary jurisdiction. It was held that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court. "I do "not think," said Lord Herschell,[8] "the appellant can claim "to recover by virtue of the statute, and at the same time insist "upon doing so by means other than those prescribed by the "statute which alone confers the right." Or, as Lord Watson said[9]: "The right and the remedy are given uno flatu, and the "one cannot be dissociated from the other." The circumstances here are far different. The appellant company are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not uno flatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect. There

[5] [1958] 1 Q.B. 554, 566, 567.
[6] [1957] 2 Q.B. 136, 148; [1957] 1 All E.R. 825.
[7] [1897] A.C. 615; 13 T.L.R. 527.
[8] Ibid. 620.
[9] Ibid. 622.

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is, in my opinion, nothing in *Barraclough* v. *Brown*[10] which denies them that remedy, if it is otherwise appropriate.

The appropriateness of the remedy was the final point on this part of the case. It was urged that, even if the court had jurisdiction to make the declaration claimed, it was a discretionary jurisdiction which should not be exercised in this case. My Lords, this plea should not, in my opinion, prevail. It is surely proper that in a case like this involving, as many days of argument showed, difficult questions of construction of Acts of Parliament, a court of law should declare what are the rights of the subject who claims to have them determined. I do not dissent from the contention of the respondents that, where the administrative or the quasi-judicial powers of the Minister are concerned, declaratory judgments should not readily be given by the court. But here, if ever, was a case where the jurisdiction could properly be invoked. It might even be thought surprising that the Minister should not be glad to have such questions authoritatively determined.

These two questions being thus determined, namely, that the court has jurisdiction to declare that the development proposed by the appellant company does not require the Minister's permission and that such a declaration ought to be made, two other questions which occupied the courts below need not be considered. They were (1) whether the Minister could lawfully annex certain conditions to the limited permission that he gave, and (2) whether their legality could be challenged except by certiorari. If no permission was required, the question of the legality of annexed conditions cannot arise.

The fifth and final question has caused me much difficulty. It is a question which, if the private Act had been drafted with proper care, could never have arisen, and it does not appear to have been seriously raised at any rate in the Court of Appeal. I have doubted whether it is permissible to raise it in this House. But I have come to the conclusion, with which I think your Lordships agree, that, if only to quiet doubts, the matter should be disposed of. The question is no less than what is the area which is the subject of the private Act, and therefore the area in respect of which under the Act of 1947 permission for development is not required. And it is the more strange that there should be any doubt about this, when it appears that the land, about which the doubt may arise, is for the purpose of quarrying operations the most important to the appellant company. The difficulty, my Lords, arises initially from the language of section 5 of the private Act which defines the area of the conservators' jurisdiction. It is said to "comprise the lands rights "and interests described in the First, Second and Third "Schedules to this Act together with all lands common or "waste over which the Conservators now have or may hereafter "acquire rights and interests all of which are in this Act referred

[10] [1897] A.C. 615.

"to as 'the Malvern Hills.'" The meaning of the expression "all lands common or waste" has been debated, and it has been urged that, since common and waste are themselves a kind of land, these words must be read as adjectivally qualifying lands and the expression must be read as if it were "common or "waste lands." The result of this would be to exclude from the conservators' jurisdiction any land in which they might have or acquire any right or interest other than common or waste land. So strange a consequence must be avoided if any other interpretation is possible. I think that it is, for I do not regard it as extravagant to suppose that the draftsman of this Act, if only ex majore cautela, thought it proper to add "common or "waste" in case it should be supposed that they were not "lands." It is legitimate to add that if common or waste lands only were intended the transposition to "lands common or "waste" is one that requires explanation, which is not forthcoming. I conclude, then, that "the Malvern Hills" include any freehold land in which the conservators had upon the passing of the Act any right or interest. Now, the appellant company were the owners of the freehold of a parcel of land immediately adjoining other land over which they had quarrying rights and which were beyond doubt part of the Malvern Hills. Upon it was situate a quarry known as Tank Quarry, and it is common ground that the working of this quarry was as important to them as was the control of such working essential to the conservators. It would not, therefore, be surprising to find that any bargain between them dealt with this land. And so it was. For the agreement between them, both the heads scheduled to the private Act and the formal agreement executed in 1925, provided that the conservators should have an option within a limited time to purchase the undertaking of the appellant company. The undertaking included the land in question. Therefore this land was land in which the conservators had at the time of the passing of the Act or by virtue of the agreement acquired an undoubted right or interest. It fell forthwith within the description of Malvern Hills in the private Act and thenceforward retained that label whether or not the option was exercised. It is satisfactory to note, though I should not be prepared to rely on the doctrine of contemporanea expositio in such a case, that it is in this way that the parties, particularly in the formal agreement of 1925, interpreted the private Act and its schedules.

I am therefore of opinion that the freehold land in question is land in respect of which permission for development was not required, and I would allow this appeal and restore the judgment of Lloyd-Jacob J. with costs here and below.

LORD GODDARD. My Lords, the appellants in this case seek a declaration as to whether or not they require planning permission for the working of quarries either on their freehold land or on land leased to them. The respondents contended that this

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question was within the exclusive jurisdiction of the Minister, either by way of appeal from the planning authority, or if, as happened here, he had called in the case for his own decision in the first instance. In support of this contention the respondents relied on the decision of this House in *Barraclough* v. *Brown*.[11] What that case decided was that where a statute conferred a right, which had not hitherto existed, to recover certain expenses in a court of summary jurisdiction, it was to that court alone to which recourse must be had, and that those seeking to recover the expenses could not first ask the High Court to declare that the right to recover existed. It was for the court indicated by the statute to decide both as to the right and the amount. I agree with the majority in the Court of Appeal, who held that this decision had no application to the facts of this case and that there were no words in the statute which deprived the appellants of their right to obtain a declaration. It was also argued that if there was a remedy obtainable in the High Court it must be by way of certiorari. I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari.

The main question in this appeal is whether the proposed development on the appellants' lands is authorised by any local or personal Act of Parliament, for if it is, no planning permission is required. The statutory authority relied on is section 54 of the Malvern Hills Act, 1924, which gives effect to and makes binding on the appellants, the conservators and the Malvern Council certain heads of agreement which are set out in the Fourth Schedule to the Act. In the Court of Appeal, relying on *Reg.* v. *Midland Railway Co.*,[12] Lord Denning put the question succinctly in this way[13]: Does the section make the heads of agreement as binding as a contract, simply dispensing with the execution by the parties, or does it make them as binding as a statute giving them the same force as if enacted in the statute itself. On this question I am in full agreement with the judgment of Morris L.J. He held that the statute conferred protection on the company, recognising their existing rights in respect of their freehold property and governing and defining their other rights. The section is inserted in the Act expressly for the protection of the company and provides that the Act is only to apply to the undertaking, property or rights of the company subject to the provisions of the heads of agreement. In my opinion the protection given by the section extends to the freehold property as well as to the leaseholds. The heads of agreement limit the rights of the company of quarrying outside their

[11] [1897] A.C. 615.
[12] 19 Q.B.D. 540.
[13] [1958] 1 Q.B. 554, 569.

freehold, and thereby impliedly recognise the right of quarrying inside it. Accordingly, in my opinion, development by quarrying is authorised by the statute and no planning permission is required. It is therefore unnecessary to consider the validity of the conditions which the Minister purported to impose, and I would allow the appeal.

LORD OAKSEY. My Lords, I have had the opportunity of reading the opinion of my noble and learned friend, Lord Goddard, and I agree with it.

LORD KEITH OF AVONHOLM. My Lords, I have had the advantage of reading the opinion to be delivered by my noble and learned friend, Lord Jenkins, and agree with the result at which he has arrived and with his reasons, with one qualification.

I have difficulty in agreeing that the company's freehold land, which was the site of the Tank Quarry, was within the jurisdiction of the conservators in terms of section 5 of the Act of 1924 and so was part of the area defined under that section as "the "Malvern Hills." The only power, as I see it, that the conservators had with reference to that area, and even here I have had great doubt, is under the option given them by paragraph 12 of the Fourth Schedule to purchase the company's undertaking as a going concern in the third, fourth, or fifth year after the passing of the Act. The purchase of the undertaking would, I think, have stopped all quarrying operations by the company in their quarrying area (including their freehold land). Whether it would have transferred the freehold to the conservators is much more doubtful. But this power, whatever its effect, could not, I think, bring the freehold land within the jurisdiction of the conservators under section 5 until it was exercised. It was not exercised and is now spent. I have difficulty in seeing how on any view it can now be within their jurisdiction.

But that does not, in my opinion, affect the result of this appeal. Section 54 of the Act of 1924 provides that the provisions of the Act shall only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement set forth in the Fourth Schedule. The first head of this agreement says: "The company's rights of quarrying to "be limited (outside their freehold property) to the quarryable "area at North Malvern defined" [on the Islington plan]. I read this as meaning that the quarrying rights are to be limited except with regard to the freehold property. The only thing that could have affected this unlimited right might have been acquisition of the undertaking under head 12 of the agreement. Just as the limited quarrying rights were, I think, authorised by the Act, so I think the unlimited rights were authorised by the Act. I accordingly agree that this appeal should be allowed.

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LORD JENKINS. My Lords, the litigation in which this appeal arises concerns a dispute between the appellant company and the respondent Ministry and county council on the question whether (as contended by the company) the working by the company after the appointed day of (so far as now material) two granite quarries in the Malvern Hills known respectively as the Tank Quarry and the North Quarry, which admittedly constitutes development within the meaning of the Town and Country Planning Act, 1947, is development which was unconditionally permitted under article 3 of the First Schedule to the Town and Country Planning (General Development) Order, 1948, made in pursuance of section 13 of that Act. The company contend that this question should be answered in the affirmative on the ground that such working is within the meaning of Class XII in such Schedule, "Develop- "ment authorised by any local or private Act of Parliament . . . "being an Act . . . which designates specifically both the nature "of the development thereby authorised and the land upon which "it may be carried out," the Act relied on by the company as having authorised the development being the Malvern Hills Acts, 1884 to 1924.

If the company's contention to the above effect is well founded, it is common ground that the permission which (as hereinafter appears) the Minister purported to grant to the company under sections 14 and 15 of the Act to work the quarries upon certain conditions was wholly inoperative, inasmuch as the company already had unconditional permission to work them under the Order.

If, on the other hand, this contention fails, and the question of permission must accordingly be taken to have remained at large for the Minister's decision, the company contends that certain of the conditions which the Minister purported to impose were ultra vires, and that the permission must therefore take effect free of those conditions.

On December 21, 1954, the company commenced the present action claiming relief in the shape of declarations framed with a view to establishing the contentions to which I have briefly referred.

The respondents took a preliminary objection to the effect that the court had no jurisdiction to adjudicate upon the company's claim that the working of the quarries was development falling within the terms of Class XII in the First Schedule to the Order, and therefore unconditionally permitted, on the ground that the statutory procedure for the determination of questions such as this provided by section 17 of the Act was exhaustive, and that the jurisdiction thereby conferred on the local authority or the Minister was exclusive.

The respondents also raised a preliminary objection with respect to the company's subsidiary contention that, even if the permission granted by the Minister was otherwise operative, certain of the conditions attached to it were ultra vires. This

objection was to the effect that the validity of the conditions imposed by the Minister could only be challenged by certiorari, the time for which was long past, and not by an action for a declaration; and further that in any event the court should on principle refuse to interfere by declaration in a matter essentially depending on the Minister's discretion.

The case was heard by Lloyd-Jacob J., who decided in favour of the company on all points, and by his judgment dated April 16, 1957, granted the declarations sought. The respondents appealed from the judgment, and on February 7, 1958, the Court of Appeal (Lord Denning, Hodson and Morris L.JJ.) by a majority (Morris L.J. dissenting) allowed the appeal. Lord Denning rejected the respondents' preliminary objection based on section 17 of the Act, so far agreeing with Morris L.J.; Hodson L.J., on the other hand, was for upholding it. Lord Denning, agreeing in this with Hodson L.J., held that the development constituted by the working of the quarries was not " authorised " by the Malvern Hills Acts within the meaning of Class XII of the First Schedule to the Order. Morris L.J., on the other hand, held that this development was so authorised.

As to the validity of the conditions, and the preliminary objection that this question could not be made the subject of a declaration, Lord Denning rejected the preliminary objection but held that the conditions were valid. Hodson L.J. agreed that the conditions were valid. He doubted whether the Minister's decision could be impeached by declaration, and moreover was of opinion that if the Minister's decision could be so impeached the result of declaring the conditions invalid could only be to destroy the entire permission. In the view taken by Morris L.J. on the rest of the case, the questions as to the validity of the conditions and the right of the company to seek a declaration thereon did not arise, but he intimated that, if he had shared the view that they did arise, he would have agreed with Lord Denning's conclusions in regard to them. From that judgment the company now appeals to your Lordships' House.

It is not surprising that the case has been the subject of a conflict of judicial opinion in the courts below, for it raises questions of considerable difficulty. To make discussion of the points at issue intelligible I should next refer to some of the provisions of the Act of 1947.

Section 12 provides by subsections (1) and (2) as follows: " 12.—(1) Subject to the provisions of this section and to the " following provisions of this Act, permission shall be required " under this Part of this Act in respect of any development of " land which is carried out after the appointed day. (2) In this " Act, except where the context otherwise requires, the expression " ' development ' means the carrying out of building, engineering, " mining or other operations in, on, over or under land, or the " making of any material change in the use of any buildings or " other land. . . ."

Section 13 provides by subsections (1) and (2) as follows: "13.—(1) The Minister shall by order provide for the grant of "permission for the development of land under this Part of this "Act, and such permission may be granted—(*a*) in the case of "any development specified in any such order, or in the case "of development of any class so specified, by that order itself; "(*b*) in any other case, by the local planning authority (or, in "the cases hereinafter provided, by the Minister) on an applica- "tion in that behalf made to the local planning authority in "accordance with the provisions of the order. (2) An order under "subsection (1) of this section (hereinafter called a 'development "'order') may be made either as a general order applicable "(subject to such exceptions as may be specified therein) to all "land, or as a special order applicable only to such land as may "be so specified, and the permission granted by any such order "may be granted either unconditionally or subject to such con- "ditions or limitations as may be so specified."

Section 14 provides by subsection (1) as follows: "14.—(1) "Subject to the provisions of this and the next following section, "where application is made to the local planning authority for "permission to develop land, that authority may grant permis- "sion either unconditionally or subject to such conditions as they "think fit, or may refuse permission; and in dealing with any "such application the local planning authority shall have regard "to the provisions of the development plan, so far as material "thereto, and to any other material considerations."

Section 15 provides as follows: "15.—(1) The Minister may "give directions to any local planning authority, or to local "planning authorities generally, requiring that any application "for permission to develop land, or all such applications of any "class specified in the directions, shall be referred to the Minister "instead of being dealt with by the local planning authority, "and any such application shall be so referred accordingly. "(2) Where an application for permission to develop land is "referred to the Minister under this section, the provisions of "subsections (1) and (2) of the last foregoing section shall apply, "subject to any necessary modifications, in relation to the deter- "mination of the application by the Minister as they apply in "relation to the determination of such an application by the local "planning authority: Provided that before determining any such "application the Minister shall, if either the applicant or the "local planning authority so desire, afford to each of them an "opportunity of appearing before and being heard by a person "appointed by the Minister for the purpose. (3) The decision "of the Minister on any application referred to him under this "section shall be final."

Section 16 provides: "16.—(1) Where application is made "under this Part of this Act to a local planning authority for "permission to develop land, or for any approval of that authority "required under a development order, and that permission or

" approval is refused by that authority, or is granted by them " subject to conditions, then if the applicant is aggrieved by their " decision he may by notice served within the time, not being less " than twenty-eight days from the receipt of notification of their " decision, and in the manner prescribed by the development " order, appeal to the Minister: . . . (2) Where an appeal is " brought under this section from a decision of the local planning " authority the Minister may allow or dismiss the appeal or may " reverse or vary any part of the decision of the local planning " authority, whether or not the appeal relates to that part, and " deal with the application as if it had been made to him in the " first instance; and the provisions of the last foregoing section " shall apply, subject to any necessary modifications, in relation to " the determination of an application by the Minister on appeal " under this section as they apply in relation to the determination " by the Minister of an application referred to him under that " section."

Section 17 provides as follows: " 17.—(1) If any person who " proposes to carry out any operations on land or make any " change in the use of land wishes to have it determined whether " the carrying out of those operations or the making of that " change in the use of the land, would constitute or involve " development of the land within the meaning of this Act, and, " if so, whether an application for permission in respect thereof " is required under this Part of this Act having regard to the " provisions of the development order, he may, either as part of " an application for such permission, or without any such applica- " tion, apply to the local planning authority to determine that " question. (2) The foregoing provisions of this Part of this Act " shall, subject to any necessary modifications, apply in relation " to any application under this section and to the determination " thereof as they apply in relation to applications for permission " to develop land and to the determination of such applications: " Provided that where it is decided by the Minister under any of " the said provisions that any operations or use to which an appli- " cation under this section relates would constitute or involve " development of the land, or that an application for permission " is required as aforesaid in respect thereof, that decision shall " not be final for the purposes of any appeal to the court under " the provisions of this Part of this Act relating to the enforce- " ment of planning control, in relation to those operations or that " use."

Section 23 deals with enforcement of planning control. Subsection (1) enables the local planning authority to serve an enforcement notice in respect of any development carried out without permission or in breach of conditions, and such notice " may . . . require the demolition or alteration of any buildings " or works, the discontinuance of any use of land, or the carrying " out on land of any building or other operations." Subsection (4) gives a right of appeal to a court of summary jurisdiction, and

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subsection (5) gives a right of appeal from the court of summary jurisdiction to a court of quarter sessions.

Sections 26 and 27 in certain cases empower the local planning authority by order confirmed by the Minister to require the discontinuance of authorised uses of land subject to compensation in respect of any damage shown to have been suffered by any person in consequence of the order. These provisions have not been resorted to in the present case.

Section 118 (1) declares "for the avoidance of doubt" that the provisions of the Act are applicable to land regulated by special enactments, but again this provision has not been resorted to here.

The planning history of the matter is briefly this.

The Town and Country Planning Act, 1947, which repealed a number of earlier enactments relating to town and country planning, received the Royal Assent on August 6, 1947, but did not come into operation until the appointed day fixed under section 20 of the Act, namely, July 1, 1948.

Between those two dates, namely, on November 17, 1947, the company made an application to the Malvern Urban District Council under the repealed enactments for permission to develop the land on which their quarries were situated "for quarrying "purposes including mining or quarrying operations . . . tip-"ping . . . and the usual processing and manufacture for sale "thereof as heretofore."

This application included a reference to the "special statutory "control of amenities" in the area by the Malvern Hills Conservators, but it is clear that the company cannot at that time have appreciated the vital bearing the Malvern Hills Acts, 1884 to 1924, might have on the question of permission.

By virtue of the transitional provisions contained in the Tenth Schedule to the Act of 1947 this application was treated as having been made on the appointed day under section 14 of that Act.

The next step was a direction by the Minister dated January 14, 1948, under the repealed enactments, which by virtue of the transitional provisions aforesaid was treated as a direction given on the appointed day under section 15 of the Act of 1947, that is to say, a direction that the company's application should be referred to the Minister instead of being dealt with by the local planning authority.

Next, after the Act of 1947 had come into force, there was a letter dated September 5, 1949, from the Minister giving the company permission to work the North Quarry (which had developed a dangerous fault) only to the extent necessary to ensure safety, and subject to certain other conditions.

On June 11, 1952, the Minister informed the company that a public local inquiry was to be held in regard (inter alia) to the company's application of November 17, 1947, and such inquiry was in due course held.

Finally, by a letter dated September 30, 1953, to the company

the Minister informed them of his decision on their application. That letter contained this passage: "At the inquiry it was contended, on behalf of the applicants, that the quarry operations proposed were development included in Class XII of the First Schedule to Part I of the Town and Country Planning General Development Order, 1950, in respect of which permission had been granted by article 3 of that Order. The Minister is advised, however, that notwithstanding the provisions of the Malvern Hills Act, 1924, and the said Order, permission is required for the continuance of the operations in question; and he must therefore deal with the application on its merits." The effect of the Minister's decision was that he refused permission altogether in respect of the North Quarry area and parts of the Tank Quarry area, but granted permission with respect to the remainder of the Tank Quarry area subject to a number of conditions, including one to the effect that the winning and working of granite should be limited to a period ending June 30, 1966. The Minister went on to say that the permission granted by his decision of September 5, 1949, was not affected by the present decision.

The General Development Order of 1948 which is relied on by the company as having by article 3 thereof given unconditional permission for the development in question under Class XII in the First Schedule thereto, came into force on the appointed day, namely, July 1, 1948, that being also the date on which the company's application was treated as having been made under the Act of 1947 by virtue of the provisions in the Tenth Schedule to that Act. As from May 22, 1950, the General Order of 1948 was replaced by the Town and Country Planning (General Development) Order, 1950 (S.I. 1950, No. 728) but the Order of 1950 preserved, in article 3 thereof and Class XII in Part I of the First Schedule thereto, the effect of article 3 and Class XII in the First Schedule to the 1948 General Order, and, accordingly, there is no material distinction between the two Orders for the present purpose. Both Orders contained in article 4 provisions under which a direction excluding the development now in question from the permission accorded by article 3 could have been given, but these provisions have not been resorted to in the present case.

This was how the matter stood when the company on December 21, 1954, commenced their action against the respondent Ministry and county council for declaratory relief of the nature I have indicated, and I may now return to the issues raised.

It will be convenient to deal first with the preliminary objection based on section 17 of the Act.

The argument for the respondents is of this nature.

Section 15 (3) provides that the decision of the Minister on any application referred to him under that section is to be final. Section 16 provides by reference to section 15 (3) that the decision of the Minister on any application determined by him on an appeal from the local planning authority shall likewise be final.

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Section 17 itself provides by subsection (2) that the foregoing provisions of Part III of the Act (which, be it observed, include sections 15 and 16) shall apply in relation to any application under section 17 as they apply in relation to applications to develop land and to the determination of such applications. The effect of that clearly must be to make the Minister's decision under section 17 (2) final, subject only to the proviso to subsection (2) under which a decision of the Minister to the effect that the relevant operations or use would constitute development, or that an application for permission is required in respect thereof is not to be final for the purposes of any appeal to the court under the enforcement provisions of Part III, the reference being to the right of appeal to a court of summary jurisdiction given by section 23. In this context—so proceeds the argument—it is plainly the intention of section 17 that with the qualification introduced by the proviso to subsection (2) the Minister should have exclusive jurisdiction finally to determine whether any given operations on or change of use of land would constitute development, and, if so, whether an application for permission in respect thereof is required, just as he has exclusive jurisdiction finally to determine an application referred to him under section 15, or coming before him on an appeal from the local planning authority under section 16. The matters on which the Minister is empowered to adjudicate under section 17 include the very point at issue here. In short, the statute has prescribed the tribunal which is to determine the matters referred to in section 17, and by so doing has precluded recourse to any other tribunal.

I am not concerned to dispute that where an application has been made, and referred to the Minister under section 15, or brought before him on appeal under section 16, and he has made his decision thereon, the finality with which that decision is invested by the express terms of the Act could not be challenged by the applicant in proceedings against the Minister for a declaration to the effect that his decision was wrong. Nor am I concerned to dispute that a person who has applied for and obtained the Minister's ruling under section 17 (1) of the Act is (subject only to the proviso to subsection (2) where applicable) similarly precluded from challenging its finality in any such proceeding. But, as I think, very fairly in the circumstances of the case, Mr. Squibb (for the respondents) disclaimed the argument that the Minister's decision on the company's application referred to him under section 15 of the Act now precludes the company from raising the contention that unconditional permission was automatically granted on the appointed day by the General Development Order of 1948, and that the application and the Minister's decisions thereon were therefore wholly ineffectual.

Accordingly, the respondents' preliminary objection is to be dealt with on the footing that this contention was one which it was open to the company to raise at the time of action brought, the only question being whether they were entitled to raise it, as

they sought to do, by an action in the High Court for declaratory relief, or were, as the respondents contend, confined by the terms of the Act of 1947 to raising it for the decision of the local planning authority, or of the Minister on appeal, under section 17 of the Act.

The respondents contend that the company were so confined, on the ground that planning control is purely a creature of statute, that the statute creating it has prescribed by section 17 a particular mode of deciding with respect to it questions of the nature described in section 17, and, accordingly, that section 17 must be construed as excluding recourse to any other tribunal for the decision of any question of that nature.

It is said that this proposition is warranted by the case in your Lordships' House of *Barraclough* v. *Brown*.[14] In that case (to put it shortly) the undertakers of a certain navigation were by a private Act of Parliament empowered, in the event of any vessel being sunk in the navigation, to remove the vessel and to defray the expenses by sale, or if they thought fit to "recover such "expenses from the owner of such . . . vessel in a court of "summary jurisdiction." The undertakers sued in the High Court the persons who had been the owners of the sunken vessel at the time of the sinking, but had ceased to be such before the expenses were incurred, claiming the amount of the expenses as damages recoverable at common law. It was objected that the court had no jurisdiction to entertain the action, and the undertakers sought to meet this objection by the argument that even if they could not recover the expenses by an action in the High Court, they were at all events entitled to come to the High Court for a declaration that upon the true interpretation of the statute they had a right to recover them. The undertakers failed in both courts below and in your Lordships' House. In holding that the appeal should be dismissed Lord Herschell said[15]: "Unwilling "as I am to determine the appeal otherwise than on the merits of "the case, I feel bound to hold that it was not competent for the "appellant to recover the expenses, even if the respondents were "liable for them, by action in the High Court. The respondents "were under no liability to pay these expenses at common law. "The liability, if it exists, is created by the enactment I have "quoted. No words are to be found in that enactment con-"stituting the expenses incurred a debt due from the owners of "the vessel. The only right conferred is 'to recover such "'expenses from the owner of such vessel in a court of summary "'jurisdiction.' I do not think the appellant can claim to recover "by virtue of the statute, and at the same time insist upon doing "so by means other than those prescribed by the statute which "alone confers the right." Dealing with the argument that a claim for a declaration could be maintained, he said this[16]: "It "might be enough to say that no such case was made by the

[14] [1897] A.C. 615.
[15] Ibid. 619.
[16] Ibid. 620.

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" appellant's claim. But, apart from this, I think it would be " very mischievous to hold that when a party is compelled by " statute to resort to an inferior court he can come first to the " High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition " was not supported by authority, and is, I think, unsound in " principle." Lord Watson said [17]: " The only right which the " undertakers have to recover from an owner is conferred by these " words: ' Or the undertakers may, if they think fit, recover such " ' expenses from the owner of such boat, barge, or vessel in a " ' court of summary jurisdiction.' The right and the remedy are " given uno flatu, and the one cannot be dissociated from the " other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely " to assess the amount of expenses to be repaid to the undertaker, " but to determine by whom the amount is payable; and has, " therefore, by plain implication, enacted that no other court has " any authority to entertain or decide these matters." Lord Shand said [18]: " I agree entirely with what has fallen from my noble " friend Lord Watson on both points. It appears to me that the " jurisdiction which can alone be exercised in a case of this kind " belongs to a court of summary jurisdiction, and that, therefore, " this suit could not be properly initiated in the court in which " it has been brought." Lord Davey said [18]: " My Lords, I " agree . . . that there is no common law right of action in this " case, and that the High Court had no jurisdiction over the " subject-matter of this action under the . . . Acts, and that the " appeal must consequently be dismissed. I only desire to " express my dissent from the contention . . . that although the " High Court could not make any judgment or give any relief in " this action, the court might make a declaration binding the " rights of the parties. In my opinion this is altogether wrong."

The principle which the respondents seek to call in aid is succinctly stated by Willes J. in *The Wolverhampton New Waterworks Co.* v. *Hawkesford*,[19] where he observed that there were three classes of cases in which a liability might be established founded upon a statute, and said of the third: " But there is a " third class, viz., where a liability not existing at common law is " created by a statute which at the same time gives a special and " particular remedy for enforcing it. The present case falls within " this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent " to the party to pursue the course applicable to cases of the " second class. The form given by the statute must be adopted " and adhered to. The company are bound to follow the form of " remedy provided by the statute which gives them the right to " sue."

[17] [1897] A.C. 615, 622.
[18] Ibid. 623.
[19] (1859) 6 C.B.N.S. 336, 356.

In truth, the validity of the principle relied on by the respondents is not open to doubt. But the question is whether it is applicable in the present case, and, in my opinion, it is not.

Where a statute creates a new right which has no existence apart from the statute creating it, and the statute creating the right at the same time prescribes a particular method of enforcing it, then, in the words of Lord Watson in *Barraclough* v. *Brown*,[20] "the right and the remedy are given uno flatu, and the one "cannot be dissociated from the other." As Lord Herschell put it in the same case,[21] the party asserting the right cannot "claim "to recover by virtue of the statute, and at the same time insist "upon doing so by means other than those prescribed by the "statute which alone confers the right." The principle is wholly apposite in cases comparable to *Barraclough* v. *Brown*.[22] If A has a right founded entirely upon a particular statute to recover a sum of money from B, and the statute goes on to provide that the sum in question may be recovered in proceedings of a particular kind, then it is wholly reasonable to impute to the legislature an intention that the sum in question, recoverable solely by virtue of the statute, should be recoverable in proceedings of the kind provided by the statute and not otherwise. The statute puts upon B for the benefit of A a liability to which B could not otherwise be subjected, and at the same time prescribes a particular form of proceedings in which it may be enforced. No doubt B must then submit to being amerced to the extent and in the manner provided by the statute. But the incidents of the burden cast upon B by the terms of the statute are not to be changed from or made more onerous than those which the statute provides, as they would be if A was at liberty to recover the sum in question, or seek a declaration of his right to recover it, in any other form of proceedings to which he might choose to have recourse. As it seems to me, the purpose underlying the principle is the protection of the person against whom the statutory right is asserted from oppression on the part of the person asserting it.

But how does the principle stand in relation to the planning legislation?

The Act of 1947, so far as it relates to planning, cannot be said to confer uno flatu on a landowner statutory rights coupled with particular remedies for breaches of those rights. On the contrary, that Act restricts to a remarkable degree the ordinary right of a landowner to deal with his land as he pleases; and it might almost be said that the only rights it creates are rights conferred on the Minister and the local planning authorities for the purpose of performing their statutory duty in relation to the administration and enforcement of planning control.

Section 17 of the Act of 1947 cannot, in my judgment, reasonably be described as conferring upon landowners a special remedy for the enforcement of statutory rights. On the contrary, what

[20] [1897] A.C. 615, 622.
[21] Ibid. 620.
[22] [1897] A.C. 615.

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it appears to me to do is to provide a cheap and expeditious procedure by which they can if they so desire ascertain the extent of the restrictions which, according to official opinion, are imposed by the Act on their ordinary rights as landowners. The company here cannot be said to occupy the position of the undertakers in *Barraclough* v. *Brown*.[23] They are not seeking to enforce statutory rights by methods other than those prescribed by the Act creating them. They are merely seeking to ascertain the extent of their statutory liabilities. It is true that section 17 itself may be said in a sense to create a statutory remedy in the shape of an application under it for the determination of any question of the kind to which it refers, but it is not a remedy for the breach of any statutory right. It is merely directed to the removal of doubts regarding the effect of the legislation in particular cases.

For these reasons, the principle of *Barraclough* v. *Brown*[24] has, in my judgment, no application here, and apart from that principle I can find no sufficient ground for holding that section 17 provides an exclusive method of determining questions of the kind to which it relates, and deprives the courts of the jurisdiction which they ordinarily possess of determining by declaration questions of that description.

Clear words would be necessary to produce this result, and paying due regard to the terms of section 17, and to the argument that it must be read in conjunction with sections 15 and 16, I cannot find any sufficient indication that it was intended to oust the jurisdiction of the court on any question which might have been made the subject of an application under section 17.

The section is permissive and not imperative. That in itself is not a circumstance of any positive weight (see the permissive language of the section in *Barraclough* v. *Brown*[25]); but the fact remains that it is not in terms made obligatory to apply under section 17, which is at least consistent with the company's contention.

Much more important is the circumstance that section 17 made its first appearance in planning legislation in the Act of 1947. In its absence the right now claimed by the company of going to the court for declaratory relief could hardly have been doubted. If the introduction of section 17 had been intended to change the law by ousting the jurisdiction of the court on questions capable of being dealt with under the section, that important change would surely have been made in express terms.

For the reasons I have stated I am of opinion that the preliminary objection fails.

This conclusion accords with the views expressed by McNair J. and the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council*.[26] That was a case in which a person

[23] [1897] A.C. 615.
[24] Ibid.
[25] Ibid.
[26] [1957] 2 Q.B. 136; [1958] 1 Q.B. 478; [1957] 2 W.L.R. 627; [1957] 3 W.L.R. 919; [1957] 1 All E.R. 825; [1957] 3 All E.R. 529.

served with an enforcement notice under section 23 of the Act of 1947 did not avail himself of the right of appeal to a court of summary jurisdiction given by subsection (4) of section 23, but applied to the court for a declaration that the enforcement notice was invalid. It was held that he was not precluded by the statutory provisions from applying to the court for relief, and that he was entitled to the relief claimed.

On the footing that the court had jurisdiction to entertain the action, I think that the case was clearly one in which the company, if they made good their contentions on the merits, could properly be given declaratory relief: see *Vine* v. *National Dock Labour Board*.[27]

I may therefore now pass to the substantial issue in the case, namely, whether the company's quarrying operations constituted "development authorised by any local or private Act "of Parliament . . . which designates specifically both the "nature of the development thereby authorised and the land upon "which it may be carried out" within the meaning of Class XII in the First Schedule to the General Development Order of 1948.

It is not in dispute that if the company's quarrying operations were, within the meaning of Class XII, "authorised" by the Malvern Hills Acts, 1884 to 1924, the additional requirement that the nature of the development so authorised and the land upon which it might be carried out should be specifically designated by the legislation authorising it was satisfied in the present case.

The case therefore turns substantially on the question whether this development was so authorised.

I have so far referred collectively to the Malvern Hills Acts, 1884 to 1924. There were in fact three Acts passed respectively in 1884, 1909 and 1924. Of these the Act of 1909 contains nothing of any relevance to the present dispute, while the Act of 1884 calls for no more than a passing reference. The statutory authorisation of the company's quarrying operations is to be found, if anywhere, in the Act of 1924. The Act of 1884 provided for the appointment of conservators who were given divers powers designed to protect the amenities of the Malvern Hills, but these powers were found to be inadequate to provide the protection intended, and the position at the time of the passing of the Act of 1924 is thus described in the preamble to that enactment:

"And whereas in recent years the amenities of the Malvern "Hills have been seriously interfered with by quarrying opera-"tions and by the erection of buildings sheds machinery and "plant and those operations are being extended in such manner "as to threaten to destroy the value of the Malvern Hills as "objects of public interest as well as to impede the user and "enjoyment thereof for purposes of public recreation and wholly "to alter the state of the hills as they existed in the year one "thousand eight hundred and eighty-four:

[27] [1957] A.C. 488; [1957] 2 W.L.R. 306; [1956] 3 All E.R. 939.

" And whereas the powers of the existing Conservators are " insufficient to preserve the Malvern Hills from such quarrying " operations and to prevent the erection of such buildings sheds " machinery and plant as aforesaid and it is desirable that further " provision should be made for the acquisition by the existing " Conservators of the manorial and other rights over the Malvern " Hills and of other property or interest in the Malvern Hills " or any part thereof and that further powers of protecting " contolling and dealing with the Malvern Hills should be con- " ferred upon the existing Conservators as in this Act provided:

" And whereas it is expedient that the area of jurisdiction of " the existing Conservators should be enlarged and their con- " stitution altered as in this Act provided: . . . "

At the time of the passing of the Act of 1924 the company had for many years been operating granite quarries in the Malvern Hills, and at that time owned the freehold of the area known as the Tank Quarry and held leases or licences of the quarrying rights in additional areas lying to the south of the Tank Quarry area. It is unnecessary to discuss in detail the somewhat complicated history of these leases or licences.

The Act of 1924 must be referred to at some length.

Section 2 contains a number of definitions, including the following: " ' The Minister ' and ' The Ministry ' mean respec- " tively the Minister and the Ministry of Agriculture and Fisheries; " ' Revenues of the Conservators ' includes the revenues of the " Conservators from time to time arising from the Malvern Hills " or from any land or other property for the time being belonging " to the Conservators. . . . "

Section 5 reads: " 5. The area within the jurisdiction of the " Conservators for the purposes of this Act and the Acts of 1884 " and 1909 shall comprise the lands rights and interests described " in the First Second and Third Schedules to this Act together " with all lands common or waste over which the Conservators " now have or may hereafter acquire rights and interests all of " which are in this Act referred to as ' the Malvern Hills.' "

By section 7 (1) " . . . the existing Conservators as re-con- " stituted by this Act and their successors shall continue to be " a body corporate by the name of ' the Malvern Hills Con- " servators ' . . . having power to hold and manage lands."

Section 20 provides that the Malvern Hills shall be regulated and managed by the conservators under and in accordance with that Act and the Acts of 1884 and 1909.

By section 21 the conservators are required to preserve the natural aspect of the Malvern Hills and protect trees, etc.

Sections 22 and 23 are in these terms: " 22.—(1) Notwith- " standing anything contained in the Acts of 1884 and 1909 the " Conservators are hereby authorised to purchase the whole or " any portions of the lands properties quarries manorial rights " and interests described in the Second and Third Schedules to " this Act and the owners thereof and other persons interested

" therein shall sell the same subject and according to the pro-
" visions of this Act and the Acts incorporated herewith.

" (2) In assessing the amount of compensation to be paid
" under this Act to the owner of any quarry any obligations such
" owner may be under in regard to his employees shall be taken
" into account.

" 23. The powers of the Conservators for the compulsory
" purchase of lands and other interests for the purposes of this
" Act shall cease after the expiration of five years from the
" thirty-first day of December one thousand nine hundred and
" twenty-four."

By section 24 (1): " On the Conservators giving notice of " their intention to exercise their option to purchase the under-" taking of the Pyx Granite Company Limited . . . pursuant to " the heads of agreement set forth in the Fourth Schedule to " this Act the Conservators shall " make a certain deposit.

By section 25 (1) the conservators were empowered to make and enforce by-laws to regulate quarrying in, upon or under the Malvern Hills: and by section 25 (2) provision was made for the payment by the conservators of compensation to any owner, lessee or occupier injuriously affected by the operation of any by-law so made.

By section 26 (1) the Minister was empowered at any time on the application of the conservators and after holding a local inquiry to make an order or orders to prohibit quarrying upon any part of the Malvern Hills specified in such order or orders.

By section 26 (2) provision was made for the payment of compensation by the conservators to persons whose interests might be affected by such order.

By section 27 the Minister was empowered, after an application had been made to him by the conservators under section 26 and had not been withdrawn, to make a temporary order or temporary orders to prohibit quarrying on the lands to which such application related.

Section 54 provides as follows: " 54. For the protection of the " Pyx Granite Company Ltd. (in this section referred to as ' the " ' company ') the following provisions shall unless otherwise " agreed in writing between the company and the Conservators " and the Malvern Council have effect (that is to say): The " heads of agreement as set forth in the Fourth Schedule to this " Act are hereby confirmed and made binding on the company " and the Conservators and the Malvern Council and the pro-" visions of this Act shall only apply to or affect the undertaking " property or rights of the company subject to the provisions of " the said heads of agreement."

The second schedule to the Act, headed " Lands and Quarries " authorised by this Act to be acquired by the Conservators," contains no reference to the Tank Quarry.

The Fourth Schedule to the Act, headed " Heads of Agree-" ment between the Pyx Granite Company Limited and the

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"Conservators and the Malvern Urban District Council," includes the following provisions: "1. The company's rights of "quarrying to be limited (outside their freehold property) to "the quarryable area at North Malvern defined on a plan to be "signed by the Right Honourable the Lord Islington the Chair- "man of the Committee of the House of Lords to whom the "Bill is referred a copy of which is to be supplied by the Con- "servators to the company. 2. The company to surrender the "remaining area held by them under the Gandolfi Licences but "to be at liberty to work under the Berington Lease until it "expires. That lease is not to be renewed. 3. The Malvern "Urban District Council (hereinafter referred to as 'the council') "to transfer to the company their interest as lessees or tenants "of the two quarries at North Malvern which they hold and "the company to purchase by agreement or by valuation the "plant and machinery of the council now there. 4. The company "to supply the council with all stone they require for repair of "roads in their area at 7s. 9d. per ton at the quarry subject to "variation of price according to variations in wages. 5. The "council to extend the company's existing licences so far as "they affect the areas which the company may under clause 1 "work to the twenty-fourth June one thousand nine hundred "and sixty on the same terms as at present affect such areas "respectively under the present licences. 6. The conservators "and the council to arrange for the grant to the company of a "licence to work the present council's quarries within the area "mentioned in clause 1 to the twenty-fourth June one thousand "nine hundred and sixty on the terms of the existing 1910 licence "so far as applicable.

. . . . . .

"10. The company to exclude from its operations the play- "ground hatched black on the plan and not to affect injuriously "the existing reservoir and aqueduct on the land numbered 10 "on the deposited plan in the parish of Malvern.

"11. The Conservators to be at liberty to plant trees on the "disused quarry dumps at the North Malvern quarries the work "to be done to the satisfaction of the company.

"12. The Conservators to have an option to purchase the "company's undertaking as a going concern at the expiration of "two years after written notice of such intention shall have been "given to the company during the third fourth or fifth year after "the passing of the Bill.

. . . . . .

"14. A clause to be inserted in the Bill excluding the under- "taking property and rights of the company from its operation "except that bye-laws may be made with the approval of the "Home Secretary (after notice to the company) in regard only "to blasting operations in the company's quarries for the pro- "tection of the public.

" 15. The company to be at liberty to continue working under " the existing licences without restriction until the new licences " above mentioned are granted.

. . . . . .

" 17. The company shall be at liberty to make and use a " tunnel fifteen feet wide and ten feet high under the area of " land dividing their freehold property from the council's quarries " at a point above the reservoir of the council to be agreed be- " tween the conservators and the council in accordance with " plans to be approved by their respective surveyors and regula- " tions to be made by the council for the protection of the public.

" 18. These provisions to be inserted in an agreement which " shall contain an arbitration clause and to be executed in " triplicate such agreement in case of difference to be settled by " a conveyancing counsel to be agreed upon between the com- " pany and the conservators or failing such agreement to be " nominated by the President of the Incorporated Law Society."

These are, I think, all the provisions of the Act of 1924 to which it is necessary to refer for the present purpose.

Reserving for later consideration the position in regard to the Tank Quarry, as to which a special question arises, it appears to me to be reasonably plain that if the heads of agreement in the Fourth Schedule are to be looked on as taking effect by virtue of the Act, and not merely by virtue of a contract between the parties recorded in the Act but having no statutory force, the Act did authorise the development by quarrying operations of the quarryable area as defined in paragraph 1 of the heads of agreement, and the plan therein referred to, including as part of that area the leasehold interests to be purchased from the Urban District Council under paragraph 3. Paragraph 1, by limiting the company's rights of quarrying to that area, must, I should have thought, be taken by necessary implication to have authorised them to quarry within it.

This view is, to my mind, borne out by a consideration of the Act as a whole. Its object may be shortly described as being to preserve the amenities of the Malvern Hills, and in particular to preserve them from the inroads of quarrying. To that end the conservators were given considerable powers, including the power of making bye-laws under section 25, and were enabled to invoke the power of the Minister to make orders prohibiting quarrying operations altogether under sections 26 and 27. The company might have been subjected, like other quarry owners in the Malvern Hills, to these restrictive provisions. But, owing no doubt to their opposition to the Bill, they were accorded special treatment. This was done by means of section 54 and the heads of agreement in the Fourth Schedule. Section 54, expressed to be for the protection of the company, enacted that unless otherwise agreed in writing between the company, the Conservators and the Malvern Council, the following provisions should have effect; and went on to provide that the heads of

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agreement in the Fourth Schedule were thereby confirmed and made binding on the same three parties, and that the provisions of the Act should only apply to or affect the undertaking, property or rights of the company subject to the provisions of the said heads of agreement. Turning to those heads of agreement one finds that by paragraph 1 they limit the company's rights of quarrying to the quarryable area defined in the plan, include in such area the quarries, the leasehold interest of the Urban District Council in which was to be purchased by the company under paragraph 3, and provide, by paragraph 2, that the company shall surrender the remaining area held by the company under the Gandolfi Licences, which apart from the Berington Lease, which we were invited to ignore, may be taken as including the whole of the land over which the company had rights of quarrying as licensees outside the permitted area. Then under paragraphs 5 and 6 provision is made for the extension of the company's existing licences so far as they affect the areas which the company may work under paragraph 1 to June 24, 1960, and the grant of a licence expiring on the same date to work "the present council's quarries" (sic "the Council's present "quarries") within the permitted area. Thus the company, in exchange for their exemption from the restrictive provisions of the Act, the recognition of their right to work within the area shown on the plan, including as part of such area the leasehold interests to be acquired from the Urban District Council, and the extension of such rights until 1960, gave up their right to work the remainder of the land held by them under the Gandolfi licences, submitted to the grant to the conservators of an option to purchase their undertaking under paragraphs 12 and 13, and furthermore submitted to the imposition of a number of stipulations to be observed and performed by the company for the protection of the public and the preservation of amenities.

Viewing these arrangements as a whole, it appears to me that they did, according to the ordinary meaning of the word, authorise the company to work within the limits prescribed by paragraph 1. Apart from section 54 and the heads of agreement the company would have been exposed to the risk of their quarries being closed down by an order of the Minister under section 26. They were, as I think, relieved of that risk and given security of tenure by section 54 and the heads of agreement upon the terms specified in the heads of agreement. That, in my view, amounted to authorisation of their quarrying operations within the reduced area allowed to them. In his most helpful judgment Morris L.J. referred [28] to the dictionary definition of "to autho-"rise" cited by Tomlin J. (as he then was) in *Evans* v. *E. Hulton & Co. Ltd.*,[29] "to give formal approval to, to sanction, approve, "countenance." Any one of these equivalents would, in my view, be apposite here.

[28] [1958] 1 Q.B. 554, 587. [29] (1924) 131 L.T. 534, 535.

The main arguments against the view that the development here in question was authorised by the Act of 1924 are two. The first is that the heads of agreement were merely contractual in their operation, so that the authorisation, if any, in this case did not satisfy the requirement in Class XII of the First Schedule to the General Development Order of 1948, because the development if authorised at all was not authorised by "any local or "private Act of Parliament." This argument, which commended itself to Lord Denning, is founded upon *Reg.* v. *Midland Railway Co.*,[30] but that appears to me to have been a very different case from this. In that case an agreement concluded between two railway companies contained a provision for arbitration in manner provided by the Railway Companies Arbitration Act, 1859. Later a private Act of Parliament was passed, and this Act scheduled the agreement and provided that it should be "confirmed and "made binding" upon the parties thereto. Disputes having arisen, one of the companies concerned applied to the Railway Commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. Objection was taken to the jurisdiction, and the objection succeeded, on the ground that the right to refer differences to arbitration was derived from the agreement itself; and that the difference was not "required or authorised to be referred to arbitration" under the provisions of any general or special Act within the meaning of the Act of 1873; and consequently that the Railway Commissioners had no jurisdiction to entertain the application.

It is to be observed that in that case there was by virtue of the agreement a valid contractual arbitration clause, before the private Act was ever passed. In the present case no concluded agreement had been entered into before the passing of the Act. The heads of agreement were not binding on anyone until the Act had been passed, and their terms were plainly such that when the Act was passed they could have no contractual validity independently of the Act. If section 54 and the Fourth Schedule had not been included in the Act it is reasonably plain that a contract in the terms of the heads of agreement in derogation of the terms of the Act could not have been validly made. I respectfully adopt the words of Romer J. (as he then was) in the unreported case of *Pyx Granite Co. Ltd.* v. *Malvern Hills Conservators and the Malvern Urban District Council*[31] where he said: "The parties only became bound by the heads of agree-"ment by virtue of the express provisions to that effect in "section 54 of the Act and the heads of agreement were in "this way made part of the Act." For these reasons I am of opinion that the argument that any authorisation given was not given by the Act, but merely vested in contract, fails.

I should add that I see nothing to displace this conclusion in the words "unless otherwise agreed in writing" which occur

[30] 19 Q.B.D. 540.

[31] Unreported (1925 P. No. 142).

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in section 54. Those words, to my mind, merely indicate that the statutory protection afforded to the company may be relinquished by the company wholly or in part if the company, the conservators and the council so agree, and do not deprive such protection of its statutory character.

The other main argument against the view that the development here was "authorised" within Class XII is to the effect that the Act did not authorise the company to do anything which they were not entitled to do before it was passed. Before the Act was passed they were entitled to quarry on any lands owned by them or in which they had or might be able to obtain licences to quarry. After the Act was passed their rights of quarrying were restricted in manner provided by section 54 and the Fourth Schedule, but they were given no new rights save in so far as they acquired the leasehold interest of the council in the quarries mentioned in paragraph 3 of the Fourth Schedule, which were included in the permitted area.

I think this argument takes too narrow a view. When the Bill which became the Act of 1924 was in the process of passing into law, prevention of quarrying was, so to speak, in the air. The legislature must be taken to have had under consideration the whole question of quarrying in relation to its effect on the amenities of the Malvern Hills, and the extent of the restrictions on the former which it would be reasonable and practicable to impose in the interests of the latter. The Act when it emerged could theoretically have stopped quarrying altogether, or subjected it to restrictions of any degree of severity as the legislature might think fit. In such circumstances I think it is right to regard an owner or licensee of quarry lands who is permitted by the Act to quarry without restriction part of his quarryable lands on condition that he gives up quarrying the rest, as authorised by the Act to quarry (albeit in right of his interest as owner or lessee) that part of his lands which the legislature permits him to quarry.

Accordingly I think this argument fails also.

A subsidiary argument arises with respect to the Tank Quarry, the company's own freehold. The difficulty here is this. Section 5 defines "The area within the jurisdiction of the Conservators "for the purposes of this Act . . ." by saying that it shall comprise the lands, rights and interests described in the First, Second and Third Schedules to the Act together with all lands common or waste over which the Conservators "now have or "may hereafter acquire rights and interests all of which are in "this Act referred to as 'the Malvern Hills.'" The First Schedule, "Property vested in the Conservators," and the Third Schedule, "Manorial Rights authorised by this Act to be acquired "by the Conservators," clearly have no reference to the Tank Quarry. But the Second Schedule, "Lands and Quarries autho- "rised by this Act to be acquired by the Conservators," in which

one would expect to find the Tank Quarry, contains no mention of it, although it does include other land held by the company as licensees. Passing to the Fourth Schedule, it appears that the only references to the Tank Quarry in that schedule consist of the words in brackets "(outside their freehold property)" in paragraph 1, and of the provision in paragraph 17 enabling the company to make a tunnel under the area of land dividing their freehold quarry from the council's quarries.

It is, accordingly, suggested that the Tank Quarry is not included in the area within the jurisdiction of the conservators as defined in section 5 of the Act, and not included in the quarryable area defined in paragraph 1 of the Fourth Schedule, and, accordingly, that the Act cannot be held to have authorised quarrying upon it.

This is a troublesome point, but I have come to the conclusion that the Tank Quarry must be taken to be included in the area of the conservators' jurisdiction, and also to be included in the quarryable area as defined in paragraph 1 of the Fourth Schedule for the following reasons: Section 5 of the Act defines the area of the conservators' jurisdiction as comprising not merely the scheduled items but also "all lands common or waste over which the Con- "servators now have or may hereafter acquire rights and "interests." I construe these words as including "all lands, or "common, or waste" and not "all common or waste lands." Paragraph 12 of the heads of agreement gives the conservators an option to purchase the company's undertaking as a going concern on the terms stated in that paragraph and in paragraph 13, this option being also referred to in section 24 of the Act. Clearly, the company's undertaking must be taken as including the Tank Quarry. An option to purchase confers on the grantee of the option an interest in the property to which the option relates. Accordingly, in my opinion the Tank Quarry is included in the area of the conservators' jurisdiction under section 5, as falling within the expression "all lands . . . over which the Conservators "now have or may hereafter acquire rights and interests." With respect to paragraph 1 of the Fourth Schedule, I regard the expression "(outside their own freehold)" as of somewhat doubtful import, but as being well capable of meaning "apart "from their freehold property" or "over and above their freehold "property," so that the permitted area extends to their freehold property as well as to the other property shown on the plan as comprised in the quarryable area. I think this construction should be adopted, particularly in view of the apparent absurdity of omitting the Tank Quarry. This conclusion is, to my mind, aided by the fact that the option given to the conservators is an option to purchase the company's undertaking as a going concern. That surely imports an intention that the working of the Tank Quarry would in the meantime continue. The provisions in paragraph 17 of the Fourth Schedule as to the making of the tunnel

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also appear to me to import the intention that the Tank Quarry should be worked. The fact that the option was never exercised does not, in my view, affect its bearing upon the construction of the Act.

I should perhaps add a word about the unreported case already referred to. The decision of the Court of Appeal [32] was to the effect that paragraph 14 of the heads of agreement was inoperative. The judgments are not altogether easy to follow, but if and so far as they involve the conclusion that notwithstanding section 54, enacted as it was for the protection of the company, by-laws made under section 25 would bind the company, however inconsistent they might be with the quarrying within the permitted area conferred on the company without qualification by the Fourth Schedule, or that notwithstanding section 54, an order could be made by the Minister under section 26 or section 27 prohibiting further quarrying by the company within the permitted area, I cannot agree with them.

I find it unnecessary to discuss the agreement of December 14, 1925, made in pursuance, or purported pursuance, of paragraph 18 of the heads of agreement. To my mind, the solution of the question of authorisation by the Act of 1924 is to be found in the Act itself, including as part of the Act the heads of agreement.

It follows from the views above expressed that, in my opinion, the difficult questions as to the propriety of the conditions attached to the permission given by the Minister under the Act of 1947, on the assumption that he was in a position to give any effective permission at all, and as to the appropriate remedy on the footing that the conditions were bad, which were fully and ably argued before your Lordships, do not arise, and I express no opinion about them one way or the other.

For these reasons I would allow this appeal.

Appeal allowed with costs.

Solicitors: *Stephenson, Harwood & Tatham; Solicitor, Ministry of Housing and Local Government; Sharpe, Pritchard & Co. for W. R. Scurfield, Worcester.*

J. A. G.

[32] Unreported, June 24, 1925.

[PRIVY COUNCIL.]

CYRIL VERNAL UDALAGAMA . . . APPELLANT;

AND

IRANGANIE BOANGE . . . . . RESPONDENT.

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July 29.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Breach of promise—Basis of action—Statutory requirement of promise "in writing"—Express written promise essential—Written evidence of previous oral promise insufficient—Limited admission of extrinsic evidence—Marriages (General) Ordinance (Legislative Enactments of Ceylon, 1938), *s.* 19 (3), *proviso.*

By the proviso to section 19 (3) of the Ceylon Marriages (General) Ordinance (c. 95 of the Legislative Enactments of 1938): ". . . no action shall lie for the recovery of damages for breach of "promise of marriage, unless such promise of marriage shall have "been made in writing":—

Held, that the writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., admit the making of the promise and evince continuing willingness to be bound by it. The promise in writing may be contained in one or more documents, but documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry. Extrinsic evidence is only admissible where such evidence is permissible on general grounds, e.g., where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing.

Accordingly, where letters passing between the parties on which the plaintiff relied as containing a promise to marry did no more, on the construction most favourable to the plaintiff, than assume that a marriage would take place as a result of an oral promise, the action necessarily failed, extrinsic evidence being inadmissible to supply the deficiencies in the correspondence.

Jayesinhe v. *Perera* (1903) 9 N.L.R. 62 overruled.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 14 of 1958) from a judgment and decree of the Supreme Court of Ceylon (Gratiaen and Swan JJ.) (November 25, 1955) reversing a judgment and decree of the District Court of Kegalle (March 10, 1954) which had dismissed an action by the present respondent against the appellant claiming Rs. 20,000 as damages for breach of promise to marry.

Family arrangements in respect of a proposed "arranged "marriage" of the parties fell through because the respondent's dowry of Rs. 5,000 and five acres of tea was not forthcoming, and the main question in this appeal was whether there was an independent promise "in writing" as required by the proviso to section 19 (3) of the Marriages (General) Ordinance, of Ceylon, which provided that ". . . no action shall lie for the recovery

* *Present*: LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

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" of damages for breach of promise of marriage, unless such " promise of marriage shall have been made in writing." The respondent alleged that such promise was contained in letters which passed between her and the appellant in December, 1950.

The terms of the letters appear from the judgment of the Judicial Committee.

1959. June 1, 2. *Sir Frank Soskice Q.C.* and *Ralph Millner* for the appellant.

The respondent did not appear and was not represented.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Beling* v. *Vethecan* [1]; *Mildred Fonseka* v. *Henry Silva* [2]; *Philip* v. *Wettasinghe* [3]; *Abilinu Hamine* v. *Appuhamy* [4]; *In re New Eberhardt Co., ex parte Menzies* [5]; *Cooray* v. *Cooray* [6]; *Ana Fernando* v. *Jokins.* [7]

July 29. The judgment of their Lordships was delivered by LORD TUCKER. In this case the respondent sued the appellant for damages for breach of promise of marriage. A good deal of oral evidence, conflicting on many points, and some documentary evidence was placed before the trial judge, who held that no written or oral promise to marry was established on the evidence before him. The greater part of the evidence related to the question whether there was an oral promise to marry. For reasons which appear later it will be seen that this evidence was immaterial to a decision of this case and should therefore have been excluded.

On appeal the Supreme Court held that under the earlier decisions of that court an " action for damages lies if, in a letter " addressed by the defendant to the plaintiff, there is confirma- " tion or at least an unqualified admission of a subsisting and " binding oral promise of marriage." It held that the necessary elements existed and, setting aside the order of the District Judge, entered judgment for the respondent. The question is whether this ruling was correct.

It is convenient at this stage to state what in their Lordships' opinion is the law of Ceylon relating to the matter. An action does not lie in Ceylon for every breach of a promise to marry. A restriction is imposed by section 19 of the Marriages (General) Ordinance (Chapter 95, Legislative Enactments of Ceylon, Vol. III, p. 122), which, after making certain provision which has no bearing on cases of breach of promise, enacts as its final provision: " . . . no action shall lie for the recovery of " damages for breach of promise of marriage, unless such promise " of marriage shall have been made in writing." There is nothing

[1] (1903) 1 A.C.R. 1.
[2] (1936) 1 C.L.J. 46.
[3] (1937) 38 N.L.R. 261.
[4] (1920) 21 N.L.R. 442.
[5] (1889) 43 Ch.D. 118; 5 T.L.R. 617.
[6] (1928) 30 N.L.R. 310.
[7] (1917) 30 N.L.R. 274.

further in the Ordinance or in any other statute which has a bearing on the point.

Their Lordships are of opinion that the policy of the legislature has been to limit the cases in which an action can be brought to those in which the promise itself is in writing. It may be contained in one or more documents. Documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry.

Some confusion seems to have arisen in this case with regard to the meaning of such words as "evidenced in writing" and "confirmation." The distinction which must always be borne in mind is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described as writing "which evidences a previous oral promise" is insufficient to support an action for breach of promise. The writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., admit the making of the promise and evince continuing willingness to be bound by it.

An illustration of a writing which, while not containing in itself a promise to marry, might be put forward as affording evidence in writing of an oral promise to marry is to be found in the case of a writing which says, "I assure you I will carry "out the promise I made last month." On such a writing the question at once arises, Was it a promise to marry, or a promise to lend money, or some other promise? The writing by itself only establishes that a promise was made. If it were possible to establish by oral evidence that the "promise made last month" was a promise to marry, the conflicts and uncertainties which may arise would be almost as much, if not quite as much, as in a case resting on oral testimony alone. In answer to oral evidence that it was a promise to marry, a contesting defendant may say it was a promise other than a promise to marry. Their Lordships are of the view that such a writing is insufficient to satisfy the statute.

The decision in *Jayesinhe* v. *Perera*[1] has been questioned in subsequent cases. Doubts have been expressed as to whether the writing relied on amounted merely to an admission in writing of a previous oral promise or was a repetition of the promise. If the word "repetition" imports an express promise to be bound by the previous oral promise this will suffice, but their Lordships are unable to find this in the letter in question in that case which, in answer to a request for a written promise of marriage, said, "I am not agreeable to what papa says for this reason: "that is if I trust darling should not darling trust me? If they

[1] (1903) 9 N.L.R. 62.

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"have no faith in my word I cannot help it. If they don't "believe my word I am not to blame." This is in effect saying, "You must rest content with such remedy as is offered you by "an oral promise," and is an express refusal to give what the Ordinance requires. Their Lordships are accordingly of opinion that the decision cannot be upheld.

Extrinsic evidence is only admissible where such evidence is permissible on general grounds, e.g., where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing.

The basis of the judgment of the Supreme Court is to be found in the following passage: "Does P.1, read in conjunction "with the letters D.7 and D.8, constitute a 'written promise' "within the meaning of the proviso to section 19 (3)? The "Ordinance does not declare that oral promises of marriage are "null and void; it merely renders them unenforceable unless "they be evidenced in writing. The object is to avoid the risk "of vexatious actions based on perjured testimony. The earlier "authorities of this court were all discussed during the argument "and it is settled law that an action for damages lies if, in a "letter addressed by the defendant to the plaintiff, there is "either confirmation or at least an unqualified admission of a "subsisting and binding oral promise of marriage. This is the "effect of *Jayesinhe* v. *Perera*,[2] *Misi Nona* v. *Arnolis*[3] and "*Karunawathie* v. *Wimalasuria*.[4] The letter P.1 completely "satisfies this minimum test."

Their Lordships have already indicated that the test referred to in this passage is not entirely satisfactory and has, in fact, given rise to differences of interpretation in its application.

As stated in the judgment of the Supreme Court, "The "parties are well-educated Kandyan gentlefolk, and each of them "is the child of parents who hold conservative ideas on the "subject of marriage." Negotiations for a marriage between them took place in the manner customary to such persons and various things had been done including the fixing of a dowry to be given by the respondent's father. If a marriage had gone through, the next step would have been a betrothal at which a certain ceremony would have been performed. This did not take place. It will appear from what is stated later that it is not necessary to examine the reasons for the failure. The parties saw each other and some letters passed between. Their Lordships will now examine the documentary evidence to ascertain whether a promise to marry can be said to be contained in it. Three letters were relied on, two from the respondent to the appellant and one from the appellant to the respondent. These are the documents referred to in the judgment of the Supreme Court as D.7, D.8 and P.1. The first is the following:

[2] 9 N.L.R. 62.
[3] (1914) 17 N.L.R. 425.
[4] (1941) 42 N.L.R. 390.

" Boange Walawwa,

" Kadugannawa.

" 18.12.50

" My darling Teddy,

" I asked Mumy if I may write to you, and though she did " not say no, she does not like me corresponding fearing that " I might fall into trouble. But I thought it is my duty to " write to you, and keep to my promise inspite of any obstacle " standing in my way.

" The other day I was anxiously waiting to meet you before " leaving, but I had to come away with a heavy heart, as Daddy " came early. I am still feeling wretched without you. The " evenings are unbearable. When I think of you darling, I wish " I could fly back to you. I don't know how I will stay here " all alone till the 7th.

" I would have liked to spend even the whole holiday there, " but I have to please so many, with the result that I am " unable to do what I want. I hope you understand me, my " darling, and will not get angry with me for leaving you, " inspite of you worrying me so much to stay behind. To spend " even a minute with you is a great joy to me, though you seem " to think that I was impatiently waiting to come home.

" I am eveready to do anything for you, but unfortunately it " is my fate that I am forbidden to do all I can for you, whom " I love more than any one in this world. I know you always " think that I don't care for you because I say can't for anything " at all. Please don't think that I have no love for you, as I " will truthfully tell you that I really love you from the very " bottom of my heart.

" —— came here a few minutes after we came home. He " was very good and did not try any of his pranks on me. Please " don't tell anything to —— because I don't want the others to " say that I made up false stories about an innocent man. I am " sure, now you have room to think that I too encouraged him; " that is why I don't want you to speak to —— about this. I " am not boasting, but it is the actual fact. I have never had " anything to do with another person, and it has always been my " one idea to love only one. Take my word I am not a person " who is easily tempted. I have always aimed at having a pure " character and you can be sure that in rain or sunshine I will " stand by you till the end of my life. It was my ambition " to find a man too with a pure character and I have found it " in you. Therefore don't fear. I will always be faithful to " you, my darling. I hope you are going for a change. If you " are going to N'Eliya please be careful the way you drive the " car. Can't you get someone to accompany you, without going

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" alone? I think I had better stop writing as I am getting late " for the post. I will write to you again on Thursday.

" With much love and kisses.
" from
" Yours for ever.
" Girlie."

Certain initials irrelevant for the purposes of this appeal appear in the spaces left blank.

The next letter is:

" Boange Walauwa,
" Kadugannawa.
" 19.12.50

" My darling Teddy,

" I hope my letter has reached you safely. Please be careful " with my letters because there are silly people waiting to make " unnecessary fuss.

" Where did you all go yesterday? I heard that you were " going home last evening.

" A little while ago we returned after a days outing in " Kandy. I had a long jaw with Aunt about the girl whom " —— and sister went to see at Kurtmegala. As for me I was " anxiously waiting to come back soon, so that I may keep to " my promise.

" Have you decided about your holiday? Darling, you must " go somewhere and have a good time. Again I am telling you, " if you are going to N'Eliya please be careful the way you " drive your car.

" Though I am here my thoughts are with you my love. Day " and night, I think of nothing else but you my darling. The " house is still been built. My one work is telling Mummy how " unfair they are in delaying like this. She too agrees with me, " but I haven't got the courage to go and tell Daddy. He doesn' " understand our position and is ready to get upset for the least " thing. That is why I am telling you that I am placed in such " a difficult position where I have to please so many.

" Only I know what a lot of mental agony I have to undergo. " Inspite of everything I never show it because I don't wish " others to say that I can't get on in life.

" I am also very anxious to know about your arrangements " etc. therefore please write to me on Saturday. I can send " one of my brothers to the post on that day. So please don't " fail to let me know all about yourself. I am taking a great risk " in asking you to write to me, but I hope everything will be " O.K. Another thing, if you are going anywhere or not please " let me know your holiday address.

" I am sending you the Observer Crossword puzzle. If it is " possible please do it and send it to me.

" I have sat up till late today because I wanted to write to " you somehow, when no one is about the place. It's past one

" o'clock and I am feeling sleepy too, so I think I had better " conclude. Now please don't disappoint me.

" With much love and kisses.

" From

" Yours for ever,

" Girlie."

The third letter, from appellant to respondent, is:

" Kegalle.

" December 21, 1950.

" My darling dearest Girlie,

" I received both your letters safe & sound. It was indeed " sweet of you to have written to me exactly as promised. As " you wanted to know my arrangements for the holidays—well " here they are. Tomorrow morning I will be going to Kandy " and Katugastota. As a matter of fact as the Post Mark will " show you, I am posting this letter from Kandy. I will try to " pick up Shelly and failing I will go up alone even to Nuwara " Eliya. If I go up alone I will stay at the Grand Hotel, Nuwara " Eliya. Otherwise I cannot definitely tell you where I will " stay. I shall send you a Christmas Card from Nuwara Eliya " to reach you on the 25th Morning. Thank you Darling for the " anxiety you have expressed regarding my driving up. I shall " indeed try to be careful as possible. Somebody has given you " some wrong information, since I have not left Kegalle since " you left on the 16th instant.

" I am glad to hear that you have been getting out a bit. I " think Darling if you can manage it, you too, should take a " holiday somewhere, why not induce your Daddy to go some- " where for a few days. You have been working very hard and " I think you fully well deserve a good holiday.

" Girlie dear, I have been missing you very badly these days. " Indeed the evenings are very dull and boring without you and " I am waiting to go somewhere for a little rest. I am much " thankful to you for the kind thoughts you have been having " about me. Girlie I don't think I need repeat all what you " have written to me, because I feel just the same way as you " have expressed. I can assure you that all the expectations " and the dreams you have of your future will not be in vain, you " can confidently hope. The sooner it is, the better, I think. " So that you should, if you possibly can, have a chat with your " Daddy and tell him that this unnecessary delay is by no means " good to either. It has been hanging fire since June but I find " nothing appears to have been done. It is no use delaying now. " I can tell your Daddy about it, but I don't want to hurt your " feelings, it will be better if you could put it to him.

" —— is yet down with measles and it looks as if Sister and " them will not be going anywhere for the holidays.

" Darling I hope you are keeping good health. Please be

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" careful of yourself and don't fall ill like last time what hap-
" pened. I suppose the mornings are bitterly cold there.

" Daya and I just returned from seeing ' The Prince and the
" ' Pauper.' It was a nice picture with a fine story of how
" Henry VIII's son Edward for a lark exchanged places with a
" pauper's son and it became a serious matter and it was with
" great difficulty that the Prince managed to convince the people
" that he was the real Prince. I wonder whether you have seen
" any picture since you left on the 16th. Yes, that day, I thought
" you might still be there, when I came after the pictures and it
" was with great sorrow that I learnt from Daya that you had
" left. Darling my thoughts are always of you every day and I
" am most anxiously waiting till the 7th of next month. So
" please on no account must you keep away from coming on
" the 7th.

" Don't worry I will not tell —— a word of what you have
" told me, nor will I tell anyone a word of it. But Darling you
" must be extremely careful of yourself and don't allow people
" to treat you in the same manner that you were treated when
" you were a small girl of 8 or 9 years. Show them a little
" reserveness on your part and I am sure they will understand.

" As regards the Puzzle I don't think you are in a hurry. I
" think the closing date is 16th January. I will have it made
" and give it to you when you come on the 7th.

" Well, Girlie my sweetheart, what do you want from Nuwara
" Eliya—don't tell me you want the lake, or the park. I always
" think how wonderful it would have been if you could have
" accompanied me on this holiday—just you and me with all the
" cares and worries of this world forgotten for ten glorious days!

" L. B. and Nanda were here last Friday evening. They too
" don't intend going anywhere. L. B. it seems is going to take a
" course of medicine at Galagedera and I suppose Nanda too will
" be there. Daya told me today that Nanda's little daughter is
" also down with measels—that means they too will have to stick
" at Yatiyantota.

" Well Darling I think I better stop, now it is nearly 11.30
" p.m. In the Christmas Card I shall give you my address in
" Nuwara Eliya and the date of my last day of stay there.
" Write to me then if you can.

" Cheerio my sweetheart.
" With love.
" Teddy."

Neither of the courts in Ceylon has been able to find in the correspondence above a promise to marry. Their Lordships are in the same position. The letters on the construction most favourable to the plaintiff do no more than assume that a marriage will take place as a result of an oral promise. Whether such promise was conditional or unconditional, and if the former, whether the condition was ever fulfilled, is not stated. Extrinsic evidence

being inadmissible to supply the deficiencies in the correspondence, the action necessarily failed.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment and decree of the Supreme Court be set aside and the decree of the District Court restored. The respondent must pay the costs of this appeal and of the appeal to the Supreme Court.

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Solicitors: *T. L. Wilson & Co.*

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[PRIVY COUNCIL.]

JAMES CLINTON CHISHOLM . . . APPELLANT;

AND

JAMES HALL . . . . . RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF JAMAICA.

Jamaica — Limitation of action — Boundaries — Contiguous plots of land — Disputed strip — Registered title defeated by limitation — Acquiescence in position of boundary fence for statutory period — Limitation of Actions Law (*c.* 395 *of R.S. of Jamaica*, 1938), *ss.* 3, 46.

Land Registration—Boundaries—Certificate—New certificate issued to replace lost certificate — New certificate merely a substitute — No alteration of rights—Limitation period not commencing from date of new certificate—Conflicting statutory provisions—Construction and reconciliation—Registration of Titles Law (*c.* 353 *of R.S. of Jamaica*, 1938), *ss.* 67, 69.

By section 3 of the Limitation of Actions Law (c. 395 of the Revised Statutes of Jamaica, 1938), an action to recover land must be brought "within 12 years next after the time at which "the right . . . to bring such action . . . first accrued"; and section 46 provides that where a reputed boundary between adjoining lands has been acquiesced in for seven years "such reputed "boundary shall for ever be deemed and adjudged to be the true "boundary. . . ."

The appellant and the respondent were the registered proprietors of contiguous plots of land in Kingston, Jamaica, the appellant, who had bought his plot on April 12, 1928, from his immediate predecessor in title who was registered as proprietor on March 12, 1928, having been himself registered on April 16, 1928. The respondent was registered as proprietor of his plot on October 30, 1941, having bought it on October 24, 1941, from the Administrator General for Jamaica as legal personal representative of the former owner who had died in 1918. The Administrator General as legal personal representative had obtained the registration of himself as proprietor and had had issued to him a new certificate of title on May 7, 1919, the certificate issued to the original owner on January

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* *Present*: LORD RADCLIFFE, LORD JENKINS, THE RT. HON. L. M. D. DE SILVA.

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21, 1901, being cancelled. The Administrator General subsequently lost the certificate issued to him, and on October 16, 1941, obtained the issue to himself of a new certificate.

On November 18, 1942, the respondent brought an action against the appellant claiming, inter alia, a declaration that a strip of land seven feet wide on the apellant's side of the existing boundary fence between the plots and coextensive with their length was comprised in his (the respondent's) certificate of title. That action was discontinued by order in 1944, and on January 31, 1951, the respondent commenced the present action against the appellant for similar relief:—

Held (1) (affirming the Court of Appeal of Jamaica) that the disputed strip formed part of the land comprised in the plot in respect of which the respondent's predecessor in title was registered as proprietor in 1901.

But (2) (reversing the Court of Appeal) that the respondent's registered title had by the time of action brought been ousted in favour of the appellant quoad the disputed strip by the operation of the Limitation of Actions Law. The appellant had been for over 12 years in continuous possession of the disputed strip—from the date of his purchase on April 12, 1928, to the date of action brought, January 31, 1951—and could show more than seven years' acquiescence in the position of the existing boundary fence. Moreover, the appellant had completed more than 12 years' possession from April 12, 1928, before the Administrator General obtained the new certificate on October 16, 1941, in place of the lost one.

The issue of the new certificate on October 16, 1941, under section 81 of the Registration of Titles Law (c. 353 of the Revised Laws of 1938) "in place of the former certificate" did not have the effect of defeating the title by limitation to the disputed strip which the appellant had acquired under section 3 of the Limitation of Actions Law. The new certificate was merely a substitute for the lost one and the procedure under section 81 did not bring about any alteration of rights—the appellant had not to show 12 years' possession under section 3 or seven years' acquiescence under section 46 from October 16, 1941, the date of issue of the new certificate.

The provision in section 67 of the Registration of Titles Law that "every certificate of title . . . shall, subject to the subsequent "operation of any statute of limitations, be conclusive evidence "that the person named in such certificate . . . is seised or pos-"sessed of such estate or interest," which, if it stood alone, might well lead to the conclusion that "subsequent" must mean "sub-"sequent to the issue of the certificate in question," was in flat contradiction of the express provision in section 69 of that Law that "the land which shall be included in any certificate of title "... shall be deemed to be subject . . . to any rights acquired "over such land since the same was brought under the operation of "this Law under any statute of limitations . . . notwithstanding "the same . . . may not be specially notified as incumbrances in "such certificate . . ." The two sections must be read together and the inclusion of the words "subject to the subsequent opera-"tion of any statute of limitations" in section 67 should not by implication abrogate the express saving accorded by section 69 to all rights acquired over the land in question since first registration under any statute of limitations whether before or after the date of the certificate of title for the time being in force. Further, even if "subsequent" in section 67 should be construed as meaning "subsequent to the issue of the certificate in question sections 67 and 69 could be reconciled by treating as applicable to section 67 the "deeming" provision enjoined by section 69.

Goodison v. *Williams* (1931) Clark's Rep. (Jamaica) 349 overruled.

Dartadeen v. *Watson* (1937) 3 J.L.R. 87 considered.

Judgment of the Court of Appeal of Jamaica affirmed in part and reversed in part.

APPEAL (No. 15 of 1956), by special leave, from a judgment of the Court of Appeal of the Supreme Court of Jamaica (July 30, 1954) reversing a judgment of Semper J. (acting) (July 25, 1953).

The following facts are taken from the judgment of the Judicial Committee, where the relevant statutory provisions appear: The parties to this litigation, namely, the plaintiff (now respondent) James Hall, and the defendant (now appellant) James Clinton Chisholm, owned contiguous plots of land fronting the west side of King Street, Kingston, Jamaica, which ran approximately north and south. The defendant's plot was known as No. 105, King Street, and the contiguous plot belonging to the plaintiff and known as No. 103, King Street, lay immediately to the south of the defendant's plot. The plaintiff also owned the plot known as No. 101, King Street, which lay immediately to the south of No. 103, these two plots having for many years been held together.

The dispute concerned the proper position of the boundary between No. 105 to the north and No. 103 to the south. At the time of action brought there was and had for many years past been in existence a physical boundary running from west to east and dividing the combined area of Nos. 105 and 103 into two parts. The defendant's contention had been and was that the physical boundary existing upon the land was rightly placed, and showed the true dividing line between Nos. 103 and 105. The plaintiff's contention had been and was that the physical boundary was placed a matter of seven feet too far south and that there had to that extent been an unwarranted encroachment on No. 103. The area in dispute was thus a strip of land immediately north of the physical boundary, and some seven feet in width from north to south, and coextensive with the length of the two properties from east to west.

The plaintiff and the defendant were the registered proprietors of their respective properties under the Registration of Titles Law (chap. 353 of the Revised Laws of Jamaica). The first certificate of title in respect of Nos. 103 and 101 was granted to Morris Aria Bonitto as the proprietor thereof in fee simple on January 21, 1901. The first certificate of title in respect of No. 105 was granted to Eugenia Blanche Bonitto (the second wife and then the widow of Morris Bonitto) as the proprietor thereof in fee simple on March 12, 1928. The defendant bought No. 105 from Eugenia Bonitto under a transfer dated April 12, 1928, and was duly registered as proprietor thereof on April 16, 1928. The plaintiff bought Nos. 103 and 101 under a transfer dated October 24, 1941, from the Administrator General for Jamaica as the legal personal representative of Morris Bonitto, who had

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died on November 20, 1918; and the plaintiff was duly registered as the proprietor of these two plots on October 30, 1941.

It was important to note: (i) that the Administrator General as legal personal representative of Morris Bonitto had applied for and obtained the registration of himself as proprietor of Nos. 101 and 103 by transmission under section 124 of the Registration of Titles Law, and had on that occasion procured the issue to himself of a new certificate of title in his own name dated May 7, 1919, the certificate originally issued in the name of Morris Bonitto on January 21, 1901, being cancelled accordingly; and (ii) that the Administrator General had subsequently lost the certificate issued to him on May 7, 1919, and had under section 81 of the Law applied for and obtained the issue to himself of a new certificate dated October 16, 1941, in place of the lost certificate, which was accordingly cancelled.

On November 18, 1942, the plaintiff commenced an action against the defendant in the Supreme Court of Jamaica for a declaration that the disputed strip of land was comprised in his certificate of title, possession and mesne profits. That action was, however, wholly discontinued by order dated June 21, 1944.

On January 31, 1951, the plaintiff commenced a further action against the defendant in the Supreme Court (being the action out of which the present appeal arose) for similar relief, the defendant counterclaiming for a declaration that the north and south boundaries of Nos. 101–3 and 105 as then existing were the true boundaries between the said properties and for rectification of the register. That action was tried before Semper J. who by his judgment dated July 25, 1953, dismissed the plaintiff's claim and made a declaration in the terms claimed by the defendant. The plaintiff appealed to the Court of Appeal of the Supreme Court (Carberry C.J., MacGregor and Rennie JJ.), who by their judgment dated July 30, 1954, allowed the plaintiff's appeal, set aside the judgment of Semper J. and entered judgment for the plaintiff for the relief sought. The defendant now appealed from that judgment.

The questions in the appeal were in substance these: (i) whether the disputed strip formed part of the land comprised in Nos. 103 and 101, in respect of which the plaintiff's predecessor in title Morris Bonitto was registered as proprietor on January 21, 1901, or formed part of the land comprised in No. 105, in respect of which the defendant's predecessor in title Eugenia Bonitto was registered as proprietor on March 12, 1928; and (ii) in the event of that question being answered in favour of the plaintiff, whether his registered title had by the time of action brought been ousted in favour of the defendant quoad the disputed strip by the operation of the Limitation of Actions Law (chap. 395 of the Revised Laws of Jamaica).

The trial judge decided the first of these two questions in the defendant's favour and accordingly found it unnecessary to decide the second.

The Court of Appeal decided both questions in favour of the plaintiff, holding that, so far as they were concerned, the second question was concluded against the defendant by the majority decision of the same court in *Goodison* v. *Williams*.[1]

1959. April 27, 28; May 1, 6. *John L. Arnold Q.C.* and *John Monckton* for the appellant.

D. N. Pritt Q.C. and *David S. Hunter* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Dunn* v. *Lareau*[2]; *Belize Estate and Products Co. Ltd.* v. *Quilter*[3]; *Gibbs* v. *Messer*[4]; *Bourne* v. *Keane*[5]; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[6]; *March* v. *Thomas*[7]; *Russell* v. *Pusey*.[8]

July 8. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: Notwithstanding the full and careful argument presented on the defendant's behalf, their Lordships find themselves in agreement with the conclusion in favour of the plaintiff reached by the Court of Appeal on the first question, and substantially accept the reasons for that conclusion given in the judgment of the court delivered by MacGregor J., which will gain nothing by repetition. Moreover, the first question is deprived of practical significance by the view their Lordships have formed on the second.

In these circumstances their Lordships feel that no useful purpose would be served by debating the first question any further, and they refrain from doing so.

As to the question of limitation, the relevant statute of limitations is, as already observed, the Limitation of Actions Law (chap. 395 of the Revised Laws of Jamaica). Section 3 of that Law imposes a limitation period of 12 years on actions for the recovery of land, and is in these terms: "No person shall make "an entry or distress, or bring an action or suit to recover any "land or rent, but within twelve years next after the time at "which the right to make such entry or distress, or to bring "such action or suit, shall have first accrued to some person "through whom he claims, or, if such right shall have not "accrued to any person through whom he claims, then within "twelve years next after the time at which the right to make "such entry or distress, or to bring such action or suit, shall "have first accrued to the person making or bringing the same."

Section 31 is in these terms: "At the determination of the "period limited by this Part of this Law to any person for "making an entry or distress, or bringing any action or suit,

[1] (1931) Clark's Reps. of Sup.Ct. Judgmts. 349.
[2] (1888) 57 L.J.P.C. 108.
[3] [1897] A.C. 367; 13 T.L.R. 347.
[4] [1891] A.C. 248.
[5] [1919] A.C. 815; 35 T.L.R. 560.
[6] [1943] A.C. 32; 58 T.L.R. 308; [1942] 2 All E.R. 122.
[7] Unrep.: Sup.Ct. of Jamaica, March 12, 1917.
[8] Unrep.: Sup.Ct. of Jamaica, Dec. 23, 1924.

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"the right and title of such person to the land or rent, for the "recovery whereof such entry, distress, action or suit respectively "might have been made or brought within such period, shall be "extinguished."

Section 46 contains special provisions as to boundaries, and so far as material for the present purpose is in these terms: "In "all cases where the lands of several proprietors bind or have "bound upon each other, and a reputed boundary hath been or "shall be acquiesced in and submitted to by the several pro-"prietors owning such lands, or the persons under whom such "proprietors claim, for the space of seven years together, such "reputed boundary shall for ever be deemed and adjudged to be "the true boundary between such proprietors; and such reputed "boundary shall and may be given in evidence upon the general "issue, in all trials to be had or held concerning lands, or the "boundaries of the same, any law, custom or usage to the "contrary in anywise notwithstanding."

Section 46 of chapter 395 was, but section 3 was not, pleaded in the defence, and an objection was taken on the plaintiff's behalf to reliance being placed by the defendant on section 3, but this objection was not persisted in, and their Lordships accordingly propose to deal with the question of limitation on the footing that section 3 is available to the defendant as well as section 46.

It is common ground that if this was a case of common law, as distinct from registered titles, the defendant would be entitled to succeed under either section.

As regards section 3, the defendant can show over 12 years' continuous possession of the disputed strip from the date of his purchase of No. 105 on April 12, 1928, down to the date of commencement of the present proceedings on January 31, 1951.

As regards section 46, the defendant can show more than seven years of acquiescence in the position of the physical boundary from the date of his purchase on April 12, 1928, down to the commencement of the plaintiff's first, and abortive, action on November 18, 1942. Moreover, the defendant had completed more than 12 years' possession from April 12, 1928, before the Administrator General procured the issue to himself on October 16, 1941, of a new certificate of title to Nos. 101–103 in place of the lost certificate which had been issued to him on May 7, 1919; and there had also been more than seven years' acquiescence in the position of the physical boundary from April 12, 1928, by the date of the issue of such new certificate.

The plaintiff's contention is that under the provisions of the Registration of Titles Law (chap. 353) the issue of the new certificate in place of the lost one on October 16, 1941, had the effect of destroying the rights which had already accrued to the defendant under the Limitation of Actions Law (chap. 395), so that the defendant, in order to make good his defence of limitation, must show 12 years' possession under section 3 or seven years'

acquiescence under section 46 computed from October 16, 1941. This the defendant could not do, since the present proceedings were commenced on January 31, 1951, which was less than 12 years from October 16, 1941; and the period of acquiescence computed from the latter date would have been interrupted before it reached seven years by the commencement of the plaintiff's abortive action on November 18, 1942, and if computed from the date of discontinuance of that action on June 21, 1944, would not have reached seven years by January 31, 1951, when the present proceedings were started.

The plaintiff's contention on this part of the case demands reference at some length to the provisions of the Registration of Titles Law. This Law is one of many enactments for the registration of titles in force in this country and in various parts of the Commonwealth and Empire. But these enactments are by no means uniform in their terms, and it was agreed in the course of the argument that no useful purpose would be served by comparing other enactments with the Jamaican Law, or citing cases decided on other enactments as aids to the construction of the Jamaican Law. Their Lordships therefore approach this question as one which turns simply and solely upon the true construction of the Jamaican Law itself.

Section 2 of the Law is in these terms: "All laws and practice "whatsoever, relating to freehold and other interests in land, "so far as is inconsistent with the provisions of this Law, are "hereby repealed, as far as regards their application to land "under the provisions of this Law, or the bringing of land under "the operation of this Law."

Section 3 contains a number of definitions and includes the following: "'incumbrance' shall include all estates, interests, "rights, claims and demands, which can or may be had, made "or set up, in, to, upon or in respect of the land adversely and "preferentially to the title of the proprietor; 'instrument' shall "include a conveyance, assignment, transfer, lease, mortgage, "charge and also the creation of an easement."

Sections 23 to 25 provide as follows: "23. Land may be "brought under the operation of this Law by the registrar regis-"tering the title of some person thereto as the proprietor thereof "in manner hereinafter provided. 24. The title of any person to "land brought under the operation of this Law shall be registered "either as an absolute or as a qualified title. 25. A person "registered under this Law as proprietor of any land with an "absolute title shall be entitled to hold such land in fee simple, "together with all rights, privileges and appurtenances, belonging "or appurtenant thereto, subject as follows—(*a*) to the incum-"brances (if any) entered on the certificate of title, and (*b*) to "such liabilities, rights and interests, as may under the provisions "of this Law subsist over land brought under the operation of "this Law without being entered on the certificate of title as "incumbrances, but free from all other estates and interests

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" whatsoever including estates and interests of His Majesty, his " heirs and successors, save only quit rents, property tax or other " impost, charged generally on lands in this Island, that have " accrued due since the land was brought under the operation of " this Law."

Section 32 provides (to put it shortly) that when the registration of any title has been provisionally approved by one of the referees under the Act, notification thereof is to be given by advertisement or advertisements as therein mentioned and also personally to all persons in possession or charge of the adjoining lands so as to give them an opportunity of lodging a caveat against the registration of the title in question. Section 36 provides that if no caveat is lodged within the time limited by the notice the title is to be registered. Under section 54 land is to be brought under the operation of the Law by the registration by the registrar of a certificate in the prescribed form. The certificate is to be made out in duplicate, one copy being bound up in the register book and the other issued to the proprietor.

Sections 67 and 69 (the critical sections for the purposes of the present case) are in these terms: " 67. No certificate of title " registered and granted under this Law shall be impeached or " defeasible by reason or on account of any informality or irregu- " larity in the application for the same, or in the proceedings " previous to the registration of the certificate; and every certifi- " cate of title issued under any of the provisions herein contained " shall be received in all courts as evidence of the particulars " therein set forth, and of the entry thereof in the register book, " and shall, subject to the subsequent operation of any statute " of limitations, be conclusive evidence that the person named " in such certificate as the proprietor of or having any estate or " interest in, or power to appoint or dispose of the land therein " described is seised or possessed of such estate or interest or " has such power."

" 69. Notwithstanding the existence in any other person of " any estate or interest, whether derived by grant from the Crown " or otherwise, which but for this Law might be held to be para- " mount or to have priority, the proprietor of land or of any " estate or interest in land under the operation of this Law shall, " except in case of fraud, hold the same as the same may be " described or identified in the certificate of title, subject to any " qualification that may be specified in the certificate, and to " such incumbrances as may be notified on the folium of the " register book constituted by his certificate of title, but abso- " lutely free from all other incumbrances whatsoever, except the " estate or interest of a proprietor claiming the same land under " a prior registered certificate of title, and except as regards any " portion of land that may by wrong description of parcels or " boundaries be included in the certificate of title or instrument " evidencing the title of such proprietor not being a purchaser " for valuable consideration or deriving from or through such

" a purchaser: Provided always that the land which shall be " included in any certificate of title or registered instrument shall " be deemed to be subject to the reservations, exceptions, con- " ditions and powers (if any), contained in the patent thereof, " and to any rights acquired over such land since the same was " brought under the operation of this Law under any statute of " limitations, and to any public rights of way, and to any ease- " ment acquired by enjoyment or user, or subsisting over or upon " or affecting such land, and to any unpaid rates and assessments, " quit-rents or taxes, that have accrued due since the land was " brought under the operation of this Law, and also to the " interests of any tenant of the land for a term not exceeding " three years, notwithstanding the same respectively may not " be specially notified as incumbrances in such certificate or " instrument."

Section 81 (under which the Administrator General obtained his second new certificate in the present case) provides by sub-sections (1) and (2) as follows: " 81.—(1) Whenever a duplicate " certificate of title or special certificate of title is lost or destroyed " the registered proprietor of the land or some person claiming " through him may apply to the registrar to cancel the certificate " of title and to register a new certificate in duplicate in the " name of the registered proprietor or his transferee in place of " such certificate and duplicate or special certificate. On proof " being furnished to his satisfaction of such loss or destruction, " and on such requisitions, if any, which he may make being " complied with, and on the expiration of the notice to be given " as hereinafter provided without sufficient cause having been " shown against the application, the registrar shall cancel the " certificate and register a new certificate in duplicate in the " name of the registered proprietor or his transferee in place of " the former certificate and duplicate or special certificate, both " of which shall thereupon be deemed to be cancelled. (2) Before " disposing of the application the registrar shall give at least " fourteen days' notice thereof in at least one newspaper and " such other notice, if any, as he may think fit."

Section 84 enables a proprietor to transfer his interest, and provides that: " . . . Upon the registration of the transfer, the " estate and interest of the proprietor as set forth in such instru- " ment, or which he shall be entitled or able to transfer or dispose " of under any power, with all rights, powers and privileges " thereto belonging or appertaining, shall pass to the transferee; " and such transferee shall thereupon become the proprietor " thereof, and whilst continuing such shall be subject to and " liable for all and every the same requirements and liabilities " to which he would have been subject and liable if he had " been the former proprietor, or the original lessee, mortgagee or " annuitant."

Section 87, after providing for cases in which part only of the land comprised in a registered title is transferred, continues as

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follows: " . . . but when the whole of the land passes to any " person other than as aforesaid, it shall not be incumbent on " the registrar to make out a new certificate of title in the name " of such person, but such person shall be deemed to be duly " registered as proprietor of such land when a memorandum of " the transfer or other legal mode as aforesaid shall have been " registered under this Law: Provided always that if the trans- " feree desire it, the registrar shall cancel the certificate of title " and the duplicate, and shall retain such duplicate, and issue " a new certificate of title in the name of the transferee. . . ."

Section 124 provides for the registration of persons acquiring registered land by transmission, this being the provision under which the Administrator General was registered in respect of Nos. 101 and 103 in the present case.

Many other sections of the Law were referred to in the course of the argument, but the question at issue in the end turns upon the true construction of sections 67 and 69, which contain the only references to limitation to be found in the Law. Section 67 provides that " every certificate of title . . . shall be received in " all courts as evidence of the particulars therein set forth, and " of the entry thereof in the register book, and shall, subject to " the subsequent operation of any statute of limitations, be " conclusive evidence that the person named in such certificate " as the proprietor of or having any estate or interest in . . . the " land therein described is seised or possessed of such estate or " interest. . . ."

That provision, if it stood alone, might well lead to the conclusion that " subsequent " must mean " subsequent to the issue " of the certificate in question " and that on the principle of expressio unius exclusio alterius any interest in the land in question acquired by the prior operation of any statute of limitations is defeated by the issue of a certificate of title under any of the provisions of the Law, the distinction being between rights so acquired before the issue of the certificate which are extinguished and rights so acquired after the issue of the certificate, which are preserved. But section 69 contains a positive provision to the effect that " the land which shall be included in any certificate " of title or registered instrument " (which by definition includes a transfer) " shall be deemed to be subject . . . to any rights " acquired over such land since the same was brought under the " operation of this Law under any statute of limitations . . . " notwithstanding the same . . . may not be specially notified " as incumbrances in such certificate or instrument."

The construction which it might be proper to place on section 67 construed in isolation is in flat contradiction of the express provisions of section 69. The two sections must clearly be read together and so far as possible reconciled with each other. If the words " subject to the subsequent operation of any statute of " limitations " had been omitted from section 67 it would have been reasonably plain that section 67 must be understood as

taking effect subject to the provisions of section 69 regarding rights acquired over the land in question since first registration under any statute of limitations, and it can hardly be right to hold that the inclusion in section 67 of the words " subject to " the subsequent operation of any statute of limitations " should by implication abrogate the express saving accorded by section 69 to all rights of this description acquired since first registration, whether before or after the date of the certificate of title for the time being in force.

Even if the word " subsequent " in section 67 should be construed as meaning " subsequent to the issue of the certificate " in question " the two sections, in their Lordships' opinion, can and should be reconciled by treating as applicable to section 67 the " deeming " provision enjoined by section 69. There is, so far as their Lordships can see, no reason why that provision, which is expressed in perfectly general terms, should not be so applicable. The result of applying it quoad limitation to section 67 is that the part of that section under which the certificate is to be conclusive evidence that the person therein named as proprietor of or having any estate or interest in the land therein described is seised or possessed of such estate or interest must be read as if it was followed by a proviso in terms conforming to the language of section 69, i.e., a proviso to the effect that the land described in the certificate is to be deemed to be subject to any rights acquired over it since first registration under any statute of limitations, notwithstanding that they are not notified as incumbrances in the certificate. If it is objected that this construction of section 67 makes the words " subject to the subsequent opera- " tion of any statute of limitations " mere surplusage, the answer is that even if that is so the anomalous and, indeed, absurd results ensuing from excluding all certificates quoad the effect of limitation from the " deeming " provision in section 69, so far as rights acquired prior to their issue are concerned, are in their Lordships' view so extreme as to justify the construction so far placed on the two sections notwithstanding that the words above quoted may be said to be rendered otiose by that construction. But it does not appear to their Lordships that the construction so far placed on the two sections does necessarily render wholly otiose the words " subject to the subsequent operation of any " statute of limitations " in section 67. Let a case be supposed in which some part of the land described in a given certificate had prior to its date been acquired from the registered proprietor by virtue of 12 years' possession since the date of the first registration of the land so described. Then under sections 67 and 69, as their Lordships have so far construed them, the certificate would be conclusive evidence that the person named in the certificate as proprietor of or having any estate or interest in the land therein described was seised or possessed of such estate or interest subject to the rights acquired over a part of such land by virtue of 12 years' possession between the date of the first

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registration and the date of the certificate, those rights falling to be regarded by virtue of section 69 as if they had been notified as incumbrances in the certificate. But in the absence of any provision to the contrary it might be argued that section 67 made the certificate conclusive evidence that the land was held as described in the certificate subject only to rights acquired by limitation between the date of the first registration of the land and the date of the certificate and therefore ranking as registered incumbrances at that date, and not to any rights so acquired after the date of the certificate. The words " subject to the " subsequent operation of any statute of limitations " might thus be regarded as having been put into section 67 ex abundante cautela to meet any argument of this kind.

But the same conclusion can, in their Lordships' view, be reached by another route. The critical words in section 67— " subject to the subsequent operation of any statute of limita- " tions "—contain the first of the only two references to limitation to be found in the law. The reader is thus invited to look further to see what provision is made later in the Law in regard to the operation of any statute of limitations, the brief reference to limitation in section 67 being in itself of doubtful import. Looking further, the reader comes to section 69 and he there finds a provision to the effect that the land included in any certificate is to be deemed to be subject to any rights acquired over such land since the same was brought under the operation of the Law under any statute of limitations, notwithstanding that such rights may not be specially notified as incumbrances in such certificate. Having reached this point, is he not justified in concluding that the reference to limitation in section 67 is a mere reference forward to the provision in regard to limitation contained in section 69, and that " subsequent " in section 67 is no more than a short way of saying what is said by section 69 in the words " since the same," i.e., the land, " was brought " under the operation of this Law " ? In their Lordships' view this construction, which can be compendiously described as making the word " subsequent " in section 67 mean subsequent to the date of issue of the first certificate issued in respect of the land in question, can legitimately be adopted for the purpose of reconciling the provisions of the two sections.

Accordingly, their Lordships hold that on one or other of the methods of construction which they have propounded the defendant's contention as to the effect of sections 67 and 69 should prevail.

The scheme of section 69 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and

his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfers section 84, which provides that the transferee shall be "subject to and liable for all and "every the same requirements and liabilities to which he would "have been subject and liable if he had been the former "proprietor." This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor; and although the words used are not particularly apt to describe rights acquired by limitation, a transfer is in any case one of the instruments to which the "deeming" provision of section 69 is applicable.

The combined effect their Lordships would attribute to sections 67 and 69 may perhaps be criticised as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than 12 years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the Law of preserving rights acquired by limitation notwithstanding that they are not noted in the register.

At all events, their Lordships' construction of sections 67 and 69 has the merit of consistency, and avoids the anomalous and absurd results which would ensue from the adoption of the construction which the plaintiff seeks to place upon the two sections. On that construction a man could acquire a title to registered land by 12 years' possession and, having done so, enforce it against the registered proprietor, although no note of it was on the register, provided that no new certificate had been issued since his title by limitation was acquired. But the issue of a new certificate in whatever circumstances and for whatever reason, would destroy a complete title by limitation after it had been acquired. Thus, if a transferee or person entitled by transmission was to demand and obtain a fresh certificate under section 87, any right over the land previously acquired by limitation would be extinguished, but if for any reason he did not do so the right would remain. More than one other example might be given but their Lordships are content to confine themselves to the actual case now before them. What happened here was that the Administrator General, having lost the new certificate issued to him on May 7, 1919, as having become entitled by transmission to Nos. 101 and 103, applied for and obtained a further new certificate in place of the lost one under section 81 of the Law, such further new certificate being dated October 16, 1941. It is claimed on the plaintiff's behalf that the purely fortuitous circumstance of the loss of the certificate of May 7, 1919, and

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the consequent issue of the certificate of October 16, 1941, to take its place, had the effect of defeating the title by limitation to the disputed strip which the defendant had acquired under section 3 of the Limitation of Actions Law on the expiration on April 12, 1940, of the period of 12 years from April 12, 1928, when No. 105 together with the disputed strip came into his possession. Their Lordships find it quite impossible to attribute this effect to the issue of a new certificate in place of a lost one. Section 81 provides in such a case for the issue of a new certificate "in place of the former certificate." This language appears to their Lordships to indicate that the new certificate is merely a substitute for the lost one and that the procedure under section 81 whereby it is obtained merely has the effect of placing the proprietor in the same position as if the former certificate had not been lost, and does not bring about any alteration of rights. It may be observed that section 81 extends to the destruction as well as the loss of a certificate and that so far as destruction is concerned it is not confined to accidental destruction. Thus, according to the plaintiff's argument, it would seem that if the proprietor was minded to defeat a right to his land acquired by limitation he could do so by the simple expedient of destroying his certificate and obtaining a new one under section 81. This surely cannot be right.

As to *Goodison* v. *Williams*,[1] the decision of the Court of Appeal by which they held themselves bound to decide the question of limitation in the present case in favour of the plaintiff, that was a case in which, after a title by 12 years' possession had been acquired by another person, the registered proprietor transferred the land and a new certificate was issued to the transferee pursuant to what is now section 87 of the Law. It was held by the majority of the court (Clark and Radcliffe JJ.) that the issue of the new certificate to the transferee had the effect of defeating the title acquired by limitation. The third member of the court, Brown A.C.J., dissenting, held on substantially the same grounds as those already stated by their Lordships that the certificate did not have this effect but that the title by limitation was preserved by what is now section 69, which must be read as qualifying what is now section 67. Clark J. appears to have based his decision mainly upon the view that the exclusive possession "rights over land" contained in section 69 applied only to rights in the nature of easements and so forth, and not to the right of exclusive possession over the land itself. It appears to their Lordships that this view is untenable having regard to the express reference to "any statute of "limitations."

Radcliffe J. appears to have held that even if the "deeming" provision in section 69 did apply to rights of exclusive possession acquired by limitation, that carried the matter no further, having

[1] (1931) Clark's Reps. of Sup.Ct.Judgmts. 349.

regard to the terms of section 67; and that section 69 did not affect a bona fide transferee for value who found no notice on the register of an adverse claim. This reasoning appears to their Lordships to ignore the express provision in section 69 to the effect that the rights acquired by limitation to which it applies are to be preserved notwithstanding that they may not be specially notified as incumbrances in the certificate or other instrument.

Their Lordships are of opinion that the view taken by the Acting Chief Justice in *Goodison* v. *Williams* [2] in his dissenting judgment was right, and that the majority decision in that case was wrong and should be regarded as overruled.

Other Jamaican cases were referred to in the course of the argument. Their Lordships find it unnecessary to mention any of these with the exception of *Dartadeen* v. *Watson*,[3] in which a Court of Appeal of two judges was equally divided in a case involving a title acquired by limitation to registered land and the effect thereon of what are now sections 67 and 69 of the Law, Furness C.J. distinguishing *Goodison* v. *Williams* [4] and upholding the claim to a title by limitation, and Sherlock J. taking the opposite view.

It was suggested in argument that on the principle of stare decisis their Lordships should not disturb the decision in *Goodison* v. *Williams*. But the only decision bearing upon the point is *Goodison* v. *Williams* itself, which was a majority decision reached by the two judges who formed the majority on different grounds, and strongly dissented from by the other member of the court. In *Dartadeen* v. *Watson* [5] the court was equally divided as to the application of *Goodison* v. *Williams* to the facts of that case, which accordingly adds nothing by way of authority one way or the other. Moreover, it must be remembered that the present appeal differs from *Goodison* v. *Williams* in that it is concerned with the special case of a certificate issued in the place of a lost certificate.

Accordingly, there is not in their Lordships' judgment any such uniform current of authority as would be required to justify them in departing from their own view of the construction and effect of the Registration of Titles Law with respect to limitation in deference to the principle of stare decisis, which in their judgment has no application here.

For the reasons which they have stated, their Lordships are of opinion that the defendant, while failing on the question concerning the inclusion of the disputed strip in the plaintiff's registered title, succeeds on the question of limitation. Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed and the order of the Court of Appeal dated July 30, 1954, set aside and the formal judgment of the Supreme Court dated July 25, 1953, restored.

[2] Clark's Reps. 349.
[3] (1937) 3 J.L.R. 87.
[4] Clark's Reps. 349.
[5] 3 J.L.R. 87.

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The plaintiff must pay the costs of the present appeal and the costs awarded against him by the judgment of the Supreme Court as now restored; but in the somewhat unusual circumstances of the case their Lordships consider that each party should pay his own costs of the appeal to the Court of Appeal.

Solicitors: *G. F. Hudson, Matthews & Co.; A. L. Bryden & Williams.*

C. C.

[PRIVY COUNCIL.]

J. C.*
1959
July 23, 29.

BHARAT . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF FIJI.

Fiji—Criminal law—Trial with "aid of assessors"—Misdirection by judge—Assessors disabled from giving aid—Judge disabled from taking their opinion—Murder—Provocation—Fiji Criminal Procedure Ordinance, c. 9, *s.* 246.

Criminal Law—Trial with aid of assessors—Misdirection by judge—Effect—Homicide—Provocation—Fiji.

At the trial of the appellant on a charge of murder, at which he gave evidence which raised issues of self-defence and provocation, the judge wrongly directed the assessors that the burden of proof was on the appellant, and also gave them a wrong description as to what amounted in law to provocation. Each assessor gave his opinion that the appellant was guilty of murder, and the judge subsequently gave judgment to the same effect. The appellant's appeal to the Court of Appeal of Fiji was dismissed:—

Held, that while at a trial "with the aid of assessors" under section 246 of the Criminal Procedure Code of Fiji, the judge was not bound to conform to their opinions, he must at least take them into account. Properly directed, it was possible that one or more of the assessors might have been of the opinion that the appellant was guilty of manslaughter only, and the fatal flaw in the trial was that the judge by his misdirection disabled the assessors from giving him the aid which they should have given and thus, in turn, disabled himself from taking their opinions into account as he should have done.

The case must be remitted to the Court of Appeal of Fiji with a direction that they should quash the conviction for murder and, in their discretion, either enter a verdict of manslaughter or order a new trial. The Court of Appeal for that purpose need not be constituted by the same judges as it was before.

APPEAL (No. 18 of 1959) in forma pauperis by special leave from a written order (which was read out by the registrar of the

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* *Present*: LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

Court of Appeal of Fiji on February 16, 1959), dismissing the appellant's appeal against his conviction on October 18, 1958, in the Supreme Court of Fiji (Lowe C.J. sitting with five assessors) of murder. He had been sentenced to death.

The following facts are taken from the judgment of the Judicial Committee: On the night of May 29, 1958, two men named Chanan Singh and Govindappa were killed in Fiji. On the next day the appellant Bharat, son of Dorsamy, was charged with the murder of them. Two separate indictments were afterwards laid against him. The first to be tried was the indictment charging him with the murder of Chanan Singh. The other remained on the file.

The appellant was the barman at the Tavua Hotel in Fiji. On the evening of May 29, 1958, he was on duty in the bar. Chanan Singh and Govindappa were drinking there. About 9 p.m. the appellant left the bar. About half-an-hour later the other two left. Neither of them was ever seen alive again. Some little time afterwards a house-girl from the hotel found their dead bodies on a road not far away. The appellant was arrested. He at first denied any knowledge of the killing but later admitted that he did it. At the trial, after the evidence for the prosecution had been heard, he gave evidence on his own behalf and said: "I went off and went for a stroll towards town. I went nowhere "in particular but went along the road some distance and then "walked back towards the hotel. On my way about three or "four chains from the hotel I met Chanan Singh and Govin-"dappa. They both stood and Govindappa said: 'You were "'showing a lot of cunning in the hotel. I will fix you up now.' "Then he attacked me with a stick. He raised the stick. As "he tried to deliver the first blow I got hold of the stick. A "struggle for possession of the stick ensued and the stick fell to "the ground. To save myself I wanted to run away. Just then "Chanan came and got hold of me. Govindappa came and got "hold of my throat. I struggled to free myself. My state of "mind was upset. I was helpless and could not do anything so "I took out my pocket knife and attacked. While Govindappa "had me by the throat Chanan Singh was holding me. I was "very excited, so much so that I did not know what I was doing. "I can't even say on whom and how many times I struck with "the knife. After a while I found myself free of the others. I "got up and ran towards the hotel. Later on S/Insp. Akuila "came and sent me to the police station. I knew Chanan Singh "for about three years before that night. I had no trouble with "him at any time during that period. He was an acquaintance "of me. There was never any trouble with him at any time "nor was there any trouble with him at the bar that evening."

The trial was held in October, 1958, before the Chief Justice of Fiji (Lowe C.J.), sitting with five assessors. On October 18, 1958, the appellant was found guilty of the murder of Chanan Singh and sentenced to death. He appealed to the Court of

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Appeal against his conviction. The appeal was heard by two judges who had been appointed specially to hear it. They came from New Zealand. They were Sir George Finlay (who acted as President of the Court of Appeal) and Sir Joseph Stanton. After hearing argument they reserved their decision and returned to New Zealand. They afterwards sent their written opinions to the registrar of the Court of Appeal and he read them in open court. It appeared from their opinions that the two judges were equally divided. Sir George Finlay was for allowing the appeal and Sir Joseph Stanton for dismissing it. In the result the appeal was dismissed. Thence the appellant appealed to Her Majesty in Council.

1959. July 23. *E. F. N. Gratiaen* and *L. Kadirgamar* for the appellant.

D. A. Grant for the Crown.

The following cases, in addition to that referred to in the judgment, were cited in argument: *Mahlikilili Dhalamini* v. *The King* [1]; *Kwaku Mensah* v. *The King* [2]; *Chan Kau* v. *The Queen*.[3]

July 23. LORD TUCKER. Their Lordships will humbly advise Her Majesty that the appeal be allowed and the order of the Court of Appeal of Fiji set aside and the case remitted to the Court of Appeal of Fiji with a direction that they should quash the conviction of the appellant for murder and either substitute a verdict of manslaughter, and pass sentence accordingly, or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances. Their Lordships will give their reasons later.

July 29. The reasons for their Lordships' decision were given by LORD DENNING, who stated the facts set out above and continued: It was submitted to their Lordships that the dismissal of the appeal was bad in law because it had not been pronounced by the senior judge or indeed by any judge who had been present at the appeal as required by section 30 of the Court of Appeal Ordinance of Fiji. Their Lordships were inclined to agree with this contention. But they were disinclined to enter into it too closely because it had nothing to do with the merits of the case. It could be corrected quite readily by having the dismissal properly pronounced and the case then brought back again before their Lordships. Their Lordships therefore proceeded to hear the argument on the other points.

The appellant's evidence clearly raised two issues for consideration. First, self-defence; second, provocation. The appellant was, of course, cross-examined on it. After all the evidence

[1] [1942] A.C. 583, 589; [1943] 1 All E.R. 463.

[2] [1946] A.C. 83, 91.

[3] [1955] A.C. 206; [1955] 2 W.L.R. 192; [1955] 1 All E.R. 266.

was concluded and speeches made, the judge summed up to the assessors as section 306 of the Criminal Procedure Code contemplates. He discussed at large the issue of self-defence. And then he mentioned the issue whether there was provocation such as to reduce the offence from murder to manslaughter. Unfortunately the judge directed the assessors wrongly upon this point. He said to them: "It has been suggested that you might think the "accused guilty of manslaughter. Before you could be justified "in thinking that you would have to come to the conclusion that "the accused's story in that particular respect is true. You "would have to be satisfied beyond reasonable doubt that it "might be that the Crown were wrong as to that aspect, and "you would have to believe that the accused received such "provocation that he was justified in resisting force by using "force. I think you might find it difficult to believe that such "was the case."

It was conceded by the Crown that this direction was erroneous in point of law. It wrongly puts the burden of proof on the accused, and it gives a wrong description as to what amounts to provocation in law.

After hearing the summing-up each of the five assessors gave his opinion that the appellant was guilty of murder. It was then for the judge to give judgment, and he did so. He came to the same conclusion as the assessors. He gave a reasoned judgment holding the appellant to be guilty of murder. In it he dealt fully with the question of self-defence, and rejected it. But he did not mention the question of provocation.

What is the consequence of the misdirection given by the judge to the assessors? According to section 246 of the Criminal Procedure Code the trial is by the judge "with the aid of "assessors." The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw.

On behalf of the Crown it was said that the misdirection did not matter, because the judge disbelieved the appellant's story altogether, and there was thus no foundation on which an issue of provocation could be raised. Their Lordships cannot accept this contention. Apart altogether from the appellant's evidence, there was some evidence of a struggle having taken place. Their

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Lordships think this was clearly a case where the question of provocation should have been considered: see *Bullard* v. *The Queen*.[1] The failure of the judge to direct the assessors properly upon it, or to consider it himself in his summing-up, means that his judgment cannot stand.

For these reasons their Lordships have advised Her Majesty that the appeal should be allowed and the order below set aside and the case remitted to the Court of Appeal of Fiji with the direction that they should quash the conviction for murder and either enter a verdict of manslaughter and pass sentence accordingly or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances. The Court of Appeal need not for this purpose be constituted by the same judges as it was before.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

C. C.

[1] [1957] A.C. 635; [1957] 3 W.L.R. 656.

[HOUSE OF LORDS.]

H. L. (E.)*
1959
June 4, 8, 9;
July 16.

OSTIME (INSPECTOR OF TAXES) . . APPELLANT;
AND
AUSTRALIAN MUTUAL PROVIDENT SOCIETY . . . . . RESPONDENT.

Revenue—Income tax—Double taxation relief—Life assurance—Mutual life assurance association in Australia — Branch office in United Kingdom — Assessments to income tax on life fund interest — Competence of assessments—"Industrial or commercial profits"—Whether taxable surpluses properly so described—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. I, Sched. D, rules applicable to Case III, r.* 3—*Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 430 — *Double Taxation Relief* (*Taxes on Income*) (*Australia*) *Order*, 1947 (*S.R. & O.*, 1947, *No.* 806), *Schedule, art. II* (1) (i), (3); *art. III* (2), (3).

The taxpayer, a mutual provident society with its head office in Australia, carried on life assurance business there and, through a branch office in London, in the United Kingdom. For the years 1947–48 to 1953–54 inclusive it was assessed to United Kingdom income tax on sums which notionally were profits of its business of insurance, the assessments being made in respect of "life fund "interest" under rule 3 of Case III of Schedule D to the Income

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* *Present*: LORD RADCLIFFE, LORD TUCKER, LORD SOMERVELL OF HARROW, LORD DENNING and LORD BIRKETT.

Tax Act, 1918, and section 430 of the Income Tax Act, 1952.[1] The taxpayer appealed and the special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was capable of applying to notional profits of a mutual insurance society) profits attributable to the taxpayer's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order

[1] Income Tax Act, 1918, Sch. I, Sch. D: "Case III. Tax in respect "of profits of an uncertain value and "of other income described in the "rules applicable to this Case . . . "r. 3: (1) Where an assurance com- "pany not having its head office in "the United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com- "pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received shall, to the extent pro- "vided in this rule, be deemed to be "profits comprised in this Schedule "and shall be charged under this "Case. (2) Such portion only of the "income from the investments of the "life assurance fund for the year "preceding the year of assessment "shall be so charged as bears the "same proportion to the total income "from those investments as the "amount of premiums received in "that year from policy holders resi- "dent in the United Kingdom and "from policy holders resident abroad "whose proposals were made to the "company at or through its office or "agency in the United Kingdom "bears to the total amount of the "premiums received by the company. ". . . (3) Every such charge shall be "made by the special commissioners "as though the company under the "provisions of this Act had required "the proceedings relating to the "charge to be had and taken before "those commissioners. (4) Where a "company has already been charged "to tax, by deduction or otherwise, "in respect of its life assurance "business, to an amount equal to "or exceeding the charge under this "rule, no further charge shall be "made under this rule, and where "a company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced."

Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, Sch., art. II: "(1) In the present "agreement, unless the context other- "wise requires . . . (f) the terms "'United Kingdom resident' and "'Australian resident' mean respec- "tively any person who is resident "in the United Kingdom for the "purposes of United Kingdom tax "and is not a resident of Australia "for the purposes of Australian tax "and any person who is a resident "of Australia for the purposes of "Australian tax and is not resident "in the United Kingdom for the "purposes of United Kingdom tax ". . . (h) the terms 'United King- "'dom enterprise' and 'Australian "'enterprise' mean respectively an "industrial or commercial enterprise "or undertaking carried on by a "United Kingdom resident and an "industrial or commercial enterprise "or undertaking carried on by an "Australian resident; and the terms "'enterprise of one of the territories' "and 'enterprise of the other terri- "'tory' mean a United Kingdom en- "terprise or an Australian enterprise, "as the context requires; (i) the term "'industrial or commercial enterprise "'or undertaking' includes an enter- "prise or undertaking engaged in ". . . the business of . . . insurance, "life insurance or dealing in invest- "ments, and the term 'industrial or "'commercial profits' includes profits "from such . . . business but does "not include income in the form of "dividends, interest, rents, royalties, "management charges, or remunera- "tion for personal services. . . . "(3) In the application of the pro- "visions of the present agreement "by one of the Contracting Govern- "ments any term not otherwise "defined shall, unless the context "otherwise requires, have the mean- "ing which it has under the laws "of that Contracting Government "relating to the taxes which are the "subject of the present agreement."

Art. III (2): "The industrial or "commercial profits of an Australian "enterprise shall not be subject to "United Kingdom tax unless the "enterprise is engaged in trade or "business in the United Kingdom "through a permanent establishment

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must prevail; and that, the taxpayer being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The Crown contended on appeal that the taxpayer, being a mutual society, had no actual profits or sources of profit and that the Order of 1947 did not deal with purely notional or conventional profits and, therefore, did not apply to the taxpayer:—

"situated therein. If it is so "engaged, tax may be imposed on "those profits by the United King- "dom, but only on so much of them "as is attributable to that permanent "establishment: Provided that "nothing in this paragraph shall "affect any provisions of the law of "the United Kingdom regarding the "imposition of excess profits tax and "national defence contribution in the "case of interconnected companies. "(3) Where an enterprise of one of "the territories is engaged in trade "or business in the other territory "through a permanent establishment "situated therein, there shall be "attributed to that permanent estab- "lishment the industrial or com- "mercial profits which it might be "expected to derive in that other "territory if it were an independent "enterprise engaged in the same or "similar activities and its dealings "with the enterprise of which it is a "permanent establishment were deal- "ings at arm's length with that "enterprise or an independent enter- "prise; and the profits so attributed "shall be deemed to be income "derived from sources in that other "territory. . . ."

Income Tax Act, 1952, s. 430: "(1) Where an assurance company "not having its head office in the "United Kingdom carries on life "assurance business through any "branch or agency in the United "Kingdom, any income of the com- "pany from the investments of its "life assurance fund (excluding the "annuity fund, if any), wherever "received, shall, to the extent pro- "vided in this section, be deemed to "be profits comprised in Schedule D "and shall be charged under Case "III thereof. (2) Such portion only "of the income from the investments "of the life assurance fund for the "year preceding the year of assess- "ment shall be so charged as bears "the same proportion to the total "income from those investments as "the amount of premiums received "in that year from policy holders "resident in the United Kingdom and "from policy holders resident abroad "whose proposals were made to the "company at or through its office or "agency in the United Kingdom bears "to the total amount of the premiums "received by the company: Provided "that in the case of an assurance "company having its head office in any "part of Her Majesty's dominions "outside the United Kingdom, in India "or in the Republic of Ireland, the "Commissioners of Inland Revenue "may, by regulation, substitute some "basis other than that prescribed in "this subsection for the purpose of "ascertaining the portion of the income "from investments to be so charged "as being income derived from busi- "ness carried on in the United "Kingdom. (3) Every such charge "shall be made by the Special Com- "missioners as though the company "had, under this Act, required the "proceedings relating to the charge "to be had and taken before those "Commissioners. (4) Where a com- "pany has already been charged to "tax, by deduction or otherwise, in "respect of its life assurance busi- "ness, to an amount equal to or "exceeding the charge under this "section, no further charge shall be "made thereunder, and where a "company has already been so "charged, but to a less amount, the "charge shall be proportionately "reduced. (5) Where, by virtue of "this section, an assurance company "is charged under Case III of "Schedule D on a proportion of the "income from the investments of its "life assurance fund or on a basis "substituted therefor, the relief "under section 425 of this Act in "respect of expenses of management "shall be calculated by reference "to a like proportion of its total "expenses of management for the "year, estimated according to the "provisions of this Part of this Act. "(6) Subsection (3) of section 131 "of this Act (which provides that "income chargeable under Case III "of Schedule D may in certain cases "be assessed and charged in one sum) "shall not apply to tax in respect of "income to which subsection (1) of "this section applies."

Held (Lord Denning dissenting), that the taxpayer's taxable surpluses were properly described as "industrial or commercial "profits" within the meaning of the Order of 1947, and the taxpayer was assessable in accordance with article III, paragraphs (2) and (3) of the Schedule to the Order and not under rule 3 of Case III the provisions of which, for present purposes, had been superseded by the terms of the Order.

Inland Revenue Commissioners v. *Australian Mutual Provident Society* [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388 considered.

Per Lord Denning. The taxpayer did not make any "profits" from its business within the meaning of the Order of 1947. But it was assessable to tax under rule 3 of Case III upon a proportion of its world "investment income."

Decision of the Court of Appeal [1958] 3 W.L.R. 354; [1958] 2 All E.R. 665 affirmed.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated June 4, 1958, dismissing an appeal by the Crown from and affirming an order of Upjohn J. dated December 20, 1957, whereby an appeal by the Crown upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the determination of those commissioners affirmed.

The question at issue in the appeal was one of construction of the provisions of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, which was given statutory force as respects United Kingdom income tax by section 51 of the Finance (No. 2) Act, 1945 (now section 347 (1) of the Income Tax Act, 1952). The material facts, which were not in dispute, were that the respondent taxpayer company, the Australian Mutual Provident Society, was a mutual insurance society established in New South Wales in 1849, incorporated in 1857 under an Act of the legislature of the then colony of New South Wales, and now regulated by a more recent Australian Act and had been at all material times an assurance company to which the Assurance Companies Act, 1909, applied, carrying on, inter alia, the business of life insurance from its head office in Sydney, and also from a branch office in London. The question which arose on those facts was whether the Relief Order, inasmuch as it provided that the "industrial or commercial profits" of an Australian enterprise should not be subject to United Kingdom income tax save as therein set forth, had the effect of rendering incompetent in law assessments to United Kingdom income tax made upon the taxpayer company under those provisions of the Income Tax Acts of 1918 and 1952 which impose, upon an assurance company not having its head office in the United Kingdom but carrying on life assurance business through a branch or agency in the United Kingdom, a charge to United Kingdom income tax in respect of a specified proportion of the income from its world-wide life insurance fund.

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The determination of the special commissioners was made on an appeal to them by the taxpayer company against assessment to income tax made upon it for the years 1947–48 to 1953–54 inclusive, the assessments in respect of the five earlier years having been made under rule 3 of Case III of Schedule D to the Income Tax Act, 1918, and in respect of the last two years under section 430 of the Income Tax Act, 1952.

The special commissioners directed that the assessments be vacated. Their grounds were that (on the footing that article III of the Relief Order of 1947 was capable of applying to the notional profits of a mutual insurance society) profits attributable to the company's business in the United Kingdom were to be assessed under that article, and not under rule 3 of Case III of Schedule D, as there was a clear conflict between the Order and the rule and the Order must prevail; and that, the company being a mutual provident society, there were no industrial or commercial profits attributable to its London branch which were assessable to United Kingdom income tax.

The case stated on the appeal from the decision of the commissioners is sufficiently set out in the report of the hearing before Upjohn J.[2]

On appeal by the Crown, Upjohn J. and the Court of Appeal upheld the determination of the commissioners. The Crown appealed.

John Pennycuick Q.C. and *Alan Orr* for the Crown.

F. Heyworth Talbot Q.C. and *G. B. Graham* for the taxpayer.

All the cases cited in argument are referred to in their Lordships' opinions.

Their Lordships took time for consideration.

July 16, 1959. LORD RADCLIFFE. My Lords, the sole question raised by this appeal is whether the respondent, an Australian life assurance company, can be lawfully assessed to income tax in this country under rule 3 of Case III of Schedule D to the Income Tax Act, 1918 (or, as the rule has become, section 430 of the Income Tax Act, 1952), having regard to the obligations undertaken by the Government of the United Kingdom in the Double Taxation Relief Agreement entered into with the Government of the Commonwealth of Australia on October 29, 1946. The question itself is said to be a short one, as in one sense it is: but it is not so easy to state it shortly, and, since its solution requires a certain amount of introductory matter, I must ask leave to take a rather longer time than I should have wished in setting my opinion before your Lordships.

The relevant facts are these. The respondent is a mutual insurance society incorporated in the state of New South Wales.

[2] [1958] Ch. 774; [1958] 2 W.L.R. 636; [1958] 1 All E.R. 305.

It has its head office in Sydney and a branch office in London: from these offices it carries on a business of life assurance. It is not in dispute that for the purposes of taxation in this country its life assurance business is to be treated as a business separate from any other class of business carried on by it and the assessments which are the subject of appeal are confined to the income or profits of that business.

These assessments relate to a number of years, beginning with the revenue year 1947–48 and ending with the year 1953–54. Those for the first five years were made under rule 3 of Case III of Schedule D to the Income Tax Act, 1918; those for the last two under section 430 of the Income Tax Act, 1952, which Act replaced the earlier Act in the process of consolidation. As the provisions of the two Acts do not differ in any relevant particular I shall speak throughout of rule 3 as the governing statutory provision. The course that the case has taken in the courts below is that the assessments raised by the appellant were discharged by the special commissioners on the respondent's appeal and the order of the special commissioners has been upheld in the High Court (Upjohn J.) and in the Court of Appeal (Jenkins, Parker and Pearce L.JJ.). In all courts hitherto the same view has prevailed, that there is a conflict between the provisions of rule 3 and those provisions of the Double Taxation Relief Agreement which deal with the taxation of industrial or commercial profits and that this conflict precludes for the future an effective assessment under the rule. I should add at this point that the agreement became municipal law of this country by virtue of an Order in Council made on April 23, 1947, under the authority given by section 51 (1) of the Finance (No. 2) Act, 1945, which allows the enactment by such Orders of the arrangements contained in double taxation relief agreements and prescribes further that the arrangements covered by an Order shall have effect in relation to income tax notwithstanding anything in any enactment "so "far as they provide for relief from tax, or for charging the "income arising from sources in the United Kingdom to persons "not resident in the United Kingdom, determining the income "to be attributed to such persons and their agencies, branches "or establishments in the United Kingdom, . . ." It is plain, therefore, that, if there is a conflict, the unilateral legislation of the United Kingdom must give way.

The decisions in the High Court and the Court of Appeal were dominated by the view taken in those courts as to the effect of the opinions delivered in this House in an earlier case involving the present respondent, which is reported as *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*.[1] Both courts treated that case as deciding that the rule 3 assessment was an assessment and therefore a tax upon the profits of the business of life assurance and as such was a tax upon commercial

[1] [1947] A.C. 605; [1947] 1 All E.R. 600; 28 T.C. 388.

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profits within the meaning of the Double Taxation Relief Agreement. I do not think that the first part of this proposition has been denied at any stage by the argument for the Crown, though it challenges the deduction to be drawn from it as to the interpretation of the agreement. However that may be, I am reluctant that the issue of this appeal should be determined by any exclusive reliance upon what was said by members of this House in the earlier case, since the point that had then to be decided, relating as it did to the applicability of certain provisions about tax-free interest to a rule 3 assessment, has no direct bearing upon the present dispute and in any event nothing said by the House in 1947 could amount to an interpretation of the words "commercial or industrial profits" in the agreement, which was not then before them. I therefore defer until later any further reference to this case.

My Lords, I think that what has to be done is first to ascertain what was the nature of the taxation imposed by rule 3, so far as that very special enactment admits of any clear categorisation, and then to ask whether or not taxation on that basis can still be imposed consistently with the obligations undertaken by the United Kingdom under the Double Taxation Relief Agreement. I will set out rule 3 in the form in which it appears in the Income Tax Act of 1918, but before I do so I must make one cautionary remark. The framers of the rule were concerned to extract what seemed to them a fair quantum of tax from what had hitherto been an unsatisfactory situation. They were not concerned with precise distinctions between commercial and investment income, which in any event do not always admit of such distinction: nor could they be expected to foresee either the contents or the wording of the Double Taxation Relief Agreements which have become a feature of post-1946 tax administration.

"3.—(1) Where an assurance company not having its head "office in the United Kingdom carries on life assurance business "through any branch or agency in the United Kingdom, any "income of the company from the investments of its life "assurance fund (excluding the annuity fund, if any), wherever "received shall, to the extent provided in this rule, be deemed "to be profits comprised in this Schedule and shall be charged "under this Case.

"(2) Such portion only of the income from the investments "of the life assurance fund for the year preceding the year of "assessment shall be so charged as bears the same proportion "to the total income from those investments as the amount of "premiums received in that year from policy holders resident in "the United Kingdom and from policy holders resident abroad "whose proposals were made to the company at or through its "office or agency in the United Kingdom bears to the total "amount of the premiums received by the company:

"Provided that in the case of an assurance company having

" its head office in any British possession, the Commissioners of " Inland Revenue may, by regulation, substitute some basis " other than that herein prescribed for the purpose of ascer- " taining the portion of the income from investments to be so " charged as being income derived from business carried on in " the United Kingdom.

" (3) Every such charge shall be made by the special com- " missioners as though the company under the provisions of this " Act had required the proceedings relating to the charge to be " had and taken before those commissioners.

" (4) Where a company has already been charged to tax, by " deduction or otherwise, in respect of its life assurance business, " to an amount equal to or exceeding the charge under this rule, " no further charge shall be made under this rule, and where a " company has already been so charged, but to a less amount, " the charge shall be proportionately reduced."

Rule 3 first became law in 1915, being introduced by section 15 of the Finance Act of that year. The situation that it was framed to deal with needs to be shortly stated: it arose from a combination of the special difficulties of establishing the true annual profit of life assurance business with the special difficulties of determining the true United Kingdom income of a non-resident life assurance company doing branch business here. If that assurance company was organised on the mutual principle, a further difficulty was superimposed: but this particular difficulty was due to the quirk of English judicial reasoning which absolved a mutual company from the possibility of making a taxable profit and could have been corrected at any time by appropriate legislation.

It had never been easy or convenient to raise an assessment under Case I of Schedule D on a life assurance society in respect of its trading income. To do so involved valuations of liabilities and assets which were not likely to be annually available. On the other hand, life assurance business by its own nature generates the life fund consisting of investments made out of the premium receipts and accumulated income and the produce of those investments is at least an important part of the annual income of the business. So long, therefore, as the investments were such as to yield interest or dividends from a source in the United Kingdom, the interest and dividends themselves fell under charge to tax and, given the allowance to the company of its management expenses, an adequate, though never an accurate, measure of the annual profit accruing to the business could be regarded as obtained. Moreover, since 1914 a company with its head office here had been liable on the income of foreign investments, even if not remitted to this country. A foreign assurance company was, however, in a different position. If it did business in the United Kingdom through a branch, it was not itself a resident and, as a non-resident, could not fairly be regarded as taxable in this country in respect either of its world income from investments or, more generally, its world income from life

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assurance business. So far as its life fund was represented by United Kingdom securities and no special tax exemption attached to them, it was liable to bear tax on the income from the securities. Theoretically, too, it was liable to an assessment under Case I of Schedule D in respect of the profits from its business carried on in the United Kingdom. But then a foreign assurance company might well not keep its life fund or at any rate any substantial part of it invested in United Kingdom securities, so the tax yield on that ground was only a speculative amount: while the problem of raising a valid Case I assessment on the profits of the United Kingdom trade carried on by a branch office which was not even under the obligation of maintaining an independent accounting system was evidently regarded as too vexing for solution.

If it is seen against this background, it is fairly clear what rule 3 was designed to effect. Its purpose was to attribute to a foreign assurance company doing life business here a reasonable sum of income or profits in respect of that business and so to tax that sum as income arising in the United Kingdom. In one sense it charged the income of all the investments of the life fund wherever received and in that sense was a tax on investment income; but the language of the taxing provision and indeed the whole scheme of it is so exceptional that I do not think it right to give any determining weight to that consideration. As I have indicated, it was not unusual to regard the income of the life fund as an acceptable alternative to the trading income of the business. In the end it is not the investment income itself that is the subject of tax but the product of a mathematical calculation represented by the income of the whole life fund multiplied by premiums obtained through United Kingdom business over the company's total premium income. It is the sum produced by this calculation that is "deemed to be profits "comprised in" Schedule D and charged under Case III. This sum, representing an unidentifiable portion of the income from investments, is "charged as being income derived from business "carried on in the United Kingdom" (see the proviso to rule 3 (2)). I regard these last words as very important, for to my mind they indicate conclusively the nature of the taxing provision as being designed to attribute to the foreign taxpayer a measure of income to represent the income of his United Kingdom business. It follows that the effect of the charge is not to charge investments "as such" or any specific investments. Finally, the fact that, under rule 3 (4), the tax charge turns out to be only a supplementary or covering charge which abates or disappears to the extent that tax is otherwise obtained by deduction from investment income or direct assessment seems to me to make it very difficult to regard the nature of the taxing provision as being other than that which I have described.

The question we have to determine is how this method of attributing a profit to a life assurance company whose head office

is outside the United Kingdom stands up against the provisions of the Double Taxation Relief Agreement. I should find nothing surprising in the conclusion that it had been superseded. Rule 3 was an attempt at a unilateral solution of this particular aspect of double taxation in which the Australian taxing authorities were certainly no less interested than the authorities of the United Kingdom. Bilateral agreements for regulating some of the problems of double taxation began, at any rate so far as the United Kingdom was concerned, in 1946. The form employed, which, for obvious reasons, employs similar forms and similar language in all agreements, is derived, I believe, from a set of model clauses proposed by the financial commission of the League of Nations. The aim is to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two the whole claim or else by prescribing the basis on which the tax claim is to be shared between them. For our purpose it is convenient to note that the language employed in this agreement is what may be called international tax language and that such categories as "enterprise," "commercial or industrial profits" and "permanent establishment" have no exact counterpart in the taxing code of the United Kingdom.

Turning then to the agreement, there is no doubt that the respondent is an Australian enterprise and therefore comes within the regulation of article III (2) that its commercial profits are not to be subject to United Kingdom tax at all unless it is engaged in business here through a permanent establishment here. It is conceded that its branch office is such an establishment, and therefore the second part of the regulation applies and tax may be imposed on the respondent's commercial profits by the United Kingdom but only on so much of them as is attributable to that establishment. It is not left wholly to the will of the United Kingdom taxing authorities to decide the basis on which that attribution of commercial profits is to be made. Article III (3) provides by its terms for a basis which in effect requires the hypothesis that the branch is an independent enterprise dealing as an independent entity at arm's length with the head office. The profits which emerge from a calculation based on this hypothesis are to be "deemed to be income derived from sources in the United Kingdom."

I do not think that it is open to us to decide what would be the consequences of taxing the respondent's commercial profits according to this new formula. It is by no means easy to see what other hypotheses are required or excluded by the central hypothesis. The sole issue under appeal is whether the respondent can be taxed at all on the rule 3 basis. In my opinion it cannot be, because the world income from the investments of the life fund, which forms the first stage in the rule 3 calculation of profits, cannot be attributed to the hypothetical independent

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enterprise without violating the very hypothesis which article III (3) is designed to lay down as the basis of taxability.

I did not understand the argument for the Crown to maintain that rule 3 could be applied consistently with an assessment according to article III (3). What was said was that, having regard to the definition of "commercial and industrial profits" in article II (1) (i), assessments under rule 3 were not affected by article III (3), since the profits they charged were not commercial or industrial profits within the meaning of the agreement. With all respect to that argument, it seems to me simply a claim to retain the United Kingdom's unilateral basis of attributing United Kingdom business profits to an overseas life assurance company in despite of the new agreed basis of attribution laid down in article III (3). It is quite true that the definition of "industrial or commercial profits" declares that it "includes "profits from such activities or business but does not include "income in the form of dividends, interest, rents, royalties, . . ." Accordingly, except so far as article VI makes certain special stipulations about double taxation of dividends, the respective claims of the taxing authorities upon items of income such as dividends or interest are not regulated on the "permanent estab- "lishment principle" of article III and are left to be taxed according to the local legislation. It would be in accordance with United Kingdom principles to tax all dividends and interest arising from sources in the United Kingdom to whomever accruing, unless specially excepted, but not to tax the foreign income of non-residents. So, in this case, the respondent has regularly borne tax on its United Kingdom interest and dividends; and, for instance, of a total tax claim of £97,961 in respect of the rule 3 assessment for 1953–54, as much as £86,796 is set off by taxes paid by deduction or otherwise under various schedules.

The tax-deducted portion of that is £79,360. Such income is no doubt income "in the form of" dividends or interest for the purposes of article II (1) (i); but when I look round for any other comparable income received in the basis year which could be excluded from the provisions of article III, I find none. Certainly I do not find it in the notional sum of profits attributed under rule 3 to the United Kingdom business, for that sum is not received in the form of dividends or interest and only exists as a measure of profits established by the legislature for the purpose of the attribution, whereas it is just that question whether such a measure is any longer sustainable in face of the Double Taxation Relief Agreement that is the subject of the present dispute. In other words, as I see it, the Crown's argument can only succeed by assuming in its favour the very hypothesis that the agreement displaces by a different standard of calculation.

I have left to the end any detailed reference to the opinions of this House in *Inland Revenue Commissioners* v. *Australian Mutual Provident Association*.[2] The issue in that case was

[2] [1947] A.C. 605.

different from this one. It turned on the question how, if at all, a rule 3 assessment should take account of the circumstance that some of the life fund investments were by statute free of tax to holders non-resident or not ordinarily resident. When the case began its progress through the courts the general construction of the nature of the rule 3 charge seems to have been governed by Rowlatt J.'s decision in *Equitable Life Assurance Society of the United States* v. *Hills*.[3] In that case he had spoken of the charge as a charge on the investment income simpliciter[4]: "They "are taxed on their investments as such, upon a proportion of "those investments." Putting that construction side by side with the later decision of the House of Lords in *Hughes* v. *Bank of New Zealand*,[5] the Court of Appeal had held that the rule 3 assessment must be adjusted in favour of the taxpayer to reflect the relief on the exempted income. This House was not prepared to accept that conclusion. I think that it is obvious from the opinions of Lords Simon, Wright and Porter that they did not accept Rowlatt J.'s construction of the rule 3 charge. For instance, Viscount Simon is found describing the rule at one point in his speech[6] as one which is made "in respect of the annual "profit of [the company's] life assurance business," and at another[7] as "not one which taxes income from investments." Lord Porter in his speech[8] rejects the argument that the charge is imposed on the income from investments and not on profits. The sum charged, he says, does not represent any real income or profit but is merely arrived at by a conventional calculation adopted for the purpose of estimating an otherwise almost incalculable sum. In the view of Lord Wright[9]: "No specific "investments were taxed. . . . The charge was a tax on the "investment income only as a machinery to tax the general "profits of the British business."

My Lords, I have quoted these extracts at some length, because it is in reliance upon their tenor that the courts below have decided against the Crown in the present case. It is true, I think, that it would have been sufficient for the decision of the earlier case if the House had merely confined itself to pointing out, as Lord Wright did, that the rule 3 charge is not in any case a charge upon any specific investments; for, if that is so, it is very hard to see how to carry the relief on particular items of income into the unappropriated proportion. It is true, too, that there is nothing in the earlier case that could amount to an interpretation of the words "commercial or industrial profits" as defined by the Double Taxation Relief Agreement, the point with which we are most immediately concerned. But, at the same time, I cannot help recognising that the decision was a unanimous decision of the House which was directed to analysing and

[3] (1924) 8 T.C. 657.
[4] Ibid. 661.
[5] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472.
[6] [1947] A.C. 605, 617.
[7] Ibid. 620.
[8] Ibid. 627.
[9] Ibid. 621, 622.

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explaining the true nature of the rule 3 charge, and of what it was that by it was brought under charge, in order to determine the validity of the claim for relief that was under appeal, and I should not think it right to propound in this case any analysis of rule 3 that was materially different from the explanation then given unless I was convinced that it was unmaintainable. As it is, I am not faced with this difficulty, since I agree with the observations of the noble Lords that I have quoted, and my own reading of the statute leads me to the same conclusion.

I notice, only to reject, an argument that was presented to, but not pressed upon, us by the Crown to the effect that, as the date of the making of the Double Taxation Relief Agreement preceded by some months the House of Lords decision in the former case, that agreement ought to be interpreted in the light of the view of the effect of rule 3 that had hitherto prevailed and not in the light of the law as laid down by this House. I do not accept that it would make any ultimate difference even if the earlier view were treated as the only relevant one, but perhaps it is sufficient to say that I do not think that such a method of construction as is proposed ought to be applied to a bipartite taxation treaty of this nature. All that can be said in such an agreement is said by article II (3), and that is not sufficient to assist the appellant's case.

I would dismiss the appeal.

My Lords, my noble and learned friends, LORD SOMERVELL OF HARROW and LORD BIRKETT, who are not able to be present today, have asked me to say that they agree with the opinion that I have just delivered.

LORD TUCKER. My Lords, I agree.

LORD DENNING. My Lords, your Lordships have to consider today the effect of certain arrangements about taxation which have been made between the governments of the United Kingdom and of Australia. These arrangements have been made so as to ensure that persons are not taxed twice over, once by the United Kingdom and once by Australia, on the same income. They have been embodied in an agreement (which I will call the Double Taxation Agreement) and given statutory force in each country. They override any other enactment. Similar agreements in like terms have been made by this country with other countries and by other countries between themselves. The interpretation which your Lordships put upon this Double Taxation Agreement is of more than usual consequence because, if a mistake should be made, it may be well nigh impossible to put it right, for your Lordships' interpretation will govern this country without any likelihood of change by Parliament. At any rate Parliament itself cannot alter the wording of this Double Taxation Agreement without the consent of both parties to it.

The important thing to notice about the Double Taxation

Agreement is that in defining " industrial or commercial profits " it draws a sharp distinction between profits from a business on the one hand (which I will call " business profits ") and income in the form of dividends, interest, rents and so forth on the other hand (which I will call " investment income "). It deals with these quite separately. So far as " business profits " are concerned, the Double Taxation Agreement says that henceforward when an Australian company has a permanent establishment in this country, it may be taxed by the United Kingdom on the profits it makes, but only on so much of them as is attributable to its establishment here. The agreement goes on to say how this amount is to be ascertained. It is by means of a given hypothesis. You are to treat the establishment here as if it were completely independent of the Australian head office and were dealing at arm's length with it, and you are to estimate the profits which such an independent enterprise might be expected to derive on its own, and then tax it on the amount so ascertained.

So far as " investment income " is concerned, the tax payable in this country is left untouched by the Double Taxation Agreement. For instance, where an Australian company has investments in this country from which it derives dividends, interest, rents and so forth, it has, of course, to pay tax on that income here by deduction or otherwise. But over in Australia the Australian company, inasmuch as it is an Australian resident, will have to pay Australian tax on all its investment income, wherever derived, including its income from investments in the United Kingdom. The Double Taxation Agreement provides that, when paying this Australian tax in Australia, the Australian company will receive credit for the tax it has paid in the United Kingdom.

Such being the general effect of the Double Taxation Agreement, your Lordships are today concerned with its effect on a very special kind of tax which is imposed here under rule 3 of Case III. It is a tax charged on life assurance companies which have their head office overseas and a branch or agency in the United Kingdom. The critical question is whether it is a tax on profits of the business so as to come within the provisions of the Double Taxation Agreement about " business profits " or whether it is rather a tax on investment income so as to come within the relevant provisions about " investment income."

My Lords, in order to explain the nature of this special tax I would first say a little about the business of life insurance itself. First, take a mutual society. It carries on business on a mutual basis, and it is settled law that it makes no trading profits but only a surplus and is not liable to tax upon that surplus: see *New York Life Insurance Co.* v. *Styles* [10] and *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association*

[10] (1889) 14 App.Cas. 381; 5 T.L.R. 621; sub nom. *Styles* v. *New York Life Insurance Co.*, 2 T.C. 460.

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Ltd.[11] But it is, of course, liable to tax on its investment income. Secondly, take a proprietary society. It carries on business on a proprietary basis and may in theory make a trading profit, but there is much difficulty in calculating it. It is difficult to say what profit there is when you receive premiums and may have to pay out big sums at some unknown future time. In any case the actuaries seek to calculate the premiums so that they just cover the risk and there is no profit as such. But a proprietary society, of course, invests its income and receives dividends from it. That is how it makes its money. The result is that in practice a proprietary company is not charged with tax on any trading profit but only on its investment income.

When you are dealing with life insurance companies resident in the United Kingdom, there is no difficulty about applying the Double Taxation Agreement to them. They are resident here and are taxed on their total investment income from the life fund, wheresoever this income is derived, and they are given credit for the tax paid by them in Australia on their Australian investments. But with an Australian society (or any company resident overseas) the position is different. Apart from the special tax which we have to consider, the only tax payable by it in the United Kingdom would be the tax on its investments *here*, and it could avoid paying tax in England by reducing its English investments to a minimum. It could make nearly all its investments elsewhere. It was in order to avoid such a situation, so obviously unjust to English taxpayers, that a special tax was introduced. In 1915 it was enacted that life insurance companies, with head offices overseas, should pay tax on a figure calculated according to a prescribed formula. The formula was this: Take the total income which the company receives from its investments all over the world. Then divide this income up. Divide it into proportions according to the volume of business done in life insurance in this country compared with the business done overseas. (This proportion was usually to be ascertained by comparing the premiums received in this country with those received overseas.) By dividing the world investment income in those proportions, you arrive at a fair figure to represent the proportion applicable to the United Kingdom. The company was to be taxed on the figure so ascertained. These 1915 provisions were afterwards embodied in rule 3 of Case III of Schedule D, and I will refer to them as "the rule 3 provisions."

The critical question, as I have said, is: What is the nature of this rule 3 tax? Is it a tax on the investment income of the company, or is it a tax on the profits of the business? For it needs must, I think, be put in one category or the other if this Double Taxation Agreement is to work on it. And it is to be remembered

[11] (1946) 62 T.L.R. 317; [1946] 1 All E.R. 637; sub nom. *Ayrshire Employers' Mutual Insurance Association Ltd.* v. *Inland Revenue Commissioners*, 27 T.C. 331.

that the term " profits " must be given the meaning it has under English law, unless the context otherwise requires.

Apart from authority, I should have thought this rule 3 tax was a tax on investment income. It is not, of course, a tax on specific investments but it is a tax on a proportion of the world investment income, and that is surely a tax on investment income and not on business profits. In so holding, I should be in good company, for Rowlatt J. so regarded it in *Equitable Life Assurance Society of the United States* v. *Hills*.[12] So did Dixon C.J., Fullagar and Menzies JJ. in *Mutual Life and Citizens' Association* v. *Federal Commission of Taxation*,[13] who all took the view that " If you impose a tax on 10 per cent. of an amount which " includes several items, you are imposing a tax on every item " which is included in that amount."

But it is said that there is a decision of this House to the effect that it is not a tax on investment income but is a tax on the profits of the business. That decision is *Inland Revenue Commissioners* v. *Australian Mutual Provident Society*.[14] I would draw the attention of your Lordships to the most unusual course which that case took. The question was how the tax under rule 3 was to be calculated when some of the investments of the society were in United Kingdom War Loan Stock which was exempted from any tax at all. Both parties—both the Crown and the society—proceeded on the footing that the tax under rule 3 was a tax on investment income and that the society must be given the benefit of this exemption. The parties differed only as to the way in which the benefit should be calculated. The method adopted by the Crown commended itself to the court of first instance. The method adopted by the society commended itself to the Court of Appeal. But when the case reached this House, a new point was raised for the first time by the House itself. It was suggested that the tax under rule 3 was not a tax on investment income at all but a tax on profits, and accordingly that the society was not entitled to any benefit at all from the exempted investments and could make no deduction at all on that account. Neither party liked the point at all. The Crown (in whose favour it appeared to be) refused to take it. The Solicitor-General (Sir Frank Soskice Q.C.) said[15]: " It is not " proposed to address the House on the question whether the " wording of rule 3 is such as not to permit any deduction at all. " The Crown does not, in any event, seek an order putting the " respondents in a worse position than the order of the court of " first instance." In spite of the Crown's reluctance, the House was so convinced of the correctness of the point, which it had itself raised, that it decided that the society was not entitled to any exemption at all. The House did not, however, carry its point of view so far as to compel the Crown to accept an order it did not ask for. The House simply reversed the decision of

[12] 8 T.C. 657.
[13] (1959) 33 Aust.L.J.R. 54, 56.
[14] [1947] A.C. 605.
[15] Ibid. 616.

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the Court of Appeal and restored the judgment of the court of first instance.

Looking back on it now, with all the knowledge since acquired, it does seem a pity that the House insisted on its own point so strongly, for it has been turned to great advantage by the mutual societies as against the Crown. It recently compelled the High Court of Australia to decide a case contrary to its own better judgment: see *Mutual Life and Citizens' Association* v. *Federal Commission of Taxation*.[16] It compelled the judges below in the present case to decide it as they did, and Parker L.J. went so far as to say[17] that he was unable "fully to understand" the decision of the House.

And, as it happened, no doubt owing to the unusual course which was adopted, the House in 1947 was never referred to a very relevant decision of its own. It was never referred to the decision in *New York Life Insurance Co.* v. *Styles*,[18] which holds that a mutual life assurance society does not make profits. That case is quite inconsistent with the notion that the tax under rule 3 is truly a tax on "profits" as that word is used in English law. At most it is a tax on a calculated figure that is "deemed to be "profits" though not so in fact. It is to be treated "as being "income," that is, as if it were income derived from the business, though not so in fact.

My Lords, I ask myself, What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? Are we to hold that the tax under rule 3 is a tax on the profits of the business for all purposes, including the purposes of the Double Taxation Agreement, which this House never had in mind at all? I think not. The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps. And that is what I would ask your Lordships to do. I would invite your Lordships to say that the decision of this House in 1947 has no application to the meaning of the word "profits" in the Double Taxation Agreement. The tax under rule 3 is not a tax on the profits of the business within the meaning of that agreement but is rather a tax on income in the form of dividends and interest.

Just consider what would be the result of applying the 1947 decision here. If the society does make "profits" from its business, the Double Taxation Agreement says that it is to be taxed here, as if it were completely independent of the Australian head office and were dealing at arm's length with it. But, on this hypothesis, what is the result? If this society were here completely independent, then, being a mutual society, it would

[16] 33 Aust.L.J.R. 54.
[17] [1958] 3 W.L.R. 354, 364.
[18] 14 App.Cas. 381.

not make any profits so as to be chargeable under Case I, and furthermore, being established in this country, it would not be liable to tax under rule 3 at all, because that tax does not apply to independent establishments here. So the establishment here would not be liable to tax on profits at all. This cannot have been intended. It is quite contrary to the tenor of the Double Taxation Agreement which assumes that, if the society does make profits, some of those profits would be attributable to its establishment in the United Kingdom.

The true answer, to my mind, is that the society does not make any "profits" from its business within the meaning of the Double Taxation Agreement. But it has a world "invest-"ment income," and it can be taxed here under rule 3 upon a proportion of that income, and when it comes to pay Australian tax in Australia (on its world investment income) it will receive credit for the amount paid here under rule 3. If I am wrong, it means that the Australian society will no longer have to pay the tax it has paid under rule 3 for 30 years or more. It will have to pay no tax at all in return for the benefit of carrying on the business of life assurance in this country—but only tax on such investments as it may choose at its will to retain in this country. I do not think that this was the intention of the Double Taxation Relief Agreement between the United Kingdom and Australia.

I would therefore allow the appeal.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Bell, Brodrick & Gray.*

J. A. G.

[CHANCERY DIVISION.]

In re BENNETT, DECD.
SUCKER *v.* ATTORNEY-GENERAL.

1959
July 24.
Vaisey J.

[1959 B. 1420.]

Charity—Royal prerogative—Bequest to non-existent body—No trusts in the will—Charitable intention—Whether application by way of scheme or under royal prerogative.

A testator gave a quarter share of her residuary estate to "The "Hospital for Incurable Women of Brompton Road, London." No body of that name existed; and, notwithstanding the appointment of executors, the will contained no trusts. On a summons by the executors asking the court to direct a scheme for the disposition of this share of the residuary estate:—

Held, that, the gift being by way of direct gift and not by way of trust, the court of equity had no jurisdiction to direct a scheme, and the gift must be applied in accordance with the directions of the Queen under the royal prerogative.

Moggridge v. *Thackwell* (1802) 7 Ves. 36 and *Paice* v. *Archbishop of Canterbury* (1807) 14 Ves. 364 applied.

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ADJOURNED SUMMONS.

Laura Sarah Bennett, by her will dated March 28, 1957, appointed the plaintiffs, Ellen Emma Sucker and Robert Bush, as her executors. By clause 4 thereof she provided: "I devise "and bequeath all my real and personal estate whatsoever and "wheresoever not hereby or by any codicil hereto otherwise "specifically disposed of . . . but subject to and charged with "the payment of my debts funeral and testamentary expenses "and the legacies bequeathed hereby or by any codicil hereto "and the duties on any such legacies bequeathed free of duty "to" four named institutions, one of which was "The Hospital "for Incurable Women of Brompton Road, London," in equal shares absolutely. The testatrix died on January 31, 1958. One quarter of her residuary estate was of the approximate value of £1,350.

According to the evidence the only institutions to be found which might answer to the description "The Hospital for "Incurable Women of Brompton Road" were the British Home and Hospital for Incurables and the Royal Hospital and Home for Incurables, both of whom had relinquished any formal claim to the one-quarter share of residue.

The executors took out the present summons asking that a scheme might be settled for the disposition of the one-quarter share of the residuary estate of the testatrix bequeathed to "The Hospital for Incurable Women of Brompton Road, "London. . . ."

Raymond Walton for the executors.
Denys Buckley for the Attorney-General.

Cases cited in argument in addition to those referred to in the judgment: *Reeve* v. *Attorney-General* [1]; *Simon* v. *Barber* [2]; *Thorley* v. *Byrne* [3]; *Sanford* v. *Gibbons* [4]; *Attorney-General* v. *Syderfen* [5]; *In re White* [6]; *Clifford* v. *Francis*.[7]

VAISEY J. In this case the question is whether a defect in the will ought to be put right by way of scheme or whether it is a matter which falls to be dealt with under the royal prerogative. [His Lordship stated the facts and continued:] It is a curious thing that the matter seems on the authorities to depend almost entirely on this principle: was the gift to the non-existent beneficiary created by means of a trust or by a direct gift? If it was created by means of a trust, then the usual procedure would follow, and it would be for the court to decide, in the familiar way, by way of scheme what should be done with the disputed amount. If, on the other hand, the gift to the non-existent hospital is not by way of trust but a direct gift, then

[1] (1843) 3 Hare 191.
[2] (1829) 3 Hare 195n.
[3] (1829) 3 Hare 195n.
[4] (1829) 3 Hare 195n.
[5] (1683) 1 Vern.Rep. 224.
[6] [1893] 2 Ch. 41.
[7] (1679) Freem.K.B. 330.

under a very long series of authorities (not altogether consistent and not altogether easy to interpret) it falls to be dealt with by the royal prerogative.

The problem is stated at great length in Tudor on Charities, 5th ed., Chap. V, sect. 1, p. 174: "The Court and the Crown." It appears rather curious at first sight that if there is a trust it should fall to the ordinary jurisdiction of the court of equity to resolve a difficulty of this kind, but that if there is not a trust then it is a matter for the Sovereign acting under the royal prerogative.

The leading case on the subject (which is not the first) is *Moggridge* v. *Thackwell*.[1] Although it seems as if this point may to some extent and on some occasions have been overlooked, and that the distinction between a gift by way of trust and a gift which is direct has not been fully considered, and in some of the cases appears to have been disregarded, it may well be that a fuller statement of the facts and a closer consideration of the terms of the instruments in question would throw a different light on the matter and make those cases reconcilable. I am not going to refer to them, but there are admittedly three cases which seem to be out of line and step with that principle and in which the court has apparently been induced to deal with the matter as if the disposition were by way of trust when, so far as the report shows, it was otherwise [*In re Clergy Society*[2]; *Bennett* v. *Hayter*[3]; *In re Maguire*[4]]. I do not think that it is necessary to attempt to reconcile these authorities. I have referred already to *Moggridge* v. *Thackwell*,[5] and there is also *Paice* v. *Archbishop of Canterbury*[6]; and it may well be that the distinction has not been carefully attended to on more than one occasion in the past. Having accepted from Mr. Walton that there is a difficulty about some of the cases, on looking at the matter and the authorities broadly, I think that in this case, where there clearly is not a trust but an ordinary gift to a non-existent charitable institution, the principle of *Moggridge* v. *Thackwell*[7] and *Paice* v. *Archbishop of Canterbury*[8] applies. There is undoubtedly some uncertainty about the position, but, after all, I am not giving a disquisition on the whole of the law on this rather obscure subject; I am considering what has to be done in this particular case where there is the admitted puzzle of a gift to a non-existent institution in terms which quite clearly import a charitable intention. There is a plain, unambiguous and undoubted devotion to charity and the only question is how that gift should be implemented and carried out.

Without saying that the decisions are unanimous, or wholly free from ambiguity, I think that in a simple case such as this, as between the jurisdiction arising from the royal prerogative

1 (1802) 7 Ves. 36.
2 (1856) 2 K. & J. 615.
3 (1839) 2 Beav. 81.
4 (1870) L.R. 9 Eq. 632.
5 7 Ves. 36.
6 (1807) 14 Ves. 364.
7 7 Ves. 36.
8 14 Ves. 364.

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and the ordinary equitable jurisdiction of the court, however little difference it may probably make in the end, the position should be most carefully safeguarded. However long I continued to hear this case, and to investigate the various authorities in which the point has either been ignored or apparently disregarded or the position misunderstood, I feel no doubt at all that I should in the end come to the conclusion that this is a case in which the royal prerogative must be appealed to, to enable justice to be done. Quite clearly there is no trust in this case, although there are references to trustees in the will in which the gift is made; first of all, certain persons are appointed to be executors and trustees of the will of the testatrix, and they are defined in this way: "they or the survivor of them or other the trustees for "the time being hereof are hereinafter called my trustees." That certainly indicates that there will be some trusts, as it defines the persons whom the testatrix designated as trustees clothed with a trust of some kind; but, curiously enough, none are to be found. There are two references in a common-form clause that the receipt of the treasurer or secretary of an institution is to be a good discharge for the testatrix's trustees; but that does not create a trust of any sort or kind.

There is, therefore, this gift, ambiguous so far as the personality of the legatee is concerned, not given by way of trust, but given straight away by way of immediate gift. Although by looking at one or two of the authorities in isolation it might appear that one should come to a different conclusion, I do not think that I can do that. But, on looking at all the authorities, once I have come to the conclusion that there is not a trust but only a direct gift, and to the further conclusion that there is here an ambiguity to be resolved, I cannot see that this court, as a court of equity, has any jurisdiction. As Mr. Buckley pointed out, my jurisdiction is based almost exclusively on the supposition of a trust; and, as no trust can be found, I must decide that the difficulty falls to be resolved by an appeal to the royal prerogative.

I do not say the jurisdiction of the court is exclusively based on the existence of a trust, but in this type of case I am powerless to act, and an appeal must be made to Her Majesty to resolve it in the appropriate and proper way. Certainly I have no duty to insist upon the court's jurisdiction unless I am quite satisfied that the court ought to have jurisdiction. The jurisdiction of this court is derived from the Crown; there is no kind of conflict, and the only question is whether this peculiar particular problem falls within my jurisdiction as a judge of the High Court or has to be dealt with away from this court by the authority which is at the base of both jurisdictions; that is to say, by the Crown itself. I do not deny that some of the cases are a little difficult, but in this particular case where the executors ask for a scheme to be settled for the disposition of this one-quarter share of the residue, I cannot direct a scheme, and the proper

course is to declare that this matter falls within the jurisdiction which belongs to Her Majesty by virtue of the royal prerogative, illustrated in the cases which I have named and many others, and to let the matter be referred through the appropriate channels so that this question may be settled. I will declare that the bequest of one quarter of the residue for the Hospital for Incurable Women of Brompton Road is a valid charitable bequest and ought to be applied in accordance with the directions of Her Majesty under the royal prerogative.

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Declaration accordingly; costs to be taxed and paid out of the residuary estate.

Solicitors: *Smith & Hudson for Jackson & Walton, King's Lynn; Treasury Solicitor.*

I. G. R. M.

[CHANCERY DIVISION.]

NARCISSI *v.* WOLFE.

[1958 N. No. 745.]

1959
June 15, 16.

Roxburgh J.

Landlord and Tenant—Business premises (security of tenure)—Application for new tenancy—"The holding"—Part of premises sub-let on furnished tenancy—Part temporarily occupied in connection with business—Whether occupation by tenant—Date of designation of property constituting holding—Whether court should investigate purpose of occupation—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (3) *and* 32 (1).

By section 32 (1) of the Landlord and Tenant Act, 1954, "... an "order under section 29 of this Act for the grant of a new tenancy "shall be an order for the grant of a new tenancy of the holding; "and in the absence of agreement between the landlord and the "tenant as to the property which constitutes the holding the court "shall in the order designate that property by reference to the "circumstances existing at the date of the order." By section 23 (3) of the Act "... the expression 'the holding,' in relation to a "tenancy to which this Part of this Act applies, means the property "comprised in the tenancy, there being excluded any part thereof "which is occupied neither by the tenant nor by a person employed "by the tenant ..."

A tenant, who applied for a new lease of the whole of the property comprised in the current lease, at the date of the application used the ground floor and basement in connection with his restaurant business and sub-let the three upper floors as furnished flats. After the commencement of the proceedings but before the hearing, the sub-tenant of the first-floor flat gave up his tenancy, and the tenant, as he had been warned by the Medical Officer of Health not to use

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[Reported by VERITY ANN MOXON, Barrister-at-Law.]

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the basement for the storage of food not in sealed containers, stored a certain amount of food on the first floor. The tenant left some furniture in the first-floor flat; he had, on one occasion, spent the night there, and he occasionally used a table for office work in connection with the restaurant. The sub-tenants continued in occupation of the second and third floors. The landlord agreed that a new lease should be granted, but contended that the holding consisted of the ground floor and basement only. The tenant admitted that the use of the first floor for storage was a temporary measure until the basement was repaired; and that, by using it himself, he hoped to obtain a new lease which included the first floor:—

Held, (1) that the date at which the property constituting the holding was to be designated was the date of the order of the court and not the date of the application.

(2) That the second- and third-floor flats were occupied by the sub-tenants and not by the tenant, and must, accordingly, be excluded from the holding.

(3) That in designating the property which constituted the holding it was not for the court to investigate a tenant's purpose in occupying the property but to see whether the occupation was genuine or not; that, since he was in real need of storage space, albeit it might be a temporary need, it was impossible to say that the tenant's occupation of the first floor was not genuine and that, therefore, at the material date the holding of which the tenant was entitled to have a new lease comprised the basement, ground floor and first floor.

ORIGINATING SUMMONS.

By a lease dated January 6, 1938, premises known as No. 5 Panton Street, Haymarket, in the county of London were let for a term of 21 years from December 25, 1937. The present tenant, Celeste Narcissi, a restaurateur, was the successor in title of the original tenant; and the present landlord, Henry Lucien Wolfe, was the successor in title of the original landlord. The premises consisted of a ground floor, basement and three upper floors, and by a notice dated February 20, 1958, under the Landlord and Tenant Act, 1954, the tenant proposed that the landlord should grant him a new tenancy of the whole of the premises for a term of 14 years from December 26, 1958, at a rent of £1,000 per annum. On April 18, 1958, the landlord gave notice that he intended to oppose the application for a new lease on the ground that the holding consisted of the ground floor and basement only and, alternatively, that he had offered to provide alternative accommodation; and offered the tenant a lease of the ground floor and basement for a term of seven years from December 25, 1958, at a rent of £1,200 per annum.

At the date of the commencement of the proceedings, the tenant was using the basement and ground floor in connection with his business of a restaurateur and the three upper floors were let furnished to sub-tenants. The tenancy agreements relating to the furnished flats came to an end on December 25, 1958, but the sub-tenants of the second- and third-floor flats continued in occupation on terms that they would leave the rooms if the tenant was required to give up his lease, that they

would not sub-let the rooms, take lodgers or remove any of the furniture and that the tenant was to clean the entrance passages and staircases and should be entitled to enter the rooms at any time for inspection or to remove or replace any of the furniture.

The sub-tenant of the first-floor flat left on February 21, 1959, and thereafter the tenant, who had been told by the Medical Officer of Health not to use the basement other than for the storage of food in sealed and vermin proof containers and the initial preparation of root vegetables subsequently cooked, used the first floor for the storage of a certain quantity of food. He also kept some furniture there; and on one occasion had spent the night there. He sometimes used a table on the first floor for writing cheques and making out bills, although he kept his stationery and invoices downstairs.

The master adjourned into court the question whether a new lease should be granted and, if so, whether of the whole or part of the premises. In December, 1958, the case was referred back to chambers for further evidence which was then filed.

Lionel Blundel Q.C. and *Harry Lester* for the tenant.
Roger Ormrod Q.C. and *J. D. F. Moylan* for the landlord.

The following cases, other than that referred to in the judgment, were cited in argument: *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors* [1]; *Southend Corporation* v. *White*.[2]

ROXBURGH J. This is an application under Part II of the Landlord and Tenant Act, 1954. There was a current tenancy of the premises under a lease made on January 6, 1938, for a term of 21 years from December 25, 1937, which expired on December 25, 1958, this application being made on June 3, 1958, and all the requisite notices have been given. The matter came before the master who adjourned into court the question whether a new lease should be granted and, if so, whether of the whole or part of the premises. On the first question it is conceded that a new lease should be granted of something and, accordingly, I order today the grant of a new tenancy in pursuance of this Act. The second question is by no means a matter of consent.

Section 23 (3) of the Landlord and Tenant Act, 1954, provides: "In the following provisions of this Part of this Act the "expression 'the holding' in relation to a tenancy to which this "Part of this Act applies, means the property comprised in the "tenancy,"—that, of course, is the whole of No. 5, Panton Street—and then come these most important words: "there "being excluded any part thereof which is occupied neither by "the tenant nor by a person employed by the tenant and so "employed for the purposes of a business by reason of which "the tenancy is one to which this Part of this Act applies."

[1] [1956] 1 Q.B. 90; [1955] 3 W.L.R. 523; [1955] 3 All E.R. 365.

[2] (1900) 17 T.L.R. 5.

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I am not concerned with occupation by a person employed, but only with the question whether some part of the premises is to be excluded on the ground that it is not occupied by the tenant.

Section 29 (1) provides: "Subject to the provisions of this "Act, on an application under subsection (1) of section 24 of "this Act for a new tenancy the court shall make an order for "the grant of a tenancy comprising such property, at such rent "and on such other terms, as are hereinafter provided." By section 32 (1): "an order under section 29 of this Act for the "grant of a new tenancy shall be an order for the grant of a "new tenancy of the holding; and in the absence of agreement "between the landlord and the tenant as to the property which "constitutes the holding the court shall in the order designate "that property by reference to the circumstances existing at the "date of the order."

Section 33 provides: "Where on an application under this "Part of this Act the court makes an order for the grant of a "new tenancy, the new tenancy shall be such tenancy as may "be agreed between the landlord and the tenant, or, in default "of such an agreement, shall be such a tenancy as may be "determined by the court to be reasonable in all the circum-"stances, being, if it is a tenancy for a term of years certain, "a tenancy for a term not exceeding 14 years, and shall begin on "the coming to an end of the current tenancy." Section 34 deals with rent in the same sort of phraseology. Section 35 is somewhat similar: "The terms of a tenancy granted by order "of the court under this Part of this Act (other than terms as "to the duration thereof and as to the rent payable thereunder) "shall be such as may be agreed between the landlord and the "tenant or as, in default of such agreement, may be determined "by the court; and in determining those terms the court shall "have regard to the terms of the current tenancy and to all "relevant circumstances."

This building consists of a basement, a ground floor and three upper floors, the 1st, 2nd and 3rd. To start with the lease is ambiguous: it states that the original tenant was a restaurant proprietor, and then it says this, and this is one of the tenant's covenants: "Not to use the demised premises otherwise than "for the trade or business of a restaurant proprietor including "the sale of tobacco confectionery and other similar produce "and/or as offices and showrooms for such business to be first "approved by the landlord in writing such approval not to be "unreasonably withheld or as to the floors of the said premises "above the ground floor without any such consent for private "residential purposes. . . ."

Mr. Blundell has asked me to construe that as though for the word "such" is substituted the word "any." I do not feel able to do that. It is altering the document; and if the doctrine falsa demonstratio is applied the difficulty is not in saying that something has gone wrong, because that is obvious,

but in saying precisely what has gone wrong. Mr. Ormrod asks me to construe it as though he could not use any part of the demised premises for the business of restaurant proprietor except the ground floor and basement without consent. I do not feel able to construe it in that way because it does not say so; and, again, if I try to apply the doctrine of falsa demonstratio I am in the same difficulty as I do not know what was intended. The best I can do is to construe it in this way: that the tenant, who was a restaurant proprietor, was able to use the whole premises for the trade or business of a restaurant proprietor if he wanted to; that he could, without any permission, use the first and second and third floors, but not the ground floor or basement, for private residential purposes. On the whole I think "such "business" refers to tobacco, confectionery and similar produce and I have come to the conclusion that the words "to be first "approved by the landlord in writing" relate to "the sale of "tobacco confectionery and other similar produce and/or as "offices and showrooms for such business." The reason why I have had to construe this clause will become apparent later.

Up till February 21, 1959 (that is to say after the issue of these proceedings), there was no doubt as to what was comprised in the holding, namely the ground floor and the basement, because all the other three floors were let to sub-tenants, furnished.

[His Lordship referred to the terms of the tenancies of the second and third floors and continued:] With regard to the second and third floors the sole question is whether they are occupied by the tenant. I do not think that anything which has been said to me throws any real light on the meaning of the word "occupied" in this case. There is a lot of law about the word "occupied" but that does not appear to me to be applicable to this Act. The Court of Appeal in *Bagettes Ltd.* v. *G. P. Estates Ltd.*[1] held that certain flats, which were unfurnished, were occupied by the tenants and not by the landlords, but the court never mentioned the word "furniture," either to comment on its absence or in any connection whatsoever. I do not think that that case throws any light on the question whether a furnished flat, let on the terms in the present case, is occupied by the tenant or by the sub-tenant; but, applying common sense, it seems to me that the second and third floor flats are occupied by the sub-tenants and not by the tenant.

The first floor stands in quite a different position. It is to be noted that section 32 (1) of the Act provides that the date at which the property which constitutes the holding is to be designated is the date of this order and not the date of the issue of the application. It is not for me to discuss the wisdom of such a provision except to say that it does lend itself to the

[1] [1956] Ch. 290; [1956] 2 W.L.R. 773; [1956] 1 All E.R. 729.

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possibility of abuse and that is really the question before me today. Mr. Ormrod says that this alleged occupation by the tenant of the first floor since February 21, 1959, is merely colourable, whereas Mr. Blundell says it is genuine and that is really the only question which I have to decide.

[His Lordship referred to the evidence and continued:] The tenant indicated that there were two things that he was interested in and hoped to achieve: one was a new lease of the whole of the premises and the other was the renovation and to some extent reconstruction of the basement to which, in his view, the landlord ought to contribute. He made no secret of the fact that if he could achieve both these objects he would cease the use of the first floor himself for the purpose of his business. He was using the first floor in part to try to take advantage of the opening which Parliament has accorded to him by section 32; and I can see nothing against his doing so when Parliament has provided him with the opportunity. The question is whether or not there was a real occupation, however conditional, or whether it was a merely colourable occupation.

[His Lordship referred to the evidence of the occupation by the tenant of the first floor flat and continued:] The purpose of the occupation of the first floor was, in part, to try and get a new lease, and the occupation was with a temporarily designed object. I do not think that it is my business to investigate the tenant's purpose; it seems to me that Parliament has invited something of this sort and what I have to do is to see whether there is a real occupation or whether it is simply colourable.

I cannot say that it is simply colourable. It may be that the mere fact that what remained in the flat was the tenant's was enough to make the occupation revert to him when the subtenant left. I deliberately refrain from deciding that question, but is is a point which I cannot entirely ignore. There was this furniture on the first floor and, while it might not be enough in itself, it is an item in the schedule of points to be considered.

I propose to eliminate altogether the use of the premises as office accommodation for that seems to me to have been almost negligible and a breach of covenant. I am inclined to accede to Mr. Ormrod's argument that, under the Act, occupation cannot be based upon acts of occupation which are in breach of covenant. That is why I had to construe the meaning of the covenant at the beginning of my judgment. That does not, however, apply either to the one night when the tenant slept in the first floor flat or to its use for storage; it does not seem to me that either of those acts was a breach of covenant, but that is why I have eliminated the office user. I am not going to decide whether the use of the first floor for one night's residence in several months would be enough. The really important matter, in my judgment, is one about which there is no real conflict of evidence, and that is the use of the first floor for

storage purposes in connection with the tenant's business as a restaurateur.

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Roxburgh J.

I accept the evidence that the tenant was in real need of storage accommodation and will continue to be in such need until the basement is put into a condition in which it can be used for storing any food. It is that aspect of the case which makes it impossible for me to say, in this case, that the occupation was merely colourable.

Therefore, I hold that today, the date of the order I propose to make, the tenant is in occupation of the first floor and, accordingly, I designate the holding as being the basement, the ground floor and first floor, but excluding the second and third floors.

Order for a new tenancy accordingly.

Solicitors: *Lesser, Fairbank & Co.; Arthur Hunt & Hunt.*

[COURT OF APPEAL.]

SCOTT *v.* MUSIAL.

[1957 S. No. 2623.]

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July 3, 6.

Morris, Ormerod and Willmer L.JJ.

Damages—Personal injuries—Jury—Assessment of damages by jury—Limits of power of appellate court to interfere—Whether pattern of awards by judges in comparable cases assist appellate court in considering appeals from awards of jury.

The difference in the approach of an appellate court to an award of damages by a judge sitting alone and an award by the verdict of a jury is such that the court will not interfere merely because it is shown that an award by a jury does not conform to such pattern or level of awards as may have emerged from the decisions of judges in comparable cases. The jury by established practice is given no guidance as to the amount which they should award, nor should they know of any such pattern. Their views may form a valuable corrective to the views of judges; and the appellate court will not interfere with their award unless it is satisfied that it is out of all proportion to the circumstances of the case.

Dicta in *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin and Austin Motor Co. Ltd.* [1935] A.C. 346, 378; *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)* [1942] A.C. 601, 616; 58 T.L.R. 240; [1942] 1 All E.R. 657; *Bocock* v. *Enfield Rolling Mills Ltd.* [1954] 1 W.L.R. 1303, 1306; [1954] 3 All E.R. 94; and *Dolbey* v. *Goodwin* [1955] 1 W.L.R. 553, 555; [1955] 2 All E.R. 166 applied.

APPEAL from Paull J. and a jury.

The plaintiff, Neil Scott, then aged about 28, was gravely injured on May 4, 1957, when his motor-cycle came into collision with the defendant's motor-van. He brought an action for

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damages, alleging negligence; negligence was denied and contributory negligence alleged against him. On an application by the plaintiff, it was ordered that the trial of the action should be with a jury.

The jury heard evidence which showed the plaintiff's injuries to be extremely serious. He had a fracture of his spine, broken ribs, and severe concussion. His left lung was collapsed. The ribs healed and the lung recovered, but at first he suffered from total paralysis below the waist, and as a result of the spinal injuries communication between brain and limbs was damaged. He was in bed in hospital for many weeks, and after being unconscious for a week he suffered hallucinations as a result of the concussion, which, as the judge told the jury in his summing-up, might indicate damage to brain centres which might result in epilepsy, though the danger of that was at the date of the trial receding as 18 months had elapsed without that development. The plaintiff left the hospital on November 11, 1957, by which time he was able to walk with a calliper and by using a stick, though he was somewhat unsteady; but he was left with serious damage to the bladder which left him without control over it, even in the middle of the sexual act, and his surgeon had said that he would have to undergo a serious operation to bring the urine out through his side into a "contraption" which would have to be removed and emptied and put back again; and that condition would persist all his life. There was also damage to the kidneys, though it was hoped that the proposed operation would obviate the danger of infection of the kidneys. There had also been some paralysis of the rectum which had somewhat improved by the time he left hospital. His potential sexual capacity was also considerably impaired.

The plaintiff had shown a courage and determination applauded by all concerned in the litigation, and he returned to work the day after he was discharged from hospital. His employers, a garage belonging to Nestlé's Ltd., where he was in charge of the maintenance department, assisted him in his anxiety to get back to work, for they took him back at his previous rate of remuneration, although he was not able to work as a skilled artificer but had to concentrate on clerical or administrative work. His employers sent a car for him each morning, and allowed him to work less than a full day until he felt able to do more.

At the trial evidence was given on behalf of his employers, stating that the plaintiff's determination to get back to his old job was "really something," but that he could not do inspections or testing. The company was prepared to keep him on for "a "reasonable time," but that did not mean that he was guaranteed a job for life. He would be kept on as long as possible, but if he could not test vehicles by driving and inspecting he was not worth the wages which he drew at the time of the trial, namely, £15 a week. The company hoped that he would get better and be able to do more practical work, because they would rather have

somebody like him getting better and doing the work than have to find somebody else.

The plaintiff gave his evidence sitting in the well of the court, and the jury were able to observe that he could only remain stationary for a few minutes at a time. He was in peril of falling, and had fallen a few days before the trial and broken his wrist. It was hoped that his muscles would get stronger so that he could dispense with the calliper and have a kind of T-iron fitting to his heel.

The judge, in his summing-up to the jury, dealt with the question of prospects of employment as follows: "He is also "entitled, in that sum that you put down there, to have borne in "mind the fact that it is all very well to say that he is in "employment, earning as much as he did before the accident; "you will remember that the manager of Nestlé's, who gave "evidence . . . said: 'Well, we thought we ought to employ him "'for a reasonable time.' You may think that that was very "good of Nestlé's because, after all is said and done, they had no "interest in this matter, because it did not happen in the course "of his work. But it does not follow from that that they will "go on employing him; it does not follow that this man's "income is safe; 'for a reasonable time' was the evidence; and "after that, he has to shift for himself. He has to try and find "work, and I thought it right to ask the manager this simple "question: 'If that man came to you for a job as a mechanical "'supervisor and you did not know anything about him, would "'you give it to him?' and he said: 'Oh, no.' You have to "take that into account, members of the jury: you have to take "into account that this is a man who not only has difficulty in "walking, but who is uncomfortable when he sits down, and quite "obviously has other difficulties."

Directing the jury on damages, the judge invited them to be moderate. He told them that they must arrive at a sum which was fair, to cover pain and suffering, loss of the amenities of life and the disabilities to which the plaintiff was now subject, and possibly loss of future earnings. He continued: "It is not going "to be a grossly extravagant sum in the sense that you would "say: 'I would not have that happen to me for a million pounds' "—that is ridiculous; but you have to be fair to the defendant "and fair to the plaintiff. Obviously it is not going to be a small "sum; obviously it will be a substantial sum—you may think, a "pretty substantial sum, but, of course, not absurdly extrava-"gant. . . . It is a sad case, but you must remember that there "are other cases just as bad, or worse, that come before these "courts. There are cases of this kind, where the man is reduced "to the position of never being able to get off a bed again, or "having to sit in a chair for the rest of his life, so although you "realise that these injuries are very serious and the results are "very unpleasant, you must not run away and give him a "fantastic sum; you must take some sum which you think is

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"reasonable for the defendant to pay and for the plaintiff to "receive, and I can help you no further about that."

The jury, after a retirement of several hours, returned a verdict for the plaintiff on liability and awarded him a total of £18,487 10s. damages, £18,000 of which total was attributable to general damages.

The defendant appealed, asking for a new trial on the issue of damages, or alternatively, that the verdict and judgment be varied by substituting a sum less than £18,487 10s. on the grounds (1) that there had been a misdirection by the judge in suggesting that the plaintiff's present employment was only of limited duration, and that after a reasonable time he would have to find other work, and (2) that the general damages totalling £18,000 were a wholly erroneous estimate of the damage suffered by the plaintiff, and out of all proportion to the facts of the case and ought to be reduced.

N. J. Skelhorn Q.C. and *Victor Watts* for the defendant.
E. Martin Jukes Q.C. and *Barry Sheen* for the plaintiff.

The following cases were cited in argument: *Nance* v. *British Columbia Electric Railway Co. Ltd.*[1]; *Bocock* v. *Enfield Rolling Mills Ltd.*[2]; *Waldon* v. *War Office*[3]; *Dolbey* v. *Goodwin*[4]; *Mechanical & General Inventions Co. and Lehwess* v. *Austin and Austin Motor Co. Ltd.*[5]; and cases summarised in Kemp on Quantum of Damages (Supplement) at pp. 27, 32, 398.

MORRIS L.J. The principal contention raised in this appeal is that an award of damages made by a jury was excessive.

On May 4, 1957, the plaintiff in the action, while riding a motor-cycle, was gravely injured as the result of a collision with a motor-van. He alleged negligence against the defendant. The defendant denied negligence, and alleged that the plaintiff was himself negligent to an extent that, either wholly or partly, caused his injuries.

The decision was made that the trial of the action should be with a jury. It therefore became the province of the jury, first to decide as to liability, and, if they found liability established, to decide what damages should be awarded.

When someone has suffered the torment of having his body so crushed or battered that the whole course of his life will be changed, it is a task of supreme difficulty to endeavour to assess the monetary sum which will fairly compensate him. A judge or jury can but essay to preserve a sense of proportion, of moderation, and of fairness. It will be reasonable to bear in

[1] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.
[2] [1954] 1 W.L.R. 1303; [1954] 3 All E.R. 94.
[3] [1956] 1 W.L.R. 51; [1956] 1 All E.R. 108.
[4] [1955] 1 W.L.R. 553; [1955] 2 All E.R. 166.
[5] [1935] A.C. 346.

mind what relation the injuries under consideration bear to other injuries to which the misfortunes of life may make man subject. It will be essential to make calm reason gain the mastery over the urges which pity may inspire. It will be necessary to harness those qualities of balanced common sense which form a sure guide to decision. It will be proper to have regard to what a particular sum of money may produce or may secure.

In these days the responsibility of assessing the amounts of damages rests, in the great majority of cases, with judges sitting alone. Some eminent judges have, in recent times, voiced the opinion that determinations by juries would often be helpful. Thus, Singleton L.J. in this court in *Bocock* v. *Enfield Rolling Mills Ltd.*[1] said: "It has been said more than once that a judge "sitting by himself is not in as good a position to assess damages "as are twelve members of a jury. They have an opportunity "of discussing the matter among themselves, and though they "may not have great experience in the matter, twelve heads "should be better than one." In the following year, in *Dolbey* v. *Goodwin*, Lord Goddard C.J. said[2]: "This court is always "reluctant to interfere in these cases, because we know the "difficulty that all judges have in coming to a decision in them. "I think it is about as difficult a task as could possibly be put "on a judge, and so I always feel when I am sitting at nisi "prius. I have often felt that in really serious cases of this "kind it is better to have a jury because the opinion of twelve "people is probably more satisfactory than the opinion of one."

In the present case there was a jury. It is now said that their award was excessive. In considering this matter, the approach of the court is different from its approach in cases tried by a judge alone. Where there is an appeal from the decision of a judge sitting alone, the appeal is by way of rehearing. The rehearing applies to the issue of damages as well as to other issues. But it is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered: see the speech of Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (*No. 2*).[3] But, if there has been an assessment

[1] [1954] 1 W.L.R. 1303, 1305; [1954] 3 All E.R. 94.
[2] [1955] 1 W.L.R. 553, 555; [1955] 2 All E.R. 166.
[3] [1942] A.C. 601, 616; 58 T.L.R. 240; [1942] 1 All E.R. 657.

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of damages by a jury, the function of the Court of Appeal on a complaint that the damages are too high or too low is different. Where the order of the court has been that trial is to be with a jury, then twelve jurors have collectively (and, be it remembered, unanimously) to decide on an assessment. On appeal, always assuming that the trial has been properly conducted and that the jury have been properly directed, it is not for the members of the Court of Appeal to seek to substitute their assessment and their judgment for that of the jury; the function of the Court of Appeal is then directed to considering whether or not the figure stated by the jury is out of all proportion to the circumstances of the case. Unless it is, this court must not interfere. The jury do not have to give reasons, and it may be impossible to deduce how the jury have regarded the particular individual features of a claim, such as, for example, in a personal injuries case, pain and suffering, deprivation of the amenities of life, and future possible loss of earnings. To warrant any interference with the award of a jury it is not enough to say that the award is more, or even much more, or less, or even much less, than what the judges of the Court of Appeal would consider to be the appropriate amount. The Court of Appeal will not interfere if the figure is one which a jury, acting properly, might award. Interference will be justified if it is made to appear that the jury must have acted improperly and so have brought about a palpably wrong result. If the figure of an award seems to be outrageous, or so extravagant that no other jury would repeat it, then there might, in some cases, be ground for suspecting that a jury has been partial or perverse. But, as the Court of Appeal will only have the figure, as announced by the jury, to consider, the court will have to decide, on a consideration of the figure itself, whether it appears so excessive or so inadequate that no twelve reasonable jurors could reasonably have awarded it; or, stated otherwise, whether the figure appears to be out of all proportion to the circumstances of the case: see the speech of Lord Wright in *Mechanical & General Inventions Co. Ltd. and Lehwess* v. *Austin and Austin Motor Co. Ltd.*[4]

In the present case we were referred by Mr. Skelhorn, in a most powerful address, to some figures of awards in cases resembling the present one which had been tried by judges alone. He submitted that the award of the jury in the present case should be regarded as being higher than those awarded by judges in comparable cases. Whether this be so or not cannot be in any way decisive in this case.

In cases which are comparable but which are decided by different judges, a certain pattern or level of awards of damages may emerge. If, however, an award of a jury does not seem to conform to such pattern, that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges. The jury will not necessarily have

[4] [1935] A.C. 346, 378.

knowledge of any pattern or level which judges have thought to be appropriate, and the jury are not bound by any such pattern or level.

Of course it is inevitable that members of the Court of Appeal, when considering a complaint against the award of a jury, will formulate individual views as to the figure of damages which they themselves would have deemed appropriate. That will be comprehended within, and will be one part of the process of deciding, whether the jury's award is out of all proportion to the circumstances of the case. It must, however, be no more than a part of that process. The figure of an award by a jury is not to be deemed to be wrong merely because judges might have arrived at a different figure.

Where, therefore, a jury is charged with the responsibility of assessing damages, their conclusion will only be assailed or displaced if attack can be made upon it on the lines that I have mentioned.

With that approach, I now consider the facts in the present case. The jury found in favour of the plaintiff on the issue of liability, and therefore had to assess the figure of damages. The figure of special damages was not much in contest. The injuries sustained by the plaintiff were undoubtedly extremely grave. [His Lordship stated the facts as to the plaintiff's injuries, as set out above, and continued:] Now I mentioned in my approach to the matter that, of course, there must be no misdirection if the award of a jury is to stand. The appeal was brought on two grounds. It was said that there was misdirection, and also it was said that the figure of the general damages awarded to the plaintiff, £18,000, was a wholly erroneous estimate of the damage suffered by the plaintiff and out of all proportion to the facts, and ought to be reduced. But there was one further complaint. It was said that the judge misdirected the jury in that he directed them in terms which suggested that the plaintiff's present employment was only of limited duration, and that after a reasonable time he would have to find other work. [His Lordship read the evidence of the employers' representative, summarised above, and continued:] The jury heard all that evidence, and it seems to me that all that the judge was telling the jury was that, though Nestlé's had treated the man very well, it did not follow that this man's income was safe—"' for a reasonable time ' was " the evidence; and after that he has to shift for himself." It does not seem to me that these words were out of conformity with the evidence given, which showed that Nestlé's were behaving most generously; they had promised to keep him on for a reasonable time, and they were keeping him on. But was his employment safe? Other people might become in authority in the company who were not able to behave so generously; the fortunes of the company might be different; the necessities might change. The judge was merely reminding the jury that the

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plaintiff's employment was not safe. I do not feel that there was any misdirection.

The main issue, therefore, is whether, on the approach which I have endeavoured to state, the court ought to interfere and say that this award should be set aside.

The judge dealt most carefully with the injuries which the plaintiff has suffered. I do not propose to go through them all in detail. There is no question that they were grave indeed, and Mr. Skelhorn, in his very fair address, has not minimised the gravity of them. [His Lordship read the judge's summing-up in regard to the plaintiff's injuries, and continued:] Then there was another very distressing and serious part of the matter relating to his future sexual life. I do not want to read what the judge said. He described the position quite fairly, and no complaint is made of the treatment of the matter in the summing up. He said that the members of the jury might think that that was a very serious aspect of the matter for a young man of 29.

Mr. Skelhorn submitted most powerfully that this case was different from the cases which are sometimes referred to as "wheel-chair cases." He made that submission when putting before us a comparison between some awards of judges in such cases and the award here. For the reasons that I have given, such comparison cannot be decisive. Mr. Martin Jukes in reply said that though this is not a wheel-chair case, the plaintiff has some afflictions that do not beset those who are condemned to a wheel-chair existence. Mr. Skelhorn says: "Well, at least this "man can go about and can do his work."

The judge was careful to invite the jury to be moderate. [His Lordship read from the summing-up as to damages as set out above, and continued:] The summing-up of the judge, as to which there is no complaint save that to which I have referred and which in my judgment is not substantiated, was a fair and balanced summing-up which left the matter to the jury for their good judgment.

The injuries are undoubtedly grave; the figure of the award is certainly high. On the principles that must guide us, I do not feel that it would be right for us to upset that decision of the jury or to say that their award cannot stand. For these reasons I think that the appeal fails.

ORMEROD L.J. I agree that this appeal should be dismissed. The appeal was founded on two grounds. The first one was that the judge misdirected the jury on a question of fact as to the plaintiff's employment. As to that, I agree with everything my Lord has said, and I agree that there is really no substance in that criticism of the summing-up of the judge. The second ground on which the appellant founded this appeal was that, in the circumstances of this case, the figure was altogether too high—so high that this court would be justified in reducing it.

I would not attempt to improve on the appreciation of the difference between the duty of this court in dealing with an appeal on the issue of damages from a judge alone on the one hand and from a judge and jury on the other which has just been made by my Lord. But there is really no issue between the parties in this case as to the test which this court must apply in deciding whether to interfere with the verdict of a jury. It was laid down by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)*,[5] and cited by Singleton L.J. in *Bocock* v. *Enfield Rolling Mills Ltd.*, when he said[6]: "In *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)*,[7] Lord Wright considered cases in which the Court of Appeal should, or ought to, interfere with a judgment on damages of a judge sitting by himself, and said: 'There is an obvious difference between cases 'tried with a jury and cases tried by a judge alone. Where the 'verdict is that of a jury, it will only be set aside if the 'appellate court is satisfied that the verdict on damages is 'such that it is out of all proportion to the circumstances of 'the case. . . .'"

There are many other passages in the reports of cases, both in the House of Lords and of this court, setting out the test to be applied, but they all amount to the same thing, that this court will only interfere if the award of damages is out of all proportion to the circumstances of the case.

The real difficulty in this case, of course, and the real argument, was as to how that test should be applied. Mr. Skelhorn agreed that the injuries in this case were very serious indeed, but argued that they were not as serious as the cases of total paralysis from the waist downwards which have been described for convenience as "wheel-chair cases," and therefore in considering the maximum beyond which no award, even of a jury, should go, it was proper to consider the damages which had been awarded by judges from time to time in what, as I say, have been described as the wheel-chair cases. He relied strongly on the decision of this court in *Waldon* v. *War Office*,[8] where the injured man was approximately the same age as the plaintiff in this case and the injuries were such that he was condemned to spend the rest of his life in a wheel-chair, and this court increased the amount of general damages from £12,000 to £17,000. Mr. Skelhorn argued that this should really be the maximum figure which should be awarded in cases of serious injury of this kind. Also he submitted that, from decisions of judges alone and judges sitting with juries in similar cases, a pattern has emerged which at least determines the standard of reasonableness which must be applied and, therefore, the damages in this case were very much in excess of that standard of reasonableness, and out of all proportion to the circumstances of the case.

[5] [1942] A.C. 601.
[6] [1954] 1 W.L.R. 1303, 1306.
[7] [1942] A.C. 601, 616.
[8] [1956] 1 W.L.R. 51; [1956] 1 All E.R. 108.

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Mr. Jukes, on the other hand, argued that here no standard could be applied. The damages were entirely at large. He adopted as part of his argument some words from one of the Hamlyn Lectures recently delivered by Devlin J., when he said that a jury was not supposed to conform to a standard that it cannot know about.

Be that as it may, it is of course well established practice in the courts that a judge in summing up shall give the jury no indication of the kind of figure at which they should arrive in determining damages. It is left to them entirely, and they have to do the best they can from the knowledge they have of the circumstances of the case, being, presumably, reasonable men and women.

But this court has, from time to time, as in this case, the duty of deciding whether a sum awarded by a jury is out of all proportion to the circumstances of the case. For my part, I fail to see how that duty can be discharged unless the court has in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind. To say that there is a standard or pattern in accordance with which damages are awarded would, in my view, be using language which is much too precise. But it would also, in my judgment, be departing from reality to expect this court to decide whether an award was out of all proportion to the circumstances of the case without having in mind a general comparison with the damages awarded in cases of a similar nature. Clearly the margins of that comparison must be wide, for the cases vary infinitely in their circumstances. One tribunal, be it judge alone or a judge and jury, may take a different view from another of a plaintiff's future earning capacity, or may be differently impressed by the loss of some faculty affecting the plaintiff's enjoyment of life.

But, after considering all these matters, there does emerge, I think, a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case, and that, I think, is how a case of this kind must be approached by this court.

Having regard to the difference in considering on the one hand an appeal from a decision of a judge alone, and on the other hand an appeal from a decision by a jury, and approaching the matter as I have endeavoured to set out, how is the test to be applied in this case? There is no doubt that the injuries were very serious. There was very serious physical impairment; not perhaps so complete as in the wheel-chair cases, but, none the less, very serious indeed. There is apparently the necessity for a serious operation, to which my Lord has referred, to mitigate, so far as possible, the bladder trouble which the plaintiff now has. There is the pain, and the possibility of increasing pain, which he will suffer through the years as the result of the deformity of the spine. There is, of course, the head injury, with the possibility, which fortunately grows less and less as time

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goes on, of traumatic epilepsy. There is the very serious impairment, to which reference has already been made, of his sexual capacity. It is impossible for us to say what regard the jury had to the various items of incapacity, all of which were put before them very clearly in the summing up of the judge. But, having regard to the over-all picture of the disability and the discomfort this man will have to endure for the rest of his life, and attempting to approach the matter in the way which to me appears to be the proper way, I have come to the conclusion that, although the sum of £18,000 for general damages is in the circumstances of this case a high one, it is not so high as to be out of all proportion to the circumstances of the case. I too, therefore, would dismiss the appeal.

WILLMER L.J. I have reached the same conclusion, and agreeing, as I do, entirely with what has fallen from my Lords already, I find it quite unnecessary to add any words of my own.

Appeal dismissed with costs.

Solicitors: *Harold M. Storer; White & Co.*

M. M. H.

[PROBATE, ETC., DIVISION.]

FRANCIS *v.* FRANCIS.

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June 17.
Lord Merriman P. and Phillimore J.

Husband and Wife—Divorce—Paternity—Presumption of legitimacy—Adultery by wife and marital intercourse at time of conception—Husband using contraceptive sheaths.

Infant—Custody—Presumption of legitimacy—Use of contraceptive sheaths.

A wife applied to the justices for an order in respect of a child born to her during the marriage and conceived at a time when she was having sexual connection not only with her husband but with an adulterer. The husband, however, was acknowledged by the wife to have been using contraceptive sheaths throughout the relevant period, and she had at first accepted, as well as her husband, that the child was the adulterer's, and had left the name of the father blank when she registered the birth. There was no evidence that contraceptive sheaths were infallible, but the justices, observing that although a sheath might be defective, or might not be used correctly, such an occurrence was unlikely to have happened without either of the parties being aware of it, or at least of the possibility of something untoward having occurred, held that they were satisfied beyond reasonable doubt in all the circumstances that the child was the adulterer's. The wife appealed:—

Held, that the use of contraceptives by the husband at the time of conception did not rebut the very strong presumption of legitimacy, which rightly stood to cover the interests of the child, who must, accordingly, be taken to be legitimate.

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Watson v. *Watson* [1954] P. 48; [1953] 3 W.L.R. 708; (sub nom. *W.* v. *W.*) [1953] 2 All E.R. 1013 approved.

Observations and citations in *Cotton* v. *Cotton* [1954] P. 305, 310, 311; [1954] 2 W.L.R. 947; [1954] 2 All E.R. 105 applied.

APPEAL by wife from the justices for the petty sessional division of Eastleigh sitting at the Hampshire County Buildings, Southampton, on March 11, 1959.

On July 27, 1958, the wife, who had previously given birth to two children of the marriage as to whose legitimacy there was no dispute, gave birth to a child D. At the material time for conception the wife was committing adultery with one "Ernest." She admitted this adultery to her husband, who had himself been discovered by her in the act of adultery; but the parties continued to sleep together, and to have marital intercourse, as they had done before, and it was accepted that the wife's adultery had been condoned. The husband, however, used a contraceptive sheath on each occasion of marital intercourse during the relevant period.

On February 16, 1959, after the parties had separated, a summons was issued upon the complaint of the wife that her husband had been guilty of desertion, of a wilful neglect to provide reasonable maintenance for herself and her three infant children, and of adultery with another woman with whom the husband was alleged to have gone to live; and she asked for an order for the custody of the three children, and for maintenance for the children and herself.

On March 11, 1959, the justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the grounds of desertion and neglect to maintain, but for reasons not stated by them made no finding upon the complaint of adultery. They ordered the husband to pay to the wife the weekly sum of £3 and to pay further weekly sums of 30s. for the maintenance of the two older children, the custody of whom was given to the wife. They refused, however, for the reasons set out below, to make any order in respect of the child D., whom they concluded not to be a child of the marriage.

At the hearing before the justices, at which the husband neither attended nor was represented, the wife, who was represented by counsel, gave positive evidence that her husband used contraceptive sheaths during the period relevant to the conception of the child D., and said that when she had told her husband of her pregnancy, and he had denied responsibility, she had accepted the fact that "Ernest" was the father; and when registering the birth she had left the name of the father blank.

The wife appealed against the refusal by the justices to make any order in relation to the child D. No other question relating to their decision was raised by either party.

The justices, after referring to the nature of the complaint and to the order which they had made, stated upon the appeal that they had made no order in respect of the child D., because

they had reached the conclusion that she was not a child of the marriage. They gave the following reasons for their decision:

"(1) The appeal in this case is limited to the question as to "whether we were correct in not making an order in respect of "the youngest child D., and our reasons are therefore confined "to that aspect of the case.

"(2) In this case we only heard the evidence of the wife "and it was obvious that the evidence given was frank and "honest. In reaching our decision we were therefore largely "concerned in considering the effect of that evidence in the light "of the cases to which we were referred. We were referred to "the following cases: *Watson* v. *Watson* [1]; *Cotton* v. *Cotton*.[2]

"(3) The child D. was born on July 27, 1958, and at the time "when she was conceived it appears that the wife was having "sexual intercourse with a man named Ernest. It was also "stated by the wife that her husband used contraceptives of the "sheath type.

"(4) When the wife found that she was pregnant her husband "denied that the child was his and the wife thereupon accepted "the fact that the man Ernest was the father; and indeed when "she registered the birth she left the portion relating to the "father blank. The wife did state at the end of her evidence "'You cannot always rely on these contraceptives,' but this did "not apparently affect her opinion at the time when the child "was born; and without detracting in any way from our view "as to the honesty of her evidence, it may be that she is now "influenced by her knowledge of the authorities which were "quoted to us. The letters [two exhibits] are letters from the "husband to the wife in which he refers to his two children and "to the presents he gave to them. It seems from the style of "those letters that there was no question in the mind of the "husband as to whether he was the father of the third child and "this attitude does not appear to have evoked any protest from "the wife even at that stage.

"(5) It seemed to us that this acceptance of Ernest as the "father was important; and although it is true that a contra-"ceptive of the sheath type might be defective, or might not be "used correctly, such an occurrence is unlikely to have happened "without either party being aware of what had happened, or "at least being aware of the possibility of something "untoward having occurred. In these matrimonial cases we do "often see women of very dull intelligence of whom a great deal "cannot be expected, but the wife in this case was an intelligent "woman who might be expected to notice any such untoward "occurrence.

"(6) The authorities quoted to us were cases where the issue "as to paternity was specifically tried, and we considered whether

[1] [1954] P. 48; [1953] 3 W.L.R. 708; (sub nom. *W.* v. *W.*) [1953] 2 All E.R. 1013.

[2] [1954] P. 305; [1954] 2 W.L.R. 947; [1954] 2 All E.R. 105.

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" the position was altered in a case such as this where we were " asked to make an order. That is to say whether it was open " to us to refuse the order in respect of this child on the grounds " that we were merely not satisfied that the child was a child " of the marriage. It appeared, however, that the presumption " as to legitimacy was such that the child must be treated as a " child of the marriage unless it was proved to us that the child " was illegitimate. We therefore considered the question in that " light.

" (7) A part of the headnote of *Watson* v. *Watson* [3] was " quoted to us from the All England Reports and reads as follows: " ' . . . Nothing except evidence that the husband did not have " ' sexual intercourse with the wife at the period of conception " ' could render illegitimate a child born in wedlock, and the " ' mere use of contraceptives did not alter that proposition . . . ' " The headnote did not in our view correctly state the effect of " the judgment. It seems from the two recent cases that we " must be satisfied beyond reasonable doubt, that is to say, be " sure, that the child is illegitimate; but we do not believe that " we are so limited as it is suggested in the headnote. It appears " that if we apply the proper standard of proof, and we are then " sure upon the evidence we have heard that the child is illegiti- " mate, we must refuse to make the order applied for and there " is no requirement that we can only reach such a decision upon " specified evidence as is suggested in the headnote.

" (8) It is however proper that we should look at the cases of " *Watson* v. *Watson* [3] and *Cotton* v. *Cotton* [4] in order to see the " type of evidence which was considered insufficient and the " reasons which were given. Counsel for the wife did suggest " to us that the facts in these cases were so similar to the facts " in this case that we were unable to do other than to reach a " decision that the child was legitimate. There are, however, " some distinctions, and we do not feel that this is correct. In " *Watson* v. *Watson* [5] contraceptives were used; but the judgment " mentions that at the time the husband did not doubt that he " was the father of the child, and in relation to the admissions " made by the wife that the co-respondent was the father of the " child the judge stated [6]: ' I do not think that such statements " ' more especially coming from the woman I know her to be, a " ' woman utterly regardless of the truth, who would say any- " ' thing to suit her own purpose, whatever that might be at the " ' moment, are sufficient to rebut the presumption of law in " ' favour of legitimacy.' In *Cotton* v. *Cotton* [7] there was a con- " flict of evidence between the husband and wife as to whether

[3] [1954] P. 48; [1953] 2 All E.R. 1013. The relevant passage in the headnote of the Law Reports reads: " The mere use of contraceptives by " spouses at the time the wife con- " ceives does not rebut the presump- " tion in favour of legitimacy."

[4] [1954] P. 305.
[5] Ibid. 48.
[6] Ibid. 54.
[7] Ibid. 305.

" intercourse had taken place or not. After referring to the " evidence, Singleton L.J. stated [8]: ' It was for the commissioner " ' to determine whether or not he could accept it as the measure " ' of proof required in a case of this kind.' Later in the judg- " ment, Singleton L.J., after stating that the measure of proof " in a matter of that kind, was indeed strict and after stating that " in that case that measure of proof was not attained, went on to " say [9]: ' It would not help anyone if I, or any other member " ' of this court, expressed a view as to the conclusion which we " ' might have reached if we had seen the witnesses and had " ' heard what they had to say. It was a question for the judge " ' of the first instance.'

" (9) It appeared in the light of the above that it was open " to us to consider the facts of the particular case before us and " to consider whether it was proved that the child was illegiti- " mate. It further appeared to us that in considering this question " we had to apply the same standard of proof as would be required " in a criminal case. In *Miller* v. *Minister of Pensions* [10] Denning " J., speaking of the degree of cogency which the evidence on a " criminal charge must reach before the accused can be convicted, " said [11]: ' That degree is well settled. It need not reach cer- " ' tainty, but must carry a high degree of probability. Proof " ' beyond reasonable doubt does not mean proof beyond the " ' shadow of a doubt. The law would fail to protect the com- " ' munity if it admitted fanciful possibilities to deflect the course " ' of justice. If the evidence is so strong against a man as to " ' leave only a remote possibility in his favour, which can be " ' dismissed with the sentence " of course it is possible, but not " ' " in the least probable " the case is proved beyond reasonable " ' doubt, but nothing short of that will suffice.' In *Reg.* v. " *Hepworth & Fearnley* [12] Goddard C.J. said [13]: ' One would be " ' on safe ground if one said in a criminal case to a jury: " You " ' " must be satisfied beyond reasonable doubt " and one could " ' also say " You, the jury, must be completely satisfied " or " ' better still, " You must feel sure of the prisoner's guilt." '

" (10) In connection with the case before us we have men- " tioned certain factors in paragraphs (3), (4) and (5) which were " of course brought out in evidence by the wife against her own " interests. We did consider the matter carefully and at some " length, and we did feel sure that the child D. was in fact " illegitimate. We felt that the wife herself had been satisfied " that this child was the child of the man Ernest; and the facts " mentioned in paragraphs 3, 4 and 5, above, and the whole " tenor of the wife's evidence, led us to our conclusion."

K. C. L. Smithies, for the wife appellant, submitted that until

[8] [1954] P. 305, 309.
[9] Ibid. 310.
[10] [1947] W.N. 241; 63 T.L.R. 474; [1947] 2 All E.R. 372.
[11] 63 T.L.R. 474.
[12] [1955] 2 Q.B. 600; [1955] 3 W.L.R. 331; [1955] 2 All E.R. 918.
[13] [1955] 2 Q.B. 600, 603.

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it was proved that contraceptives were infallible, evidence of their use could not rebut the presumption of law that a child born in wedlock was legitimate.

The husband in person.

The cases referred to in argument are cited in the judgments.

LORD MERRIMAN P. referred to the nature of the appeal and said that the justices, in a very careful and closely reasoned judgment, had come to the conclusion that they were entitled, if not bound, to find that the child was illegitimate, and that it was solely for that reason that they had declined to give custody of that child to the wife, in whose care the child was, and had, accordingly, disabled themselves from making any order for the payment of maintenance for the child. His Lordship continued: The evidence was that the wife had, on her own confession, committed adultery with another man. She said she was provoked by the fact that she had caught her husband in the act of adultery with another woman (not the woman with whom he is living now), and she says that this (though we do not have to inquire into this on this appeal) was the matter which conduced to her own adultery with this named man. There being no doubt, as I understand it, that it would have been physically and medically possible for that man to be the father of the child, it is nevertheless the fact that her adultery having been discussed between her and her husband—and, incidentally, the adultery in the act of committing which she had caught him—they nevertheless went on sleeping together at the material time so far as the conception of this child was concerned. But let this be said in the husband's favour, that the wife gave positive evidence, which she made more positive still when she was asked the specific question by the court, that each time she and her husband had had sexual intercourse at the material time that her husband had used contraceptives, and by referring back to the early part of her evidence she was plainly referring to sheath contraceptives. There had been talk of pessaries being used and the supply having given out, and that sort of thing, but I am taking this on the basis that it was established in the husband's favour that at the material time he was using rubber sheaths in sexual intercourse with his wife.

On that the magistrates have held in a reasoned decision, on the basis of two cases to which I will refer in a moment, that they ought to find, and that they were entitled to find, that this child was illegitimate.

I have come to precisely the opposite conclusion as a matter of law, because I think that the justices have misdirected themselves on this point, and I think really that the matter, particularly in relation to the use of rubber sheaths, is concluded by the

Court of Appeal's approval in *Cotton* v. *Cotton* [1] of the decision in *Watson* v. *Watson* [2] by Barnard J., who said, with reference to a case in which the principal issue was the use of rubber sheaths [3]: "If I had to decide this merely on a balance of probability I "would decide in the husband's favour" (meaning that the child was illegitimate), but in face of the presumption of law which "means that he must satisfy me beyond all reasonable doubt, I "feel that he has not displaced the presumption. I therefore "decide the issue in favour of the wife"—that is, in favour of the child's legitimacy.

In this case there is, I think, no doubt that the parties certainly accepted the probability that this child was the child of the adulterer and not of the husband, and, in a word, the question is whether that is good enough. Against that, of course, one has to take a sentence or two in the wife's evidence when, in answer to the court when she was pressed about this statement of hers about the habitual use of sheath contraceptives, she said, first of all, "You cannot always rely on these contraceptives," and secondly, "I cannot tie down who the father is." That was said rather in the context that when she came to register the birth she left the name of the father blank. There is no doubt, I think, that between themselves the parties had accepted the probability that the child was, or certainly might be, the child of the man with whom the wife had committed adultery.

But in *Cotton* v. *Cotton* [4] the Court of Appeal, adopting as they did [5] in a similar case the passage which I have read from Barnard J.'s judgment, emphasised [6] the words of Lord Cottenham L.C. in *Morris* v. *Davies* [7]: "The evidence must be such as "to exclude all doubt, that is, of course, all reasonable doubt in "the minds of the court or jury to whom that question is sub-"mitted." Now, those words of Lord Cottenham L.C. are taken from the quotation of them by Luxmoore J. in *In re Bromage, Public Trustee* v. *Cuthbert (Infant) and Others*, [8] where they are followed by a quotation from the opinion of Lord Lyndhurst in the same case [9]: "That presumption of law is not lightly to be "repelled. It is not to be broken in upon, or shaken by a mere "balance of probabilities; the evidence for the purpose of "repelling it must be strong, distinct, satisfactory and con-"clusive."

It is upon that basis that I think we are bound to hold here that there was no such repelling of the legal presumption, and that this child, actually born in wedlock, must be taken to be legitimate.

The result of that is, I think, that the only ground on which no

[1] [1954] P. 305.
[2] [1954] P. 48.
[3] Ibid. 55.
[4] [1954] P. 305.
[5] Ibid. 310.
[6] Ibid. 311.
[7] (1836, 1837) 5 Cl. & Fin. 163, 215.
[8] [1935] Ch. 605, 611; 51 T.L.R. 408.
[9] 5 Cl. & Fin. 163, 265.

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custody order was made for this child being this finding of illegitimacy, we ought to vary the justices' order by adding that the wife should be given the custody of this child. We have not, of course, the child represented before us. If we had had any doubt about the propriety of the decision at which we are arriving, with which I have reason to believe my brother agrees, we should certainly have taken steps before coming to an opposite conclusion to have the child independently represented. But having regard to the conclusion at which we have arrived there is no need, in our opinion, to do so.

As I have already said, the mother has the child in her care at the moment. She is obviously the proper custodian, and in the child's interest it is plain that some proper custodian should be appointed, and it seems to me the inevitable conclusion that we must give the mother the custody.

There then remains the point about which the husband is more particularly anxious. I have said that he was not represented in the court below when an order for £3 for the wife and 30s. each for the two elder children was awarded to her, together with the custody of those children. That is £6 in all as things stand, and apparently he has already run into trouble, because the wife has taken enforcement proceedings, under which he has been ordered to pay within a month and pay off the arrears at 10s. a week. We are not dealing with those proceedings at all, but if the justices are asked to make any maintenance order in respect of the child of whom the wife is given custody by this court they will, no doubt, take into account what the state of the husband's finances may be, and if he is really and truly unable to pay the existing order (and, of course, it must be remembered that rightly or wrongly he has placed upon himself the burden of supporting another household) they will take those facts into account and do whatever may be just in the circumstances. It is not for us to order or to suggest either the award of any particular amount, or that no amount should be awarded, nor even to say that a nominal amount should be awarded. That is a matter for the justices themselves.

I propose that we vary the justices' order by giving the custody of the child to the wife for the reasons that I have given.

PHILLIMORE J. I agree, and I would only add a word out of deference to the decision of the justices and the very careful assessment of their reasons which we have had put before us.

As my Lord has said, where a child is born in wedlock there is a presumption that it is a child of the two spouses, and that is a presumption which is not lightly to be dispelled. In this case I think that the justices felt that both spouses were, and certainly that the husband was, of the opinion that this child was not the child of the husband but was the child of another man; and the fact that the parties took this view weighed heavily with the justices, more especially as the wife herself admitted

that whenever she and her husband had had intercourse he had used contraceptives. I think that the justices, thinking as they did that both the husband and the wife believed that the child was not the child of the husband, and thinking that it was rendered all the more unlikely by the fact that the husband had used contraceptives, came to the conclusion that this entitled them to find that the presumption had been dispelled.

In my judgment that was clearly wrong. Whether one chooses to call the measure of proof which has to be adduced "strong," "distinct, satisfactory and conclusive" or to use Singleton L.J.'s word "strict," [10] it must be wrong where a woman, albeit committing adultery, is every night sharing a bed with her husband, and from time to time having intercourse with him, although he may use contraceptives, to suggest that a child born in those circumstances can safely be said to be a child of the other man, or that there is evidence to rebut the very strong presumption which rightly stands to cover the interests of the child.

I take the words of Sir Francis Jeune P., quoted by Barnard J. in *Watson* v. *Watson*,[11] to which my Lord has referred. Sir Francis Jeune P., giving judgment in *Gordon* v. *Gordon & Granville Gordon*,[12] said this: "If the husband could, from the "circumstances of time, place, and health, have had nuptial "intercourse with his wife, and there be no evidence to prove "that he did not have such intercourse, he must be considered "the father of her child, even if she had committed adultery "with one, two or twenty other men."

Well, here was a husband who at the material time when this child was conceived was sharing a bed with his wife and having intercourse with her, albeit using contraceptives. In such circumstances, in my judgment, the presumption in favour of the child's legitimacy is not dispelled, and this child must be treated as the child of the husband in this case.

For these reasons I agree with the course my Lord proposes.

Appeal allowed: order varied and case remitted to the justices to determine maintenance.

Solicitors: *Hewitt, Woollacott & Chown for Page, Gulliford & Gregory, Southampton.*

J. B. G.

[10] [1954] P. 305, 311.
[11] [1954] P. 48, 54.
[12] [1903] P. 141, 143.

[COURT OF APPEAL.]

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Morris, Ormerod and Willmer L.JJ.

REGINA *v.* MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION). *Ex parte* HUBBLE.

National Insurance — Industrial injuries benefit — Fresh evidence — Power to review previous decision—Further report of surgeon on claimant's injury—Whether "fresh evidence"—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 40 (1). *Evidence—Fresh evidence.*

Section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides that except as provided by the Act "any "decision of a claim or question shall be final."

The claimant, a coal miner, suffered an injury to his back while at work in July, 1955. In April, 1957, a medical board constituted under the Act of 1946 made a final assessment of the extent of his disablement at 5 per cent. for life.

He appealed against the smallness of that award to a medical appeal tribunal under section 39 (2) [1] of the Act. At the date of the hearing on July 15, 1957, he was in a plaster bed in hospital, having undergone an operation for his back condition on July 4. The tribunal had before it a report of the surgeon, dated June 28, 1957, stating that it was too early to estimate the final assessment

[1] National Insurance (Industrial Injuries) Act, 1946, s. 12 (1) [as substituted by s. 3 (1) of the National Insurance (Industrial Injuries) Act, 1953]: "Subject to the next follow- "ing subsection, an insured person "shall be entitled to disablement "benefit if he suffers as a result of "the relevant accident from loss of "physical or mental faculty such that "the extent of the resulting disable- "ment assessed in accordance with "the following provisions of this sec- "tion amounts to not less than one "per cent.; and for the purpose of "those provisions there shall be "deemed not to be any relevant loss "of faculty when the extent of the "resulting disablement, if so assessed, "would not amount to one per cent."

S. 39: "(1) The case of any "claimant for disablement benefit "shall be referred by the insurance "officer to a medical board for deter- "mination of the disablement ques- "tions in accordance with the follow- "ing provisions of this Part of this "Act relating to the determination of "claims, and if, on that or any sub- "sequent reference, the extent of "the disablement is provisionally "assessed, shall again be so referred "not later than the end of the period "taken into account by the provisional "assessment. (2) If the claimant is "dissatisfied with the decision of a "medical board, he may appeal in the "prescribed manner and within the "prescribed time and the case shall "be referred to the medical appeal "tribunal: Provided that an appeal "shall not lie against a provisional "assessment of the extent of disable- "ment before the expiration of two "years from the date of the first "reference of the case to a medical "board under the foregoing sub- "section, nor where the period taken "into account by the assessment falls "wholly within the said two years. "(3) If the Minister notifies the in- "surance officer within the prescribed "time that he is of opinion that any "decision of a medical board ought "to be considered by a medical appeal "tribunal, the insurance officer shall "refer the case to a medical appeal "tribunal for their consideration, and "the tribunal may confirm, reverse "or vary the decision in whole or in "part as on an appeal."

S. 40: "(1) Any decision under this "Act of a medical board or a medical "appeal tribunal may be reviewed at "any time by a medical board if "satisfied by fresh evidence that the "decision was given in consequence "of the non-disclosure or misrepre- "sentation by the claimant or any "other person of a material fact "(whether the non-disclosure or mis- "representation was or was not "fraudulent)."

of the disablement but that the surgeon would like to send a further report later.

The tribunal, without any adjournment, gave their decision on July 15, setting aside even the award of 5 per cent. and finding that any loss of faculty that might have been suffered was due to an aggravation of a pre-existing condition which had wholly ceased by May 12, 1957.

On August 2, 1957, the claimant obtained from the surgeon a further report stating that the operation of July 4 had disclosed the presence of a disc injury, that the disablement was the result of an injury, and that the permanent disability would be more than 5 per cent. The claimant thereupon sought to have his case reviewed under section 40 (1) [1] of the Act; and on August 28, 1957, a reviewing medical board, with the further report of the surgeon before them, made a provisional assessment of 10 per cent. disablement from May 13 to June 16, 1957, and of 100 per cent. disablement from June 17 to October 17, 1957.

The Minister referred that decision to the medical appeal tribunal under section 39 (3) of the Act. The tribunal, by their decision on October 28, 1957, set aside the reviewing medical board's assessments, giving as their reason their view that the further report of the surgeon was not "fresh evidence" within section 40 (1) since the claimant could have obtained a second opinion from the surgeon before the decision of July 15 or could have asked for an adjournment of that decision.

On appeal by the claimant against the refusal of the Divisional Court to bring up and quash by order of certiorari the decision of October 28 on the ground of error of law on the face of the record:—

Held, that the decision of October 28 did not disclose any error of law and the tribunal had correctly construed "fresh evidence" in section 40 (1) as meaning evidence "which the claimant was "unable to produce before the first decision was given or which he "could not reasonably be expected to have produced in the circum-"stances of the case." The scheme of the Act in relation to the review of purely medical questions showed that such questions were intended to be dealt with once for all, subject to a strictly limited right of review in exceptional cases where a reviewing board was satisfied by "fresh evidence," videlicet, evidence newly available, in the limited and restricted sense given to those words in decisions under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, and to the words "further evidence" in R.S.C., Ord. 58, r. 9 (2). To construe them more widely as meaning further or additional information which could have been given on an earlier hearing would enable a dissatisfied party to obtain successive reviews whenever a fresh medical opinion was obtained, and would be contrary to the policy of the Act.

Johnson v. *Johnson* [1900] P. 19, 20, 21; 16 T.L.R. 26 followed.

Decision of Divisional Court on this point [1958] 2 Q.B. 228; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374 affirmed.

APPEAL from Divisional Court (Lord Goddard C.J., Cassels and Diplock JJ.).

On July 14, 1955, Horace Hubble, a coal miner, while in the act of getting a truck back on to some rails when at work at the Hucknall Colliery, Nottinghamshire, sustained an injury to his back by an accident arising out of and in the course of

[1] For footnote 1 see p. 456.

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his employment. He was away from work for certain periods and drew injury benefit pursuant to the provisions of section 11 of the National Insurance (Industrial Injuries) Act, 1946,[1] until the expiration of the injury benefit period on January 12, 1956. Thereafter his case was considered as that of an insured person entitled to disablement benefit under the provisions of section 12 (1) (as amended by the National Insurance (Industrial Injuries) Act, 1953 [1]), and the appropriate medical board at Mansfield made a number of successive provisional assessments of the extent of his disablement for relatively short periods, ultimately expiring on May 12, 1957, and on April 24, 1957, the medical board made a final assessment of the extent of his disability at 5 per cent. from May 13, 1957, for the period of his life, and found that the loss of faculty in respect of which the assessment was made resulted from the accident of July 14, 1955. The effect of the finding was to entitled the applicant to a disablement gratuity of £67 10s.

A few days after that decision, on April 30, 1957, the claimant again went off work, and with the exception of one or two days in May, remained away from work until November, 1957.

On June 5, 1957, while awaiting admission to Harlow Wood Hospital for his back condition, the claimant gave notice of appeal under section 39 (2) of the Act of 1946 to the medical appeal tribunal against the decision of the medical board of April 24, in a letter which showed that he considered that the extent of his disability had been fixed at too low a percentage.

On June 17, the claimant was admitted to hospital, and on July 4, 1957, underwent an operation for removal of a prolapsed disc. Some 11 days later, on July 15, the claimant's appeal was heard by the medical appeal tribunal. He was still in a plaster bed in hospital, following the operation on July 4, and was represented at the hearing by a trade union official, Mr. Clarke, of the National Union of Mineworkers, who tendered a report by Mr. Malkin, a surgeon who had examined the claimant in hospital on June 28, 1957, before the operation, and stated, in the form of a letter to the trade union official: "As requested "by you I examined this man at Harlow Wood Hospital where "he is an in-patient. History: He first attended Mansfield "Hospital on July 15, 1955, complaining of pain in his back "which he thought had come on after work which involves "pushing. The first pain he felt was at the end of December, "1954, and he did not improve. He said that the pain was "on the left side of his back and down his leg and that it "was made worse by coughing and sneezing. There was tender- "ness over the sacro-iliac joint. I saw him on July 22 and "found that there was limited movement of his spine and pain "was referred to the left sacro-iliac region. He was given a "course of physiotherapy and was seen again on October 5, when

[1] For footnote 1 see p. 456.

" he said he was not improving. He was then seen early in " 1957. He complained of pain in his back. There was pain " on stretching the left sciatic nerve and considerable limitation " of movement of the spine. I thought there were some signs " of a disc lesion and I recommended his admission to Harlow " Wood where he now is. He is lying on a plaster bed pre- " paratory to further treatment. Opinion: This man is suffering " from a condition affecting his spine which has resulted from " his work and I consider that he requires in-patient hospital " treatment. It is impossible at the present time to give a " definite estimate of what his life assessment would be, but " I should like to send you another report later."

There were also presented to the tribunal some written observations on behalf of the Minister, concluding with the submission that " having regard to the medical evidence " (which included certain hospital notes) " (a) the claimant's back con- " dition is only partly attributable to the relevant accident, and " (b) the relevant loss of faculty has been correctly assessed."

On or about July 31, 1957, the tribunal notified the claimant of their decision of July 15 in the following terms: " Dear Sir, " With reference to your claim for disablement benefit the medical " appeal tribunal, which considered your case on July 15, 1957, " decided that . . . from May 13, 1957, there is no loss of " faculty resulting from industrial accident on July 14, 1955. The " findings of the tribunal are summarised as follows: Mr. Hubble " is in hospital but we heard Mr. Clarke of the National Union " of Mineworkers with the medical report of June 28, 1957, by " Mr. Malkin. It is clear from the medical evidence before us, " including the hospital notes, that any loss of faculty which may " have resulted from the relevant accident was only an aggrava- " tion of a pre-existing condition, which aggravation had ceased " by May 12, 1957. We set aside the assessment of medical " board of April 24, 1957."

After the tribunal's decision of July 15, 1957, which was notified to the applicant on July 31, 1957, the applicant remained in hospital and was examined again by his surgeon, Mr. Malkin, who reported on August 2, again in the form of a letter to the trade union official, as follows: " As requested by you I saw this " man today. Since I last examined him he has had operative " treatment in Harlow Wood Hospital for a disc lesion. As a " result of the investigation, it was decided that there probably " was an injury to an intervertebral disc, and the operation which " was carried out on July 4, 1957, showed that a disc injury was " present. This was removed and a graft was applied to the " spine. Since then, he has made good progress but he will " require further treatment at Harlow Wood for at least another " month before he commences to get up. Opinion: This man " is suffering from the effect of an injury to an intervertebral " disc which has probably been caused by the type of work he " does which involves constant bending and twisting in a bent

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" position. I consider that his present condition is due to the " effects of an injury. He will have a permanent partial dis- " ability which will be more than 5 per cent."

Armed with that report, the claimant asked for a review by the medical board under section 40 (1) of the Act of 1946. On August 28, 1957, the medical board decided that they could review under subsection (1). Their decision took the form of answers to two questions on a printed and prepared form headed " Disablement benefit. Medical board report. Review on the " ground of non-disclosure or misrepresentation of a material " fact." Under the heading " Decision of the medical board on " application for review," the first question: " (1) Are you satisfied " by fresh evidence that the decision under review was given in " consequence of the non-disclosure or misrepresentation by the " claimant or any other person of a material fact? " was answered " Yes." The second question was: " (2) If the answer to (1) " is yes, please state the nature of the fresh evidence and the " material fact." The answer to that was as follows: " The " claimant, Mr. Hubble, was admitted to Harlow Wood Hospital " on June 17, 1957: operation July 5, 1957, for prolapsed inter- " vertebral disc, bone graft from left ilium followed by plaster " of paris and now confined in strict bed and still a patient at " Harlow Wood. Also a further report confirming the above " from Mr. Malkin's letter of August 2, 1957."

The medical board then made provisional assessments of the extent of the disablement from May 13 to June 17, 1957, of 10 per cent. and from June 17 to October 17, 1957, of 100 per cent.

Thereupon, pursuant to section 39 (3), the Minister directed the insurance officer to refer the decision of the medical board to a medical appeal tribunal.

The decision of the medical appeal tribunal dated October 28, 1957, was as follows: " Having considered the decision of the " above-mentioned medical board " [the medical board held at Mansfield on August 28, 1957] " on the case of the person named " (who was represented by Mr. Clarke of the National Union of " Mineworkers) the tribunal have decided as follows: There is " no fresh evidence to show that the decision under review was " given in consequence of the non-disclosure or misrepresenta- " tion by the claimant or any other person of a material fact." There were then set out the reasons for the decision including the findings on all questions of fact material to the decision, as follows: " When the medical appeal tribunal gave its decision " on July 15, 1957, it had Mr. Malkin's report of June 28, 1957, " before it, and the claimant had already undergone the opera- " tion of July 4, 1957. The claimant obtained a second report " from Mr. Malkin on August 2, 1957. Our attention has been " drawn to a decision (No. R(1) 16/57) of the [Industrial In- " juries] Commissioner who held that ' " fresh evidence " means " ' some evidence which the claimant was unable to produce

" ' before that decision was given or which he could not reason-
" ' ably be expected to have produced in the circumstances of
" ' the case.' It was, in our judgment, possible for the claimant
" to have obtained a second opinion from Mr. Malkin before the
" medical appeal tribunal gave its decision. The claimant could
" have asked the medical appeal tribunal to grant an adjourn-
" ment if they had had insufficient time to get a second report
" from Mr. Malkin, but we think that eleven days (namely,
" from July 4, 1957, when the claimant had the operation to
" July 15, 1957, when the medical appeal tribunal heard the
" case) was sufficient time. In the circumstances we must
" allow this reference, and set aside the decision, dated August
" 28, 1957, of the review board."

The claimant thereupon sought and obtained leave from the Divisional Court to move for two orders of certiorari. The first was in reference to the decision of the medical appeal tribunal of July 15, 1957. It was contended that the medical appeal tribunal when determining the appeal of the claimant against the decision of the medical board dated April 24, assessing his disablement at 5 per cent. final for life, had no jurisdiction to set aside such assessment by holding that there was no relevant disability. That application was dismissed by the Divisional Court on May 16, 1958.[2] The Divisional Court also dismissed a motion for an order of certiorari in respect of the decision of the medical tribunal dated October 28, 1957. The contention in support of such motion was that the tribunal was wrong in law on the face of its award in holding, and so directing itself, that fresh evidence under section 40 (1) of the Act of 1946 meant some evidence which the claimant had been unable to produce before the decision of July 15, notified on July 31, was given, or which he could not reasonably have been expected to have produced in the circumstances of the case.

The claimant appealed only against the refusal to bring up and quash the decision of the medical appeal tribunal of October 28, 1957. On the hearing of the appeal it was conceded on behalf of the Minister that though the only question on the appeal was whether there was any error of law on the face of the decision of October 28, it was appropriate, having regard to the references in that decision to the two medical reports, the decision of the appeal tribunal of July 15, and the decision of the reviewing medical board of August 28, that the court should look at those documents in addition to the record of the decision itself.

F. W. Beney Q.C. and *Henry S. Ruttle* for the claimant.

J. R. Cumming-Bruce for the Minister of Pensions and National Insurance.

The following cases were cited in the course of the argument:

[2] [1958] 2 Q.B. 228; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374.

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Baldwin & Francis Ltd. v. *Patents Appeal Tribunal*[3]; *Rex* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw*[4]; *Regina* v. *Medical Appeal Tribunal, ex parte Gilmore*[5]; *Johnson* v. *Johnson*[6]; *Skeen's Case* (*Regina* v. *Skeen and Freeman*)[7]; *Edwards* (*Inspector of Taxes*) v. *Bairstow*[8]; *In re Chennell, Jones* v. *Chennell.*[9]

MORRIS L.J. said that it was necessary to state the history of this matter in order to explain the point which now arose and the scheme and provisions of the Act of 1946. His Lordship read section 12 (1) which defined the circumstances in which an insured person became entitled to disablement benefit, in the form substituted in the National Insurance (Industrial Injuries) Act, 1953. Section 36 of the Act of 1946 provided that disablement questions under the Act were to be determined by medical boards or medical appeal tribunals.

[His Lordship then stated the facts leading to the claimant's first appeal on July 15, 1957, set out above, and continued:] The Act of 1946 contains many detailed provisions which not only prescribe the manner in which the questions arising under the Act are to be determined but also provide for certain appeals and for certain reviews of decisions. Section 36 (1) provides: "Subject to the provisions of this Part of this Act, any of "the following questions arising under this Act shall be deter- "mined as provided by this subsection, that is to say" then paragraph (*a*) provides that certain defined questions are to be determined by the Minister. Section 37 provides for appeals in certain cases from the Minister's decisions and, subject to certain conditions, for a review by the Minister.

Section 36 (1) (*b*) provides that other defined questions are to be determined in like manner "subject to any prescribed "modifications and adaptations, as a corresponding question "arising in respect of an allowance under the Family Allow- "ances Act, 1945." Section 36 (1) (*c*) provides: "any ques- "tion—(i) whether the relevant accident has resulted in a "loss of faculty; (ii) whether a loss of faculty is likely to be "permanent; (iii) at what degree the extent of disable- "ment resulting from a loss of faculty is to be assessed, "and what period is to be taken into account by the assessment; "shall be determined by a medical board or medical appeal tri- "bunal constituted in accordance with the following provisions "of this Act." Section 38 provides for the constitution of medical boards and medical appeal tribunals. Section 39 deals with references to medical boards and appeals and references to medical appeal tribunals. Section 40, which falls specially to be

[3] [1959] 2 W.L.R. 826; [1959] 2 All E.R. 433.
[4] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.
[5] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.
[6] [1900] P. 19; 16 T.L.R. 26.
[7] (1859) Bell C.C. 97.
[8] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.
[9] (1878) 8 Ch.D. 492.

considered in this case and to which I will later refer, provides that, in certain circumstances, there may be a review of a decision of a medical board or of a medical appeal tribunal.

Section 36 (2) is in the following terms: "Subject to the "foregoing provisions of this section, any claim for benefit and "any question arising in connection with a claim for or award of "benefit shall be determined by an insurance officer, a local "appeal tribunal or the commissioner appointed or constituted "in accordance with the following provisions of this Act." Sections 42, 43 and 44 provide for the appointment of the commissioner and deputy commissioners, for the constitution of local appeal tribunals, and for the appointment of insurance officers. Sections 45, 46 and 47 provide for the determination of claims by insurance officers and references to local appeal tribunals and for appeals to the commissioner. Then, by section 50, which has now been amended by section 4 of the Act of 1953, it was provided that in certain circumstances there might be a review of a decision of an insurance officer, a local appeal tribunal, or the commissioner.

It will be seen, therefore, that, as laid down in the Act, different types of questions fall to be determined in different ways and that after determinations there are certain appeals and that, subject to certain stated conditions, there may be reviews.

Section 36 (3) provides as follows: "Except as provided by "this Part of this Act or by the Family Allowances Act, 1945, "as applied by paragraph (*b*) of subsection (1) of this section, "any decision of a claim or question as provided by the fore-"going provisions of this section shall be final."

[His Lordship stated the facts as to the hearing of the appeal on July 15, read the surgeon's first report, and continued:] It will be seen that Mr. Malkin stated that the pain in the claimant's back was first felt by him at the end of December, 1954, which was over six months before the pain of which he complained on July 15, which he thought had come on after work which involved pushing. It will also be seen that the report was dated some 17 days before the hearing before the medical appeal tribunal.

[His Lordship set out the Minister's written submissions, and the terms of the decision of the medical appeal tribunal of July 15, 1957, and continued:] It will be seen, therefore, that the result of the claimant's appeal was that not only did he not succeed in getting anything he asked for but he also lost the modest measure of success that he had achieved before the medical board. The appeal tribunal decided that any loss of faculty which may have resulted from the relevant accident was only an aggravation of a pre-existing condition and that such an aggravation had ceased on May 12.

That decision came as a disappointment to the claimant. As Mr. Malkin's letter of June 28 had stated that the claimant was lying on a plaster bed preparatory to further treatment, and as

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Mr. Malkin had said that he would like to send another report later, it may seem unfortunate that some postponement of a final decision, whether on request or on offer, did not take place. But it may be that the tribunal considered that they would not be further assisted by seeing another report. The nature of the present proceedings does not, however, provide us with means of knowing whether some alternative course could helpfully have been followed.

Having lost on appeal, the claimant sought to have a review, under the provisions of section 40 (1).

[His Lordship read the subsection, concluded his statement of the facts, as set out above, and continued:] Appeal is now brought to this court and the question which arises is whether there is any error of law on the face of the decision of October 28. If there is not, then no case for making an order of certiorari is made out. Though we are only concerned with the decision of October 28, it has been agreed for the purposes of this case, and very helpfully agreed, by Mr. Cumming-Bruce that it is appropriate, having regard to the references in the decision of October 28, that we should look at the two medical reports, the decision of the medical appeal tribunal of July, and the decision of the medical board of August 28. Mr. Cumming-Bruce stated expressly that it was in the circumstances of this case, and having regard to the features of this case, that we were entitled to look at those other documents.

It is clear that a review under section 40 (1) may only take place if the medical board is satisfied that the decision to be reviewed was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact (whether or not there was fraud) and that the medical board is so satisfied by fresh evidence. The decision of the medical appeal tribunal of October 28 recorded in terms what view it held as to the meaning of the words "fresh evidence." The decision was made on the basis of the interpretation which was followed as to what those words mean. If those words were correctly construed, then there is no error of law on the face of the award. There is no statutory provision for an appeal from the decision of a medical appeal tribunal and the jurisdiction of the Queen's Bench Division in its control of inferior courts cannot be enlarged so as to give an appeal in the ordinary sense.

Mr. Beney has submitted that, in their context, the words "fresh evidence" mean no more than further or additional evidence or further or additional information. He submits that any evidence additional to that which was before the medical appeal tribunal on July 15 would qualify to be called "fresh "evidence," even though it was evidence that could then readily have been given. But this submission, in my judgment, gives no real or satisfactory meaning to the word "fresh."

It is interesting to contrast the ways in which certain reviews

may take place. Thus, in regard to decisions of the Minister, section 37 (6) provides: "The Minister may, on new facts being "brought to his notice, review a decision given by him of any "such question as is mentioned in paragraph (*a*) of subsection "(1) of the last foregoing section." Then follows a proviso which I need not read. In the case of any matters coming under section 36 (1) (*b*), there is a provision in section 5 (3) of the Family Allowances Act, 1945, as follows: "The Minister "may at any time and from time to time revise any award "made or decision given by him under this Act, if it appears "to him that the award or decision was erroneous either in view "of further information which has been brought to his notice "since the date on which it was made or given as to the cir-"cumstances existing at the time by reference to which it was "made or given, or by reason of some mistake having been made "with respect to those circumstances or to the law." Then follows a proviso which I need not read.

In the case of decisions of insurance officers, local appeal tribunals, or the commissioner, it was provided by section 50 (1) as follows: "Any decision under this Act of an insurance officer, "a local appeal tribunal or the commissioner may be reviewed "at any time by an insurance officer, or, on a reference from "an insurance officer, by a local appeal tribunal, if—(*a*) he or "they is or are satisfied by fresh evidence that the decision "was given in ignorance of, or was based on a mistake as to, "some material fact; or (*b*) there has been any relevant change "of circumstances since the decision was given; or (*c*) the "decision was based on the decision of a special question and "the decision of the special question is revised under this Part "of this Act or the Family Allowances Act, 1945: Provided that "a decision that an accident was not an industrial accident shall "not be a subject to review, and a decision that an accident was "an industrial accident shall only be subject to review where "the insurance officer or local appeal tribunal, as the case may "be, is or are satisfied by fresh evidence that the decision was "given in consequence of any wilful non-disclosure or misrepre-"sentation of a material fact." That section has in certain ways been amended by section 4 (4) of the Act of 1953; but it is to be observed that twice in that section the words "fresh "evidence" are used. All those provisions, which are in differing terms, denote careful and deliberate drafting. The reviews that may take place are limited by the requirements of the particular words that are used. It seems to me that the words "fresh evidence" bear the same meaning in section 40 as they do in section 50. They are words which have been considered by the courts, and as Parliament has employed them in certain contexts in this legislation, it is reasonable to give them due and proper meaning. If a term with a legal meaning is employed, it is reasonable to consider that the term is employed with its accepted meaning.

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If an appellant had knowledge of some material fact at the time that he was appearing before a medical appeal tribunal, but, if for some reason he decided not to disclose such material fact, and if a decision were given, I cannot think that he could then seek to review the decision by bringing the material fact before the medical board and asserting that he had "fresh "evidence." In my judgment, he would not have "fresh "evidence." "Fresh evidence," it seems to me, must have the quality of newness, or the feature of having become newly available and obtainable.

Assistance is provided by considering the decision in *Johnson* v. *Johnson*,[1] concerning the meaning of the words "fresh evi- "dence," which were used in the Summary Jurisdiction (Married Women) Act, 1895, s. 7, which reads as follows: "A court of "summary jurisdiction acting within the city, borough, petty "sessional or other division or district, in which any order under "this Act or the Acts mentioned in the schedule hereto, or "either of them, has been made, may, on the application of "the married woman or of her husband, and upon cause being "shown upon fresh evidence to the satisfaction of the court at "any time, alter, vary, or discharge any such order" and so on. Sir Francis Jeune P., in his judgment, said[2]: "The question "raised in this case is of general interest, but, to my mind, "absolutely free from doubt. The Summary Jurisdiction "(Married Women) Act, 1895, s. 7, provides that a court of "summary jurisdiction, acting as therein specified, may, upon "fresh evidence, alter, vary or discharge an order previously "made. But it is necessary that magistrates should clearly "understand what 'fresh evidence' means, though, in my view, "there is no real doubt about it. It means practically the same "sort of evidence as that upon which a new trial would, in the "ordinary course, be granted; it must relate to something which "has happened since the former hearing or trial, or it must be "evidence that has come to the knowledge of the party applying "since the hearing or trial, and which could not by reasonable "means have come to his knowledge before that time. It must "amount to what was called in the old forms of pleading res "noviter ad notitiam perventa. It is altogether a mistake to "suppose that 'fresh evidence,' within the meaning of the Act "of 1895, means or includes evidence which could have been "called, but which was not in fact adduced, at the first hearing. "It would be monstrous to suppose that a party could abstain "from calling evidence, and could thereafter proceed to make "application upon application, based on evidence which might "have been tendered in the first instance. I have no hesitation "in saying that to the words 'fresh evidence' in section 7 must "be assigned the limited meaning and scope which I have

[1] [1900] P. 19; 16 T.L.R. 26. [2] [1900] P. 19, 20-21.

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" indicated. . . . " The judgment of Gorell Barnes J.[3] was to the like effect.

The definition adopted by the medical appeal tribunal was this: fresh evidence means some evidence which the claimant was unable to produce before the decision was given, or which he could not reasonably be expected to have produced in the circumstances of the case. In my judgment, that definition is in no way erroneous. In the context of section 40 (1) I consider that " fresh evidence " does have the meaning which was accepted by the medical appeal tribunal.

For these reasons, I am of opinion that no error of law on the face of the decision is shown, and that, accordingly, the decision of the Divisional Court was correct. I would dismiss the appeal.

ORMEROD L.J. I agree that the appeal should be dismissed. The issue before this court in the end resolved itself into a comparatively short point. The only way in which the matter could come first before the Divisional Court and then this court was by way of an application for an order of certiorari. That application, as Morris L.J. has already pointed out, could only succeed if the applicant could satisfy the court that there was a manifest error on the face of the record which would justify the court exercising its discretion in favour of the applicant.

As the matter came before this court, the only question to be considered was whether the medical appeal tribunal was in error in construing the term " fresh evidence " in section 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, as meaning some evidence which the claimant was unable to produce before that decision was given, or which he could not reasonably be expected to have produced in the circumstances of the case. If that is the proper construction of the words of the subsection, then it is an end to this appeal, with the exception that Mr. Beney raised the question that, even if the construction put on those words by the medical appeal tribunal was the correct one, there was still a question, on the face of the documents before the court which constituted the record, whether the report of Mr. Malkin of August 12 should not be regarded as " fresh evidence " even in the light of that construction. But it was pointed out in the course of the argument that this was substantially a question of fact, and the point was virtually abandoned by Mr. Beney in his reply.

Had that question been answered in the affirmative, it might well have been that a further question, as to whether there had been a non-disclosure and whether that non-disclosure had been of a material fact, might have had to be considered—as indeed it was considered by the Divisional Court. But that question, in the circumstances, does not arise and, for my part, I say nothing about that part of the judgment of the Divisional Court.

So far as the construction of the words " fresh evidence " is

[3] [1900] P. 19, 22.

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concerned, I agree with the view expressed by Morris L.J. We are considering a term which had been used, and deliberately used, by the draftsman in the section, which has already received judicial interpretation in the construction of an earlier statute.

Reference has been made to the Summary Jurisdiction (Married Women) Act, 1895, and the judgment of Sir Francis Jeune P. in *Johnson* v. *Johnson* [4] has been cited, and I need not repeat it. It is sufficient to say that, since that decision, there has been no question as to what is the proper interpretation of the words "fresh evidence," at least as far as that statute is concerned.

It is interesting to note that R.S.C., Ord. 58, r. 9 (*a*), gives this court full discretionary power to receive further evidence on a question of fact either by ordinary evidence in court, by affidavit, or by deposition taken before an examiner or commissioner. Although the term there used is "further evidence," not "fresh evidence," it is of some assistance to note the interpretation which has always been put by the court on those words, and I read, for convenience from the current edition of the Annual Practice, some words of Denning L.J. in *Ladd* v. *Marshall*,[5] where he said: "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial," and then went on to describe other necessary factors to be considered.

That is the position as it was for a considerable number of years before this particular Act was placed on the statute book. And it would seem to me to be sufficient to warrant putting on the words "fresh evidence" the construction which has already been placed upon them in the context of another statute.

Mr. Beney submitted that so to construe the words in question was taking much too strict a view of the language of the section, having regard to the fact that this inquiry was not an action inter partes but was an application by an individual for certain benefits from a fund which had been established by statute. His submission was that "fresh evidence" meant nothing more than evidence which was not considered by the tribunal at the hearing. Of course, that would imply that a claimant, if he wished, for any reason, either because he did not think it was important, or because he wished to keep something in reserve, could hold back evidence or information which was in his possession and produce it at a later stage. If he could do that once, there is no reason why it should not be done on a number of occasions, and there would be no end to proceedings which could conceivably arise as a result. I think that must be a possibility which the legislature had in mind, something which it was their intention not to allow. I think that is made clear by the careful use of the language which has been adopted by the legislature in this statute in relation not only to reviews under section 40, but to reviews under section 50

[4] [1900] P. 19, 20–21.

[5] [1954] 1 W.L.R. 1489, 1491; [1954] 3 All E.R. 745.

and under other sections. The various forms of language used have already been pointed out by Morris L.J., and I do not propose to repeat them. But they have the effect of strengthening the view which I have formed of the construction of the words which we have been considering.

In my view, therefore, the medical appeal tribunal was right in adopting the construction which they did adopt, which was set out in their decision of October 28, 1957, and, if that be so, it is clear that the appeal must be dismissed.

WILLMER L.J. I have reached the same conclusion, and I am of opinion that the application for certiorari was rightly dismissed by the Divisional Court.

The medical appeal tribunal held that there was no " fresh " evidence " to show that the decision under review was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact. In so holding, they followed the decision of a commissioner in an earlier case, where it was held that " fresh evidence " in this context means some evidence which the claimant was unable to produce before the decision under review was given, or which he could not reasonably be expected to have produced in the circumstances of the case. The medical appeal tribunal concluded on the facts that the claimant (or his representative, Mr. Clarke), could have obtained what was claimed to be the fresh evidence, namely, the second report from Mr. Malkin, the surgeon, before the medical appeal tribunal gave its previous decision.

It was, as I understood, conceded by Mr. Beney, that, if the medical appeal tribunal were right in their view as to the meaning of " fresh evidence " in the context of section 40 (1) of the Act, he could not in these proceedings challenge their conclusion that Mr. Malkin's second report did not amount to " fresh evidence " as so construed. But Mr. Beney contended that the expression " fresh evidence," as used in section 40 (1), should not be construed in so narrow a sense, especially bearing in mind that the inquiry before a medical board or a medical appeal tribunal is a somewhat informal proceeding, and in no sense a lis inter partes. He argued that, in relation to such a proceeding, the words " fresh evidence " are wide enough to cover any new information which has come to light since the decision under review, and on which the tribunal might see fit to rely. I feel myself unable to accept Mr. Beney's submission, for three reasons. First, the words " fresh evidence," which are used in section 40 (1) of the Act, are words with a long history behind them. They have frequently been considered and have been construed in connection with their use in the Summary Jurisdiction (Married Women) Act, 1895. My Lord has already referred to the judgment of the President [Sir Francis Jeune] in *Johnson* v. *Johnson*[6]

[6] [1900] P. 19, 20–21.

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(supra). The definition of "fresh evidence" therein laid down has, so far as I am aware, been consistently followed ever since. It seems to me that, when adopting this particular expression in enacting the Act of 1946, Parliament must be presumed to have used those words in the well-defined sense in which they have been judicially construed for so many years.

Secondly, Mr. Cumming-Bruce, in the course of his very forceful argument, persuaded me, by reference to the words used in other sections of the same statute, that the words "fresh evidence" as used in section 40 (1) were very carefully chosen. Morris L.J. has already referred to the different forms of words used in relation to different kinds of review which are open to dissatisfied parties under various sections of the Act. I do not go over again what my Lord has already said. In the light of the phraseology used in other sections of the Act, I find it difficult to resist the argument that the use of the well-worn phrase "fresh evidence" in section 40 (1) was deliberate, and that those words were carefully chosen so as to restrict the powers of review available under that section.

Thirdly, I am disposed to agree with Mr. Cumming-Bruce's submission that, if the words "fresh evidence" were to be construed as contended for by Mr. Beney, they would practically be robbed of any meaning, and might as well have been omitted from the section altogether. I would agree with and adopt this passage from the judgment of the Divisional Court, where it is said[7]: "If Mr. Beney were right, it would mean that any "claimant—or presumably any insurance officer—if dissatisfied "by a decision of a medical tribunal, could go and get an opinion "from another doctor and relying upon this or anything con-"tained in it as a material fact, apply for a review. If unsuc-"cessful, the process could be repeated any number of times by "obtaining fresh opinions from fresh medical men." I am satisfied that such a thing could not possibly have been intended by Parliament when this statute was enacted.

On the contrary, as was submitted by Mr. Cumming-Bruce, I think it is clear that the policy of the Act was to ensure that these purely medical questions, which are the questions referred to medical boards and medical appeal tribunals, should be dealt with once and for all, subject to a very strictly limited right of review in exceptional cases. If that were the policy, as it seems to me it must be, there was good reason to provide that, in such exceptional cases, the power to review should be exercised only on the production of "fresh evidence" in the previously accepted sense of those words.

In those circumstances, it seems to me that the unfortunate claimant in this case did not bing himself within section 40 (1), for his application for a review was not, in my judgment, supported by "fresh evidence" as I understand those words. It

[7] [1958] 2 Q.B. 228, 242; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374.

follows that the medical appeal tribunal were guilty of no error of law in rejecting his claim and reversing the decision of the medical board, and the application for certiorari was rightly refused.

The further question, much discussed by the Divisional Court, as to whether there was, in the circumstances of this case, a non-disclosure by the claimant (or by his representative, Mr. Clarke), and, if so, whether he was entitled to rely on it, does not, in my opinion, arise and I therefore express no view about it.

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REGINA v. MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION).

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Taylor, Jelf & Co. for Hopkin & Sons, Nottingham; Solicitor, Ministry of Pensions and National Insurance.*

M. M. H.

[COURT OF APPEAL.]

FISHER *v.* FISHER.

[F. 1957. (D) No. 409.]

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Hodson, Sellers and Harman L.JJ.

Estoppel—Per rem judicatam—Husband and wife—Divorce—Petition by husband alleging desertion — Previous nullity proceedings by husband—Dismissal of wife's charges of cruelty in previous proceedings—Wife's answer to husband's petition alleges constructive desertion—Whether wife estopped from repeating cruelty allegations.

In September, 1954, a husband petitioned for a decree of nullity on the ground that the marriage had not been consummated. The wife by her answer denied the husband's allegation and cross-prayed for dissolution of the marriage on the ground of her husband's cruelty. The commissioner found that the marriage had been consummated, that the allegations made by the wife about the husband's conduct were proved, but that they did not amount to cruelty, and therefore both the husband's petition and wife's cross-prayer were dismissed. The wife left the matrimonial home in October, 1954, and had never returned.

In November, 1957, the husband petitioned for divorce on the ground of his wife's desertion. The wife denied the desertion and cross-petitioned for a divorce on the ground of constructive desertion. In her answer she relied on the allegations which she had raised in the previous proceedings and on some further allegations of expulsive conduct which were not raised in the previous proceedings:—

Held, that there could be no estoppel per rem judicatam where the subject-matter of litigation in previous proceedings was different, and, since constructive desertion was a fresh issue not determined in the previous proceedings, the wife was entitled to have her allegations heard and assessed in the present proceedings.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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Thompson v. *Thompson* [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161 and *Winnan* v. *Winnan* [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862 applied.

Dictum of Willmer J. in *Bright* v. *Bright* [1954] P. 270, 288; [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939 disapproved.

APPEAL from Sir Reginald Sharpe Q.C., sitting as a special commissioner of divorce at Lewes.

The parties were married on September 5, 1936; they adopted a child in September, 1945, and the wife left the husband in 1953, but this departure was followed by a reconciliation. On September 18, 1954, the husband, Harold Francis Fisher, petitioned for nullity on the ground that the marriage had not been consummated. The wife, Winifred Mabel Fisher, by her answer denied the husband's allegation and cross-prayed for a divorce on the ground of her husband's cruelty. The wife left the matrimonial home on October 27, 1954, and never returned. On December 6, 1955, Sir Reginald Sharpe, sitting as a special commissioner, found that the marriage had been consummated, that the wife's allegations about her husband's misconduct were proved but that they did not amount to cruelty. He therefore rejected both prayers.

The present proceedings were instituted on November 8, 1957, when the husband petitioned for a divorce on the ground of his wife's desertion. The wife denied the desertion and cross-prayed for divorce on the basis of her husband's constructive desertion. In her answer she relied on allegations which were contained in her cross-prayer for cruelty in the previous proceedings and also on allegations of expulsive conduct which were not raised in the previous proceedings.

At the hearing of the suit the commissioner held that the wife was estopped per rem judicatam from putting forward her own case of desertion, since her cross-charge involved the same questions as those which had been determined against her in previous proceedings, and further that she sought to raise some additional matters which might have been, but were not, raised in the earlier proceedings. The commissioner granted the husband a decree nisi and dismissed the wife's cross-petition. The wife appealed.

Francis B. Purchas for the wife.

Nigel H. Curtis-Raleigh for the husband.

The following cases were cited in argument in addition to those referred to in the judgments: *Reg.* v. *Hutchings* [1]; *Putt* v. *Royston* [2]; *Pike* v. *Pike* [3]; *Timmins* v. *Timmins* [4]; *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council.* [5]

[1] (1881) 6 Q.B.D. 300.
[2] (1682) T. Raym. 472.
[3] [1954] P. 81; [1953] 3 W.L.R. 634n.; [1953] 1 All E.R. 232.
[4] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.
[5] [1926] A.C. 94.

HODSON L.J. stated the facts and continued: That the wife left her husband, and had never since returned, was common ground between the parties; but as to the circumstances leading up to her leaving, she was not permitted by the commissioner to give any evidence at all. The issue of desertion was not open to the wife in the earlier proceedings, which were for nullity, and it was no defence to that petition that the wife had been deserted. Moreover, she could not then make a substantive allegation of desertion as the foundation for a petition for divorce because the period which had elapsed since the separation was less than three years.

In those circumstances, it would indeed be strange if the wife were estopped from setting before the court and having decided the question of whether or not she had been deserted by her husband. But the commissioner, in holding that she was estopped, followed the decision of Willmer J. in *Bright* v. *Bright*.[1] The judge in that case based himself on the Privy Council decision of *Hoystead* v. *Commissioners of Taxation*,[2] and I think it is desirable to refer to that case first. The dispute there was about an income tax assessment. The headnote reads: "Under a will the annual income from an estate in Australia was "divisible by the trustees between the testator's daughters. The "trustees objected to an assessment for the financial year 1918–"1919 under the Land Tax Assessment Act, 1910–1916 of "Australia . . .", and they claimed a deduction in respect of the share of each daughter.

"A case was stated for the opinion of the full court of the "High Court upon the questions (1) Whether the shares of the "joint owners, or any of them and which of them, in the land "were original shares . . . (2) How many deductions . . . the "respondent should make. The full court answered these "questions as follows: (1) The shares of the six children sur-"viving at the date of the assessment; (2) Six. Judgment upon "the objection was entered accordingly. Upon the assessment "for 1919–1920 the commissioner allowed only one deduction "of £5,000, contending that the beneficiaries were not joint "owners within the meaning of the Act." That view was upheld by the full court; but it was held by the Privy Council: ". . . "that the commissioner was estopped, since although in the "previous litigation no express decision had been given whether "the beneficiaries were joint owners, it being assumed and "admitted that they were, the matter so admitted was "fundamental to the decision then given."

Lord Shaw, in giving the judgment of the Board, said[3]: "It "is seen from this citation of authority that if in any court of "competent jurisdiction a decision is reached, a party is estopped "from questioning it in a new legal proceeding. But the prin-"ciple also extends to any point, whether of assumption or

[1] [1954] P. 270; [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939.
[2] [1926] A.C. 155; 42 T.L.R. 207.
[3] [1926] A.C. 155, 170.

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" admission, which was in substance the ratio of and fundamental " to the decision. The rule on this subject was set forth in the " leading case of *Henderson* v. *Henderson*[4] by Vice-Chancellor " Wigram as follows: 'I believe I state the rule of the court " ' correctly when I say that, where a given matter becomes the " ' subject of litigation in, and of adjudication by, a court of " ' competent jurisdiction, the court requires the parties to that " ' litigation to bring forward their whole case, and will not " ' (except under special circumstances) permit the same parties " ' to open the same subject of litigation in respect of matter " ' which might have been brought forward as part of the subject " ' in contest, but which was not brought forward, only because " ' they have, from negligence, inadvertence, or even accident, " ' omitted part of their case. The plea of res judicata applies, " ' except in special cases, not only to points upon which the " ' court was actually required by the parties to form an opinion " ' and pronounce a judgment, but to every point which properly " ' belonged to the subject of litigation, and which the parties, " ' exercising reasonable diligence, might have brought forward " ' at the time.' "

Those are wide words, but they have been considered by the House of Lords in *New Brunswick Railway Co.* v. *British & French Trust Corporation Ltd.*,[5] where Lord Romer, referring to the passage which I have read from Lord Shaw's judgment, said: " It was sought to treat this passage as an authority for " the proposition that the plea of res judicata can successfully be " raised whenever it can be shown that a question substantially " similar to that being litigated has been decided in an earlier " action between the same parties. My Lords, I cannot read " the words that I have just cited as laying down any such " proposition, a proposition for which, I venture to think, no " authority can be found in the books. It is no doubt true to " say that whenever a question has in substance been decided, " or has in substance formed the ratio of, or been fundamental " to, the decision in an earlier action between the same parties, " each party is estopped from litigating the same question there- " after. But this is very different from saying that he may not " thereafter litigate, not the same question, but a question that " is merely substantially similar to the one that has already been " decided. If in an action the question of the construction of a " particular document has been in substance decided, each party " to the action is estopped from subsequently litigating the same " question of construction of that particular document. But he " is not estopped from subsequently litigating the question of " construction of another document even though the second one " be in substantially identical words. For the documents are " two distinct documents, and the questions of their construction " are two distinct questions."

[4] (1843) 3 Hare 100, 114, 115.

[5] [1939] A.C. 1, 43; 55 T.L.R. 260; [1938] 4 All E.R. 747.

Willmer J., in the *Bright* case,[6] sought to apply those principles which he derived from the judgment in *Hoystead*[7] in a case where there had been previous proceedings by a wife alleging cruelty, inter alia, and subsequent proceedings by a wife alleging desertion, and based on the same matters in part as she had raised in the earlier proceedings. He came to the conclusion that as to those matters which had been previously raised, they had specifically been decided against her in the earlier proceedings, and therefore she could not raise them again. But he went on to say that she was estopped from raising certain matters not specifically raised before on the ground that those allegations could well have been brought forward as part of the previous case of cruelty if they were allegations of substance.

It is only the second part of his decision which is, I think, open to criticism, because it is, after all, a salutary and necessary principle that one party should not be permitted to vex and oppress his opponent by repeating allegations which have been previously made and decided adversely to that party. But the rule has to be confined within proper limits, and sometimes it has been difficult to determine how the rule should be applied in particular cases. The most recent statement of the rule, I think, was that of Morris L.J. sitting in this court as one of the majority in *Society of Medical Officers of Health* v. *Hope*.[8] He said[9]: "The underlying principle supporting a plea of res "judicata is that it is desirable that litigation should end, and "that it is undesirable that a person should be vexatiously "pursued in litigation in regard to a matter that has already "been decided. It has, however, always been clear that the "plea will only avail if it appears that there is an attempt to "reopen the very matter that has been decided." The question often arises, what is "the very matter that has been decided"?

Before passing from *Bright* v. *Bright*[10] I should refer to the recent decision of this court in *Thompson* v. *Thompson*,[11] in which *Bright's* case[12] was discussed. The actual question which arose for decision in *Bright* v. *Bright*—certainly the second question which has been criticised—did not arise in *Thompson* v. *Thompson*. I ought to refer to some observations of my own about *Bright* v. *Bright* because I think that what I said[13] then is certainly incomplete, and may well be misleading. I referred to *Bright* v. *Bright*[14] and *Hill* v. *Hill*[15]—another decision arising in the divorce jurisdiction—as "cases where there had been "previous divorce proceedings in which judgment had been given "against parties who were held to be estopped from again raising "in later divorce proceedings issues which had been decided in

[6] [1954] P. 270.
[7] [1926] A.C. 155.
[8] [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509.
[9] [1959] 2 W.L.R. 377, 389.
[10] [1954] P. 270.
[11] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161.
[12] [1954] P. 270.
[13] [1957] P. 19, 38.
[14] [1954] P. 270.
[15] [1954] P. 291; [1954] 2 W.L.R. 473; [1954] 1 All E.R. 491.

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"the earlier divorce proceedings. In such cases there is no "difficulty in applying the ordinary principles of estoppel." I did not make it clear in that passage that I was considering only those issues which the wife in *Bright* v. *Bright* [16] had sought to raise again after those specific issues had been determined against her in earlier proceedings. But I did refer again to *Bright* v. *Bright*, showing that I had in mind the criticism which can be and, I think, must be said to be validly directed against the second part of Willmer J.'s decision. I said [17]: "In dealing "with the decision of Willmer J. in *Bright* v. *Bright* I have not "overlooked the observations of the Divisional Court in *Cooper* "v. *Cooper* (*No. 2*),[18] which, however, do not touch the particular "aspect of estoppel raised in this appeal." I may say that the majority decision in *Thompson* v. *Thompson* [19] was to the effect that there was no estoppel, because the charges of cruelty which the wife sought to make in the *Thompson* case had not previously been in issue at all. There had been earlier proceedings for wilful neglect to maintain in which she had made accusations that her husband was cruel, but the allegation of cruelty was not specifically made. It is, I think, always difficult in these cases to distinguish between them when one has to bear in mind that the facts of the cases nearly always differ, and very often there is more than one ratio decidendi in the particular case.

I must now make a reference to the decision of the Divisional Court which was referred to—*Cooper* v. *Cooper* (*No. 2*) [20]—which followed *Foster* v. *Foster*,[21] another decision of the Divisional Court. In the *Bright* case [22] Willmer J. had sought to distinguish *Foster* v. *Foster*,[23] but Lord Merriman P. in *Cooper* v. *Cooper* [24] disapproved of that part of the judgment of Willmer J. in the *Bright* case which related to matters which might have been raised as particulars of cruelty in so far as the judge held that the wife was estopped from raising them in desertion proceedings by directing her evidence to expulsive matter. The President said [25]: "It is said that this decision of ours in *Foster* v. *Foster* [26] "has been distinguished and criticised by Willmer J. in *Bright* "v. *Bright*.[27] I venture to observe that in so far as there is a "difference between the two cases, and the principles on which "they are decided, this court is bound, as indeed was Willmer J., "by the decision in *Foster* v. *Foster* [28] if it is applicable. I do "not propose to go through all the detail of the various matters "which were used in connection with the two charges of cruelty "in *Bright* v. *Bright* [29] which had been dismissed by the com- "missioner, and the particulars which were given in support of

[16] [1954] P. 270.
[17] [1957] P. 19, 39.
[18] [1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358.
[19] [1957] P. 19.
[20] [1955] P. 168.
[21] [1954] P. 67; [1953] 3 W.L.R. 623; [1953] 2 All E.R. 518.
[22] [1954] P. 270.
[23] [1954] P. 67.
[24] [1955] P. 168.
[25] Ibid. 174.
[26] [1954] P. 67.
[27] [1954] P. 270.
[28] [1954] P. 67.
[29] [1954] P. 270.

" the charge of desertion, save one only. It appears that one " of the new allegations which had not been included in the " dismissed petition for cruelty was an allegation in paragraph 13 " that ' between the years 1927 and 1930 at The White House, " ' Freetown, the respondent frequently told the petitioner that " ' he no longer wanted her, and wished that she could go.' If " that allegation had been dealt with on the ground that it could " not fairly be taken to be expulsive conduct, that would be one " thing; but ruling it out as inadmissible, in spite of the fact that " it had not been put before the court on the charge of cruelty, " though it ought to have been put before the court on that " charge, is another thing. I now refer to one passage in Will- " mer J.'s judgment: ' In the result, I hold that so far as this " ' petition raises the same allegations as those put forward in " ' the previous petition for cruelty the wife is estopped from " ' reiterating those allegations in support of her plea of construc- " ' tive desertion.' " In the previous decision those allegations had been specifically rejected.

The President continued [30]: " So far, I have no comment or " criticism to make; but it then goes on: ' That decision covers " ' paragraphs 14, 15 and 17, which, as I pointed out, are para- " ' graphs reiterating matters which formed the subject of specific " ' allegations and specific findings in the previous case.' Very " good." Then he quotes again with regard to three other paragraphs of which No. 13 raises matters not specifically raised in the previous proceedings, quoting Willmer J: " . . . ' It is clear " ' to me that these allegations could all well have been made as " ' part of the cruelty case which it was then sought to establish; " ' indeed, one could go further, and say from experience of this " ' court that each of them is of the type commonly raised in " ' almost every cruelty case which comes before this court.' " And then Willmer J. says that that brings it within the passage " in Lord Shaw's opinion in *Hoystead* v. *Commissioner of Taxa-* " *tion* [31] which had already been cited in full in support of the " proposition that estoppel relates not only to acts which actually " were raised and decided, but to anything which ought to have " been raised and was not raised, deliberately or otherwise, on " the occasion before. So far as that lays down that because, " in the course of a charge of cruelty, matters may emerge or " even be particularised suggesting that the husband wishes the " wife to clear out, or even puts it plainer than that and tells " her to clear out, the dismissal of the cruelty charge operates " as an estoppel from using that class of evidence in support " of a charge of constructive desertion, I respectfully disagree, " and if that is the purport of that paragraph, as I think it is, " I think that it conflicts essentially, though the details of the " cases are different, with the decision of this court in the case " of *Foster* v. *Foster*, [32] and I am not prepared to accept it."

[30] [1955] P. 168, 175.
[31] [1926] A.C. 155.
[32] [1954] P. 67.

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Karminski J.[33] agreed with the opinion expressed by the President and, in my view, that expression of opinion by the Divisional Court has the effect, which I think is right, that part at any rate of Willmer J.'s decision in *Bright* v. *Bright*[34] cannot be supported.

It is to be observed that the allegations made in the present case are not the same as those which were made in the *Bright* case in this respect, because the allegations (which have been repeated in this petition from the earlier pleading) are allegations of matters which had not been determined adversely to the wife in the previous proceedings. The commissioner who tried the earlier case—who was the same commissioner who tried the later case—preferred the wife's evidence to that of the husband; but in arriving at a conclusion that there was no cruelty, he based himself in part on the fact that there was no evidence of injury to the wife's health. He concluded that even in the light of his finding as to the correctness of the wife's evidence about the matters she relied on for cruelty, he did not think it would be at all possible to hold the husband's behaviour as amounting to cruelty.

There is no question of the wife's allegations having been rejected, and therefore there is no question of her seeking to re-agitate in later proceedings matters of fact which have been specifically determined against her in earlier proceedings.

As to the second group of allegations, they are, I think, of the same character as those which were excluded by Willmer J. in the *Bright* case, that is to say, allegations of what is called expulsive conduct. It is quite true, as Willmer J. indicated, that in cruelty cases very often everything conceivable is included which may possibly have a bearing upon the issue of cruelty, the pleading usually being based upon a course of conduct coupled with an allegation of injury to health; and it is very often difficult to say that any matter which takes place between husband and wife which savours of unkindness is irrelevant. But that is not to say that details of expulsive conduct, if excluded from a previous suit based on cruelty, cannot be relied on in a subsequent case based upon desertion.

In the present case, I think that it is the duty of the court quite clearly on the facts, as I have stated them, to give the wife an opportunity of having heard her case on desertion, and her case in so far as it consists of a denial of her husband's allegations of desertion. She has so far been deprived of that opportunity by what I regard as a misapplication of the rule applicable to res judicata. To enable her to pursue her remedy is not, I think, in breach of that part of the rule which is relevant here stated in Spencer Bower on Res Judicata, p. 9, that, to establish res judicata it must be proved: "(v) That the "judicial decision was, or involved, a determination of the same

[33] [1955] P. 168, 176. [34] [1954] P. 270.

" question as that sought to be controverted in the litigation in " which the estoppel is raised."

I agree that the language of the *Hoystead* case [35] can be read as lending support to the argument accepted first by Willmer J., and afterwards by the commissioner. But I think that on consideration that language does not support the whole of the judge's judgment, and that this appeal should be allowed. The case should, in my opinion, be sent back for re-trial; and I think it would be right in the circumstances of this case that the matter should go for re-trial before the same commissioner, if he is available to take it.

SELLERS L.J. I feel no doubt that this matter must be tried, and that the case must go back for the wife's allegations to be heard and assessed. No decision has been reached at any time on the issue of constructive desertion by the husband of his wife. Some evidence of the wife in the previous proceedings, which was in fact accepted, was held not to be cruelty, and that decision seems to have been arrived at, as my Lord has said, because the commissioner—who was the same judge who tried this case from which appeal now lies—was not able to find that the acts which were proved were sufficient in themselves to amount to cruelty or had, in any event, affected the wife's health. But that evidence was, as evidence, accepted in her favour as acts which had taken place between the parties. It seems to be available to the wife, and there is nothing to estop her from relying on it along with the additional matters which she wishes to raise to support her allegation that, on a proper consideration of the whole of the facts, there should be a finding of constructive desertion by the husband.

We were invited by the commissioner—at least observations in the course of the argument invited this court—to review the whole of the cases. I do not feel free to examine either the several authorities which have been cited to us, or the principles which they establish. If it were otherwise, I think there is some conflict of judicial opinion which might well be considered. But I feel that this court is precluded from any such investigation because, as I follow it, this matter, so far as the present case is concerned, has been decided by the case to which my Lord referred, and the previous decision on which it was based. The decision in *Thompson* v. *Thompson* [36] by a majority was in these terms, which are I think an accurate summary of the decision of the majority, Hodson L.J. and Morris L.J.: " The allegation " of cruelty put forward by the wife in the divorce proceedings " should not be struck out on the ground that she had previously " failed to establish the same charge in the maintenance pro- " ceedings, for the subject of litigation was not the same in the " two sets of proceedings."

The decision of this court in the *Thompson* case followed the

[35] [1926] A.C. 155. [36] [1957] P. 19.

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decision of the Court of Appeal in *Winnan* v. *Winnan* [37]—in which Bucknill L.J. delivered the first judgment and with whom Lord Morton of Henryton and Asquith L.J. agreed—and the same principles are set out there. The second ground on which the *Winnan* case was decided was that "the subject of litigation in "the two proceedings was not the same." The litigation in the two proceedings here is not the same, and those two cases would appear to be binding authorities on this court.

But whatever the right view is on that matter, this is a case in which there can be no estoppel because, in my view, quite plainly the issue has never been tried in any way whatsoever. The facts should be given consideration, not as to whether they amount to cruelty, but looked at again to see whether they amount to something other than cruelty and establish constructive desertion because it was conceded by counsel there is a difference between the two. It is not necessary in order to establish constructive desertion that the facts relied on should of necessity amount to cruelty.

I therefore feel that this appeal should be allowed, and the matter should be tried by the same commissioner. I think that is most desirable.

HARMAN L.J. I agree. It seems to me that the result of the present case comes largely from a confusion of terms. That is a very potent source of deception and it arises here again. It can be truly said that this wife has made unfounded charges of cruelty against her husband; that may mean either that the court rejected the facts alleged or that though it accepted them, it decided they did not amount to cruelty as that word is understood in the Divorce Court.

The second is the present case. It follows that these charges of cruelty may not be repeated as such. That is a very different matter from saying that those same facts did not amount to matters relevant to an issue of constructive desertion which, as my Lord has said, has never been tried at all.

It would indeed be an astonishing result of the confusion in which words can result if the wife, on an issue which has never been before the court, were compelled to be silent about matters which the court has already declared she has truly stated. That she should be kept silent even from true words on a new issue is an astonishing plea. With all respect to the very energetic argument we have heard, I think this court would be landed in an absurdity if we prevented this wife from telling the truth about her case.

I agree, therefore, that the appeal should be allowed, and with the course proposed by my Lords.

Appeal allowed with costs in Court of Appeal and below.

Solicitors: *Marsh & Ferriman; Cyril E. Wheeler.*

[37] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

[CHANCERY DIVISION.]

BERNSTEIN *v.* BERNSTEIN.

1959
June 12, 25.

Roxburgh J.

Contempt of Court—Committal order—Ex parte motion, on—Ward of court—Removal from jurisdiction—Order made on ex parte application by Court of Chancery of County Palatine of Lancaster—Ex parte application to extend order to High Court—Jurisdiction of Chancery Division—Court of Chancery of Lancaster Act, 1850 (13 & 14 *Vict. c.* 43), *s.* 15—*R.S.C., Ord.* 52, *r.* 3.
Lancaster Chancery Court.

On May 8, 1959, the Court of Chancery of the County Palatine of Lancaster made an order, on an ex parte motion, committing the respondent to gaol for his contempt of court in removing a ward of the County Palatine Court out of the United Kingdom without leave. On an ex parte application under section 15 of the Court of Chancery of Lancaster Act, 1850,[1] for an order making the committal order an order of the High Court:—

Held, (1) that section 15 of the Act of 1850 gave the High Court a discretion to extend an order of the County Palatine Court to cover the jurisdiction of the High Court, and that a committal order made ex parte should not be extended unless the High Court would have had jurisdiction to make such an order in the circumstances prevailing on the day of the hearing before the High Court.

(2) That under R.S.C., Ord. 52, r. 3,[2] a committal order might

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[Reported by Miss V. A. MOXON, Barrister-at-Law.]

[1] Court of Chancery of Lancaster Act, 1850, s. 15: "Whenever a "plaintiff or defendant in any suit "or proceeding in which a decree or "order shall have been made by the "said County Palatine Court shall "reside or withdraw his person or "goods out of the jurisdiction of the "said court, and also whenever any "decree or order of the said court "cannot be fully enforced by reason "of the non-residence of any party "to be bound thereby within the "jurisdiction of the said court, then "and in every such case it shall be "lawful for Her Majesty's High "Court of Chancery, upon the appli-"cation of any person entitled to the "benefit of such decree or order, and "upon the production of a transcript "of such decree or order, or such part "thereof respectively as cannot be "enforced for the reasons aforesaid, "under the signature of the registrar "of the said County Palatine Court, "and an affidavit that by reason of "such non-residence or removal as "aforesaid such decree or order, or "such part thereof as aforesaid, can-"not be enforced, to make such "decree or order, or so much thereof "respectively as cannot be enforced "for any of the reasons aforesaid, a "decree or order of the said High "Court of Chancery, and thereupon "such decree or order, or such part "thereof respectively as aforesaid, "shall and may be enforced against "such of the parties bound by the "same as shall be within the juris-"diction of the said High Court of "Chancery, and all proceedings shall "and may be had thereupon as if "such decree or order had been "originally made by the said High "Court of Chancery, and all the "reasonable costs and charges of "and consequent upon such applica-"tion shall and may be recovered in "like manner as if the same were "part of such decree or order."

[2] R.S.C., Ord. 52, r. 3: "Except "where according to the practice "existing immediately before Novem-"ber 1, 1875, any Order or rule might "be made absolute ex parte in the "first instance, and except where "notwithstanding rule 2 a motion or "application may be made for an order "to show cause only, no motion shall "be made without previous notice to "the parties affected thereby. But "the court or a judge, if satisfied "that the delay caused by proceed-"ing in the ordinary way would or "might entail irreparable or serious

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not be made ex parte in the Chancery Division of the High Court unless the court was satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief; that, as in the circumstances prevailing at the time of the hearing of the present application the court was not so satisfied, there would have been no jurisdiction in the High Court to make a committal order, and that therefore the order of the County Palatine Court should not be extended to cover the jurisdiction of the High Court.

Favard v. *Favard* (1896) 75 L.T. 664 and *O'Donovan* v. *O'Donovan* [1955] 1 W.L.R. 1086; [1955] 3 All E.R. 278n. considered.

MOTION.

On May 8, 1959, the Court of Chancery of the County Palatine of Lancaster, upon an ex parte motion by the applicant, Doris Bernstein, made an order committing the respondent, Harry Bernstein, the applicant's husband, to Strangeways Gaol for his contempt in removing Miriam Bernstein, a ward of the County Palatine Court, out of the United Kingdom and out of the jurisdiction of the County Palatine Court without leave and preventing her from being returned to the custody of the applicant.

The respondent had taken the ward out of the United Kingdom on April 30, 1959, and had not returned. The applicant now applied ex parte under section 15 of the Court of Chancery of Lancaster Act, 1850, for an order making that part of the order of the County Palatine Court which committed the respondent to prison an order of the High Court.

L. A. Cohen for the applicant.

The following case, not referred to in the judgment, was cited in argument: *D.* v. *A. & Co.*[3]

Cur. adv. vult.

June 25. ROXBURGH J. read the following judgment. This is a motion to make an order dated May 8, 1959, and made in the Court of Chancery of the County Palatine of Lancaster, an order of this court.

[His Lordship read section 15 of the Court of Chancery of Lancaster Act, 1850, and continued:] The phrase "it shall be "lawful" indicates that I have a discretion in the matter. It was long ago laid down that such an application should be made ex parte, and this motion is so made, though whether that is consistent with the present Rules of the Supreme Court I do not pause to inquire.

There are a few cases in the reports in which such orders

"mischief, may make any order ex "parte upon such terms as to costs or "otherwise, and subject to such "undertaking, if any, as the court "or judge may think just; and any "party affected by such order may "move to set it aside."

[3] [1900] 1 Ch. 484.

have been made. For example, in *Duke* v. *Clarke*,[1] where the practice was laid down, an order was extended to enable a party to levy execution for costs. One of the orders so extended was an order giving leave to issue a writ of attachment, but it does not appear to have been made ex parte in the Palatine Court: *Dunmore* v. *Wharam*.[2] But there is no reported case in which a committal order has hitherto been extended. The Vice-Chancellor's order is such an order, and it was made ex parte: "Upon motion ex parte this day made unto this court by Mr. "Cohen of counsel for the applicant . . . this court doth order "that the said respondent . . . do stand committed to Strange-"ways Gaol in the City of Manchester for his contempt in "removing . . . the above named infant who is a ward of this "court out of the United Kingdom and the jurisdiction of this "court without leave and in preventing her from being in the "custody of the applicant . . ."

The affidavit in support of the motion before the Vice-Chancellor had proved that the respondent had written a letter on April 30, 1959, stating that he was leaving with the ward for Israel; and there was evidence that they had left for Israel on that day. The affidavit sworn in support of this application does not give any reason for supposing that the respondent father intends to come within the jurisdiction of this court. It merely states: "4. I verily believe that the said order operates only "within the jurisdiction of the Court of Chancery of the County "Palatine of Lancaster and that unless the said order is enlarged "by this honourable court the respondent may return with "impunity to any part of the United Kingdom which is not "within the jurisdiction of the Court of Chancery of the County "Palatine of Lancaster. 5. For the aforegoing reasons I verily "believe that it is desirable and necessary that the aforesaid "order of the Court of Chancery of the County Palatine of "Lancaster be made an order of this honourable court."

As I have a discretion to exercise on this ex parte application, I have come to the conclusion that I ought not to extend an ex parte committal order unless I should have jurisdiction myself to make such an order in the circumstances prevailing, not on May 8, but today; and, in my judgment, I should not have jurisdiction to do so.

Under the old Chancery practice, leave to issue a writ of attachment could be obtained ex parte, but an order for committal never could. A writ of attachment was and is appropriate to enforce an order to do something. An order for committal was and is appropriate to punish disobedience consisting of doing something which ought not to be done: see *In re Evans*,[3] and the certificate of Mr. Registrar Lavie there set out. This distinction was abolished by the Judicature Act, and R.S.C., Ord. 44, r. 2, provides: "No writ of attachment shall be issued without

[1] [1894] W.N. 100.
[2] (1898) 67 L.J.Ch. 221.
[3] [1893] 1 Ch. 252; 9 T.L.R. 108.

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" the leave of the court or a judge, to be applied for on notice " to the party against whom the attachment is to be issued "; and the procedure now in force in the Chancery Division of this court is embodied in R.S.C., Ord. 52, r. 3, as follows: [His Lordship read the rule and continued:]

Counsel for the applicant relied on *Favard* v. *Favard* [4] and *O'Donovan* v. *O'Donovan*.[5] *Favard* v. *Favard* [6] was a motion for a writ of attachment. There is and was in the rules a rule (R.S.C., Ord. 68, r. 1) which provides that (with an immaterial exception) " nothing in these Rules . . . shall affect the pro- " cedure or practice in . . . (*d*) proceedings for Divorce or other " Matrimonial Causes." Endowed, accordingly, with a freedom with which I am not endowed, the President proceeded to apply to a writ of attachment the old Chancery practice which allowed an ex parte application, saying [7]: " I do not see how this court " can have more power than the Court of Chancery possessed." The ratio decidendi of that case [7] might have led to an expectation that, where an ex parte committal order was asked for in the Probate, Divorce and Admiralty Division it would be refused, because that was not allowed even by the old Chancery practice. This did not happen in *O'Donovan* v. *O'Donovan* [8] or apparently in *Phillips* v. *Phillips*.[9] But I do not enjoy the freedom which those judges all had. I am bound by the rules, and I have no jurisdiction to order committal or attachment ex parte unless satisfied that " the delay caused by proceeding in the ordinary " way would or might entail irreparable or serious mischief."

I am not satisfied of this. The difficulty will be to find the respondent within the jurisdiction of this court, if he ever comes within it; and this will be so whether I accede to or refuse the present application. If the applicant takes the appropriate steps promptly when he is found, he will not have come here with impunity.

Therefore, I should have no jurisdiction to make an ex parte committal order myself in the circumstances in evidence today; and, as that is so, I am not prepared to extend to cover this jurisdiction an ex parte order made in another jurisdiction. I would adopt a few words from the judgment of Lindley L.J. in *In re Evans* [10]: " It seems a strong thing to put a man in prison " without his having notice of the application." The motion is accordingly dismissed.

Motion dismissed.

Solicitors: *Hatchett, Jones & Co. for Theo. M. Cohen, Manchester.*

[4] (1896) 75 L.T. 664.
[5] [1955] 1 W.L.R. 1086; [1955] 3 All E.R. 278.
[6] 75 L.T. 664.
[7] 75 L.T. 664, 665.
[8] [1955] 1 W.L.R. 1086.
[9] [1955] 1 W.L.R. 1087n.
[10] [1893] 1 Ch. 252, 265.

[COURT OF APPEAL.]

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June 30;
July 1, 2.

Morris,
Ormerod and
Willmer L.JJ.

[X 1957 S. No. 2170]

Landlord and Tenant — Repairs — Weekly tenancy — Implied term — Express conditions of tenancy restricting tenant from doing work to demised premises without consent and reserving to landlords right to enter and do repairs — Tenant required to deliver up premises in good and tenantable repair—Practice of council to do repairs—Tenant of council flat injured by defect in demised premises —Whether term to be implied that landlords must keep premises fit for human habitation—Whether any duty in landlords independent of contract to guard against foreseeable dangers from defect in demised premises of which they have notice.
Contract—Implied term—Landlord and tenant.

The printed conditions of a weekly tenancy of a borough council flat required, inter alia, that the tenant should "reside in the "dwelling," and that he should at the end of the tenancy deliver up the dwelling in good and tenantable repair and condition. By clause 9: "The tenant shall not do nor allow to be done any "decorative or other work to any part of the dwelling without "consent in writing. . . ." By clause 11 the council was to be at liberty to enter the dwelling to inspect the state of repair and execute repairs therein. No express term in the agreement placed on either party liability for repairs, but it was the practice of the council to do all the repairs, within certain limits.

On November 30, 1955, the tenant was leaving his flat by the front door when, owing to a long-standing defect in the door which caused it to jam, he had to use force to close it by pulling on the only external handle, the letter-box knocker. The knocker came off and he fell backwards against an iron balustrade and suffered injury to his back. The council had had notice of the defect before the date of the accident but had failed to remedy it.

The tenant brought an action against the council claiming damages, first, for breach of contract, contending that having regard to the express terms of the agreement, there must be implied a term that the landlords would make the demised premises in all respects reasonably fit for habitation; and secondly, for breach of duty in that, having had notice of the defect in the demised premises, the landlords had allowed it to continue in that condition to the possible danger of the user. The council denied liability.

Held, that there was here no breach of duty by the landlords either under or independently of the contract. Nothing in the express terms of this contract required that as a matter of business efficacy there should be implied a term, contrary to the general law of landlord and tenant, obligating the landlords to keep the demised premises in a fit state for human habitation. The express terms, and in particular the prohibition on the tenant doing repairs without consent, were explicable on other grounds in the context of this agreement and could not by implication make the landlords liable to do repairs.

Observations of Somervell L.J. in *Mint* v. *Good* [1951] 1 K.B. 517, 521; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159 explained and distinguished.

Nor was there independent of the contract any breach of duty, for there is no general duty, apart from contract, on a landlord to guard against reasonably foreseeable dangers arising from a defect on demised premises of which he has notice.

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Quaere, whether even if such a term could be implied in this contract a trivial defect in a door would render premises unfit for habitation or whether the damage to the tenant could reasonably have been foreseen.

APPEAL and cross-appeal from Glyn-Jones J.

In December, 1952, the plaintiff, Albert Edward Sleafer, became tenant of a council flat on the first floor of a block of flats recently erected for the Borough of Lambeth. An agreement, dated November 28, 1952, and signed by the plaintiff, provided as follows: "The council of the Metropolitan Borough "of Lambeth, acting by their director of housing, hereby agree "to let, and I Albert Edward Sleafer do hereby agree to take "on a weekly tenancy, from Monday, the first day of December, "1952, tenement No. 5, Martin House on the Wyvil Estate in "the Metropolitan Borough of Lambeth, at a rent of £2 1s. 2d. "or such lesser sum as may be payable from time to time under "or by virtue of the council's rebate scheme which is incor- "porated in this agreement, payable weekly in advance, and "subject to the conditions of tenancy printed overleaf. The "above rental includes 7s. 4d. per week hot water service charge. ". . . Tenants must read and shall be deemed to have read the "conditions of tenancy."

The general conditions of the contract of tenancy included the following: Clause 2: "The tenant is required to reside in the "dwelling which is to be used as a private dwelling only. The "tenant shall not use the dwelling as a shop or workshop or "expose any goods or materials for sale, exchange or hire there- "in. No permanent notices may be exhibited on the premises." Clause 5: "The tenant shall repay to the council the cost of "repairing any damage done to the dwelling or to the fixtures "or fittings. The tenant shall not make any alterations to the "internal arrangements or external appearance of the dwelling. "The tenant must pay the cost of replacing any windows broken "during his tenancy, and the cost of replacing keys lost." Clause 7: "The tenant shall give immediate notice to the "director of housing or his representative of any stoppage in "the soil, waste or drain pipes. The placing in W.C. of rags, "cotton, bottle or anything likely to choke the drain is strictly "prohibited. Any expense caused by infringement of this regu- "lation will be charged against the tenant." Clause 9: "The "tenant shall not do or allow to be done any decorative or other "work to any part of the dwelling without consent in writing. "Nails on no account are to be driven into the walls, floors, "or any part of the dwelling." Clause 11: "The council shall "be at liberty on production of a written authority under the "hand of the town clerk or other authorised officer by its agents "or workmen to enter the dwelling to inspect the state of repair "and to execute repairs therein, or for any other purpose, at "all reasonable hours of the day." Clause 15: "The tenant

" shall deliver up the dwelling at the end of the tenancy together " with all landlords' fixtures in good and tenantable repair and " condition (subject to fair wear and tear) and with all locks, " keys and fastenings complete."

The plaintiff went into and remained in occupation. In the early part of 1955 he did some decorative work himself to the external door and casement frames. The housing superintendent noticed that the work had been done and informed her superior in these terms: " Mr. Sleafer, the tenant of this flat, has " decorated the external door and casement frames. This has " been done to match existing colours, and quite nicely. If you " consider that no further action should be taken, perhaps you " will write an appropriate letter to forestall any more fancy " ideas." The director of housing thereupon wrote to the plaintiff on February 19: " My attention has been drawn to the fact " that you have painted the external woodwork of the above " flat. I must draw your attention to the conditions of agree- " ment, in which it states that tenants must not carry out " decorations. If you require to carry out further decorations, " it will be necessary for you to apply for permission. You will " appreciate that this is necessary in order to maintain a good " standard of decorations on the estate."

When the plaintiff painted his front door, he had to remove the postal plate, a fitting affixed to the outside of the door having one part that could be pushed inwards to admit letters. On the outside was a knocker in the form of a handle. The postal plate was affixed on the outside of the door by two bolts which went through the door, and it would be possible, if anyone did not adjust the postal plate properly, to leave it so that the handle was not securely held in the rings or lugs on the outside.

The plaintiff was disturbed by the fact that his front door used to jam so that it became very difficult to close. It caught at the bottom part and against the upright, owing, it was said, to the fact that the door was defective because it had dropped a little so as to cause it to bind on the threshold or the weather plate fixed inside the threshold.

On November 30, 1955, the plaintiff and a visitor left the flat at about half-past nine. The plaintiff tried to close the front door but it jammed, and he had to pull it quite hard two or three times. Still it did not close and he pulled somewhat harder; and when he did that, the handle or knocker came away in his hand, because one of the rings which held it broke, when more than usual force had to be applied. In the result he was caused to go backwards, fell rather heavily against an iron balustrade opposite his front door, and suffered injuries, though they were not very apparent at first. Later on, the rent collector, when he called, noticed that the knocker of the door was missing.

On April 20, 1956, a letter was written to the council on behalf of the plaintiff suggesting that the council was liable in law for the plaintiff's injuries. The council denied responsibility.

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The plaintiff thereupon brought an action against the council claiming damages, first, for breach of contract, in that they were under an obligation to do the repairs arising as an implied term from the conditions of tenancy under which the landlords prohibited the tenant doing repairs without permission and reserved to themselves the right to do repairs and the right to enter the premises to inspect the state of repairs and execute repairs therein; and secondly, for breach of duty to take reasonable care to prevent damage from want of repair towards every person, including the plaintiff, lawfully on the premises.

At the trial of the action a rent collector employed by the council gave evidence that it was the practice of the council to do all repairs thought to be necessary, within certain limits, and went on to explain that in the case of such items as broken windows there would be a special position.

The plaintiff in his evidence stated that he had complained of the state of the door to a representative of the council who had thereupon taken a hammer to deal with the weather plate; that thereafter the door was somewhat better; but that the trouble recurred. His wife said that further complaints had been made, first to somebody who had called for the rent and then at the rent collecting office. The landlords' witnesses said that no complaint had been made.

Glyn-Jones J., while accepting that the witnesses called on behalf of the council were truthful, decided that either owing to faulty recollection or for some other reason they were in error: he decided that notice had been given to the council.

The judge, in his judgment on June 28, 1958, came to the following conclusions: first, that the door was defective, namely, that it closed only with difficulty after overcoming the resistance caused by quite considerable jamming; secondly, that the defects to the door had been made known by the plaintiff or his wife to the council some time before November 30, 1955; thirdly, that it was quite reasonable to try to close the door by using the knocker or handle; and fourthly, that the plaintiff had suffered his injuries in the way that he described, namely, because the knocker came off and so caused him to fall backwards.

The judge held, however, that there could not be implied into the contract between the tenant and the council such a term as would render them liable for breach of contract; and he gave judgment for the council.

The tenant appealed. The council cross-appealed, inter alia, against the judge's finding that the council had had notice of the defect in the door, but in the event the cross-appeal was not heard.

F. W. Beney Q.C. and *Douglas Lowe* for the tenant.

Stephen Chapman Q.C., *Peter Rawlinson Q.C.* and *Gracm Williams* for the council.

The following cases were cited in argument: *Miller* v. *Hancock* [1]; *Fairman* v. *Perpetual Investment Building Society* [2]; *Devine* v. *London Housing Society* [3]; *Hargroves, Aronson & Co.* v. *Hartopp* [4]; *Huggett* v. *Miers* [5]; *Lucy* v. *Bawden* [6]; *Dunster* v. *Hollis* [7]; *Cockburn* v. *Smith* [8]; *Heap* v. *Ind Coope and Allsopp Ltd.* [9]; *Mint* v. *Good* [10]; *Greene* v. *Chelsea Borough Council* [11]; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [12]; *Thurogood* v. *Van Den Berghs and Jurgens Ltd.* [13]; *Pomfret* v. *Ricroft* [14]; *Sutton* v. *Temple* [15]; *Hart* v. *Windsor* [16]; *Cruse* v. *Mount* [17]; *Cavalier* v. *Pope* [18]; *Matthews* v. *Kuwait Bechtel Corporation.* [19]

MORRIS L.J. read the terms of the agreement of November 28, 1952, and said that the court had been told that nothing in the rent rebate scheme, incorporated in the contract, was relevant for present purposes. His Lordship read the material clauses of the conditions of tenancy and continued:

It may be said, I think, with justification, that the conditions as drawn do not very clearly explain to anyone reading them how the matter of doing repairs stands between landlord and tenant. The evidence before the judge showed that, in practice, the repairs were done by the landlords. [His Lordship referred to the evidence given by the council's rent collector on the practice as to repairs, stated the further facts, commented that on the photographs before the judge and the court it seemed that the reasonable and appropriate method of pulling the front door to when outside would be to take hold of the knocker and to use it to close the door, stated the conclusions of the judge, and continued:]

The landlords on this appeal served a notice saying that they would, if necessary, contend that the finding by the judge, in favour of the plaintiff, that notice of the alleged defect in the door was communicated to the council was against the weight of evidence. Mr. Rawlinson, following Mr. Chapman, was prepared to argue that point and to deal with the evidence in regard to it, but we intimated that we thought that it would be convenient in the first place to deal with the legal issues that arise,

[1] [1893] 2 Q.B. 177.
[2] [1923] A.C. 74; 39 T.L.R. 54.
[3] [1950] W.N. 550; 66 T.L.R. (Pt. 2) 1012; [1950] 2 All E.R. 1173.
[4] [1905] 1 K.B. 472; 21 T.L.R. 226.
[5] [1908] 2 K.B. 278; 24 T.L.R. 582.
[6] [1914] 2 K.B. 318; 30 T.L.R. 321.
[7] [1918] 2 K.B. 795.
[8] [1924] 2 K.B. 119; 40 T.L.R. 476.
[9] [1940] 2 K.B. 476; 56 T.L.R. 948; [1940] 3 All E.R. 634.
[10] [1951] 1 K.B. 517; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159.
[11] [1954] 2 Q.B. 127; [1954] 3 W.L.R. 12; [1954] 2 All E.R. 318.
[12] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.
[13] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.
[14] (1668) 1 Wms.Saund. 321n.
[15] (1843) 12 M. & W. 52.
[16] (1844) 12 M. & W. 68.
[17] [1933] Ch. 278; 49 T.L.R. 87.
[18] [1906] A.C. 428; 22 T.L.R. 648.
[19] [1959] 2 W.L.R. 702; [1959] 2 All E.R. 345.

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and, as a result, we have not investigated that separate matter raised by the council.

Mr. Beney, for the plaintiff, submitted that there was to be implied in the contract of tenancy a term which would make the landlords liable. In his reply, Mr. Beney somewhat modified the term that he originally submitted should be implied. He first submitted that if a part of the demised premises or access thereto, the use of which was necessary for the plaintiff, could not reasonably be used by him unless it was kept in repair, and if the right to repair it was solely in the lessors, there was an implied contractual term that it could be repaired by the lessors, providing that they knew of or had adequate notice of the necessity for such repair. Mr. Beney somewhat simplified that contention, for he submitted that on the facts of this case it was to be implied that the landlords should make the premises in all respects reasonably fit for human habitation. If there was an implied term to that effect, it would be necessary for Mr. Beney to assert that if a door jams and can only be closed with difficulty, a house is not reasonably fit for human habitation. Mr. Beney further submitted that, apart from the implication of a term, there was a duty in the landlords, in all the circumstances, to effect repairs.

It is common ground that there is no question of the application of any statutory provisions. Mr. Beney in his interesting argument cited a number of cases dealing with the obligations that may lie on landlords in certain circumstances. He referred first to *Miller* v. *Hancock*,[1] and later made a submission as to the extent to which that case still survives. He referred us to such cases as *Hargroves, Aronson & Co.* v. *Hartopp*,[2] *Huggett* v. *Miers*,[3] *Lucy* v. *Bawden*,[4] *Dunster* v. *Hollis*,[5] and *Cockburn* v. *Smith*,[6] and to several other cases.

If a landlord lets a flat and retains the staircase which gives access to it, questions may arise as to the obligations cast on the landlord. If a landlord lets a flat and retains possession of the premises above the flat, questions may arise as to his obligations if rainwater is allowed to go into the flat. But it seems to me that such questions do not arise in the present case. In the present case, the door was clearly part of the demised premises.

In regard to the general law concerning premises let on lease, we were referred by Mr. Chapman to several cases, including *Hart* v. *Windsor*,[7] in which Parke B. said[8]: "It appears, "therefore, to us to be clear upon the old authorities that there "is no implied warranty on a lease of a house, or of land.

[1] [1893] 2 Q.B. 177.
[2] [1905] 1 K.B. 472; 21 T.L.R. 226.
[3] [1908] 2 K.B. 278; 24 T.L.R. 582.
[4] [1914] 2 K.B. 318; 30 T.L.R. 321.
[5] [1918] 2 K.B. 795.
[6] [1924] 2 K.B. 119; 40 T.L.R. 476.
[7] (1844) 12 M. & W. 68.
[8] Ibid. 86.

" that it is or shall be reasonably fit for habitation or cultivation. " The implied contract relates only to the estate, not to the " condition of the property."

In *Cockburn* v. *Smith* [9] Bankes L.J. said: " I want to make " it plain at the outset that this is not a letting of the whole " house, where, without an express covenant or a statutory " obligation to repair, the landlords would clearly be under no " liability to repair any part of the demised premises whether " the required repairs were structural or internal and whether " they had or had not notice of the want of repair."

Mr. Beney's submission depends, however, on the actual conditions in this contract. He referred to clauses 9 and 15 in particular, though he relied on other clauses as well, notably clause 2. Clause 2, I think, is primarily designed to ensure that a person may not take a flat at a time when there is a housing shortage unless he is personally genuinely desirous of occupying it.

Mr. Beney submitted that clause 9 contains a prohibition against a tenant of the flat doing any decorative or other work in the flat. He read that clause in conjunction with clause 15. He submitted that because of the existence of those two clauses and because (as he submitted) clause 9 prohibits a tenant from doing repairs, there is in the circumstances of this case—and he so limited the matter—an implied term that the landlord will make the flat in all respects reasonably fit for human habitation. It does not seem to me that clause 9 does contain a prohibition against the tenant doing repairs. It seems to me that Mr. Chapman is correct when he submits that the real purpose of clause 9 is to ensure that there will not be haphazard conditions in premises of this kind. It might not be, for example, at all appropriate if a number of front doors were all painted in different colours which might make the appearance unsightly. It would be unfortunate also if the work was badly done and if defects were obscured and covered up.

I read clause 9 as being designed to keep control over the work done by a tenant and not as being a prohibition. I have no doubt that in fact, and in practice, the borough council intended to do the necessary repairs, but the question arises whether they had obliged themselves to do such repairs. I can find nothing in these conditions which shows that the borough council had obligated themselves to do repairs.

The question then arises whether it is necessary in order to give this contract business efficacy to imply the term for which Mr. Beney contended. In my view, it is certainly not necessary. If it had been desired to have any such term, it could have been made the subject of an express term.

Mr. Beney relied strongly on something said by Somervell L.J. in this court in *Mint* v. *Good*.[10] The question which there

[9] [1924] 2 K.B. 119, 128.

[10] [1951] 1 K.B. 517; 66 T.L.R. (Pt. 2) 1110; [1950] 2 All E.R. 1159.

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arose was in reference to liability for a nuisance on premises to a passer-by on the highway. There is no need to refer to the law on that subject; but what was said by Somervell L.J. in that case was said in reference to the circumstances under which a landlord, as opposed to an occupier, would be liable for nuisance. The first part of the headnote very helpfully states the point decided: "The principle that a landlord, who has expressly "reserved the right to enter the demised premises and do repairs, "is liable in nuisance for injuries caused by the defective state "of the premises to a person passing along the highway on which "they abut, applies to cases where the landlord has impliedly "reserved that right; and a term to that effect is normally to be "implied in the contract of tenancy when the premises are let "on a weekly tenancy." In stating his reasons for the conclusion to which I have referred, Somervell L.J. said [11]: "It seems "to me that the same principle must apply if a landlord has "impliedly reserved to himself the same right. I cannot see "any principle by which a landlord should be in one position in "the case of an express reservation, and in a different position "in the case of an implied reservation. The question, therefore, "would be whether, in the circumstances as stated, a right to "enter on and view the premises and do necessary repairs is to "be implied. I would have said that, in the absence of evidence "which excluded it, there is no term which would be more easily "and more necessarily implied by law in a tenancy of this kind "than a right in the landlord to enter, or to re-enter, to examine "the premises and to do necessary repairs. It must be in the "contemplation of both parties to such a weekly tenancy that "the tenant will not be called upon to do repairs. The Rent "Restriction Acts have rather altered the position; but in the "old days it would have been absurd for either side to contem-"plate that a man who was only a weekly tenant should be "called upon to do repairs. Both sides, I think, must contem-"plate as the basis of the contract that the house will be kept in "reasonable and habitable condition; that that will be done by "the landlord and not by the tenant; and, although he does not "bind himself to do so, that he will have the right to enter and "look after his own property by doing repairs."

Mr. Beney took comfort from those words because he said they support his submission that the landlord in a case of this kind has obligated himself to do repairs. Mr. Beney pointed particularly to the phrase "the basis of the contract" and submitted that Somervell L.J. was suggesting by the use of those words that it was the basis of the contract that the landlord would oblige himself to do the repairs. With every respect to Mr. Beney's argument, I do not take that view of those words. I think that those words merely mean that the parties contemplated that in fact and in practice the landlord would do the repairs, but I think that Somervell L.J. was making it clear

[11] [1951] 1 K.B. 517, 521.

that there must be that expectation, although the landlord was not bound to do the repairs. The words "although he does not "bind himself to do so" seem to me to point irresistibly to that view of Somervell L.J.'s words.

In the present case the council expected to do repairs but were rather careful to avoid in this weekly contract making themselves bound to do the repairs.

For these reasons, I, for my part, have found it quite impossible to read into this contract the term for which Mr. Beney so powerfully contended. It is not necessary to do so in order to give efficacy to this contract.

Secondly, Mr. Beney submitted that, independently of contract, there was a duty that arose in all the circumstances, one of which he submitted was that the landlords were given notice of certain defects. The landlords wished to challenge the judge's finding of fact on that matter. I find it impossible to say that any duty can be formulated other than such as is to be found in the contractual position. Of course, the landlord must not vis-à-vis his tenant commit any tort but it seems to me that the obligations of the landlord must be found in the contract or in any additional term which must necessarily be implied in the contract.

I ought to add that the point was taken by Mr. Chapman, that, even if he were wrong in regard to the contractual obligations of the landlords, no damages could be claimed in this case, or no damages other than nominal damages, because the defect in the premises was not of such a nature as to make it reasonably foreseeable that an injury of the kind which the plaintiff suffered would result from the breach. I do not find it necessary to develop this point because I do not think it necessary to decide it.

We were referred to the very helpful statement of the law by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd., Coulson & Co. Ltd. (Third Parties)*.[12] Asquith L.J. formulated the proposition in these terms: "In cases of "breach of contract, the aggrieved party is only entitled to "recover such part of the loss actually resulting as was at the "time of the contract reasonably foreseeable as liable to result "from the breach." Mr. Chapman submitted that the loss here was not reasonably foreseeable. In answer to that point, Mr. Beney referred to the sixth proposition of Asquith L.J.[13]: "Nor, "finally, to make a particular loss recoverable, need it be proved "that upon a given state of knowledge the defendant could, as "a reasonable man, foresee that a breach must necessarily result "in that loss. It is enough if he could foresee it was likely so "to result. It is indeed enough, to borrow from the language of "Lord du Parcq, in the same case" [*Monarch Steamship Co. Ltd.* v. *Karlshamns Olje-fabriker (A/B)*] "at page 234,[14] if

[12] [1949] 2 K.B. 528, 539; 65 T.L.R. 274; [1949] 1 All E.R. 997.
[13] [1949] 2 K.B. 528, 540.
[14] [1949] A.C. 196, 234.

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"the loss (or some other factor without which it would not "have occurred) is a 'serious possibility' or a 'real danger.' "For short, we have used the word 'liable' to result. Possibly "the colloquialism 'on the cards' indicates the shade of "meaning with some approach to accuracy." Had this point arisen for direct decision, Mr. Beney would have submitted that it was "on the cards" that injury to the tenant might result from a breach of the landlords' suggested obligation. I, for my part, do not find it necessary to decide that question.

For the reasons that I have given, I have reached the conclusion that the judge was correct in dismissing the action. It was a most unfortunate mischance and no one can fail to be sorry for the plaintiff. But I am not persuaded that liability in law attaches to the landlords.

ORMEROD L.J. I agree that this appeal should be dismissed. It is not in issue that, so far as an ordinary tenancy is concerned where the question of repairs is not raised in the tenancy agreement, there is no obligation on the landlord to keep the premises in repair.

In this case it is clear that the terms of the tenancy agreement contain no express provision by the landlords that they will do the repairs required in this case, or, indeed, any repairs to the property in question. It is not for this court to comment on the form of this tenancy agreement, but it may be that it would be a useful thing from the point of view of the tenant if the position were put a little more clearly than in fact it is.

The contention of the landlords is that they are under no obligation to repair and that the tenancy agreement contains no provision which obliges them either expressly or by implication to make any repairs. It has appeared in the course of the case that it would have been a very simple matter for the landlords to resolve all doubt by making it an express term of the contract that they were under no obligation to do any repairs; but that has not been done, and it is for this court to construe the agreement as it is.

The submission of Mr. Beney is that, although there is no express term here which would put the landlords under an obligation to do repairs, one should be implied by reason of the conditions of the tenancy which are contained in the agreement. It was argued, both in the court below and in this court, that it was a necessary implication of the terms of the tenancy that there should be at least an implied obligation on the landlord not necessarily to do all repairs, but, as Mr. Beney put it, in all respects to keep the premises reasonably fit for human habitation.

When this matter was argued before the judge it was contended by counsel for the defendants that in no circumstances could a condition be implied that the landlords should be under an obligation to repair. The judge dealt with that in this way: "Although I cannot follow Mr. Lowe in saying that the mere

"fact that the landlord has reserved the right to do repairs "means that there is imposed on him an obligation, I cannot "agree with Mr. Rawlinson when he says to me that the absence "of some express term in the tenancy, whether oral or in writing, "means that there can never arise a contractual duty on the "landlord to do the repairs—in other words, that such term can "never be implied. I am not sure that that is right; I am not "prepared to say that circumstances may not arise in which a "court could find itself impelled to imply such terms in a tenancy "agreement." Without having, of course, to decide that question, as at present advised, I should certainly agree with the judge. A tenancy agreement, like any other agreement, must be read as a whole, and it may very well be that in construing the agreement it is possible to imply an obligation on the landlords to do repairs. But the question which the judge had to decide and which this court has to decide was whether in this particular agreement such an obligation could be implied. The judge went on: "I have examined as fully and as carefully as I "can the circumstances of this case to see whether it would be "right to imply such a term into this tenancy agreement, and "I have come to the conclusion that it would be wrong. It is "true that the borough council owns and lets a large number of "dwellings; it is true that the tenants who take a tenancy of any "one of these dwellings of the borough council may justly say "that they are aware that the corporation does in fact do the "repairs; but that amounts, I think, to no more than an expecta-"tion or hope on the part of the tenant that if the place needs "repair the borough council will repair it."

It does appear from the evidence that the practice has been for the council to do the repairs, and it may very well be in the course of time that this particular fault in the front door of this flat will be remedied by the council, although in fact it had not been done before this unfortunate accident occurred.

Mr. Beney submits that, taking into account particularly clauses 9, 11 and 15 of the terms of the tenancy, there should be implied such an obligation on the part of the landlords to do the repairs. The one on which he relies particularly is clause 9, which provides: "The tenant shall not do or allow to be done "any decorative or other work to any part of the dwelling "without consent in writing. Nails on no account are to be "driven into the walls, floors, or any part of the dwelling." Mr. Beney agreed that if that condition were not included he would not be able to ask this court to imply the term which he thinks should be implied; and he agrees, too, that he can only ask the court to imply this term if the effect of clause 9 is that it is a prohibition on the tenant not to do any repairs at all. For my part, I agree with my Lord that this condition does not import a prohibition on the tenant. It certainly imposes a restriction in that it will not allow him to do repairs without the consent of the landlords; but that is a very different thing from saying

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that the repairs shall not be done. The mere fact that the condition says that the repairs shall not be done without the consent of the landlords, I would have thought, contemplated that in certain circumstances the tenant would be allowed to do repairs.

I take the view, which has been taken by my Lord, that this clause does not amount to a prohibition but is merely a restriction, and, if that be so, then I think Mr. Beney's argument fails.

In these circumstances, without going into the numerous authorities which have been cited by Mr. Beney in his very careful and detailed argument, I would say that on that point this appeal must fail and should be dismissed.

The further point raised by Mr. Beney that there is a duty on the landlords apart from contract is one on which I would wish to add nothing to what has been said by my Lord. For my part also, I cannot see how in this case any duty can arise on the landlords independently of the duties, if any, which may be imposed on them by the terms of the tenancy. Therefore, without saying anything further, I agree that the appeal should be dismissed.

WILLMER L.J. I also have reached the conclusion that this appeal fails. The plaintiff's case is that the landlords, the Lambeth Borough Council, were in breach of their duty by failing to keep his front door in proper repair, as a result of which the accident occurred in the way described. The case is put forward both on the basis of breach of contract and as a tort. For myself, I think it is quite impossible to say that the defendants are under any liability in tort, and for this reason: I do not see how the plaintiff can show that the defendants owed him any duty except by invoking the contract whereby he became their tenant. There can be no duty owed to all the world to keep anybody's front door in repair. The duty, if there is one in this particular case, must arise as a matter of contract.

It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair. I do not think any help is to be derived from the numerous cases cited to us by Mr. Beney, where the question at issue was as to the landlord's responsibility for non-repair of premises which he has retained and not demised. Here we are concerned with the non-repair of something which was demised. It is clear that the agreement between the plaintiff and the defendants contained no express stipulation with regard to liability for repair of the demised premises. The question, therefore, arises whether any obligation on the part of the landlords to execute repairs and, in particular, repairs to this front door, can be implied.

I am bound to say that, if the tenants of the Lambeth Borough Council feel in a state of bewilderment as to what their rights and obligations are when they have finished reading these conditions

of tenancy, I can well understand their difficulty. These are, however, the conditions which the borough council has thought fit to impose on its tenants, and we must do our part to construe them. It is conceded on their behalf that the conditions must be construed contra proferentes. Mr. Beney has contended, particularly having regard to the express provisions of clauses 2, 5, 9 and 15, that an obligation is to be implied against the defendants to repair these premises at least to the extent of rendering them reasonably fit for human habitation. He suggests that in this connection the same test as would be applied under section 2 of the Housing Act, 1936, if that were applicable, should be applied here, having regard to the provisions of this particular agreement. He concedes, however, that there must be some limitation to the implied obligation to do repairs, and that it is not every repair which would come within the duty of the council. For myself, without wishing to express any concluded view, I have a great deal of sympathy for the general proposition put forward by Mr. Beney. I think there is much to be said for the view that clause 2 of the agreement, which requires the tenant to reside in the dwelling-house, does by implication require the landlords to do such repairs as may make it possible for the tenant to carry out that obligation. At least it seems to me that that is a possible view. But if that view be right, the obligation would not, in my judgment, extend to cover the type of repairs which we have to consider in this case. All that was wrong in this case was that the door was faulty, partly because one of its sides was binding at the bottom against the jamb, and partly because the weather board at the foot of the door was binding on the floor underneath. As I understand it, it would be the simplest possible operation to put a door which is out of adjustment in that way into proper repair, and it could not be regarded as other than a very trivial repair.

Wherever the line is drawn, even assuming that Mr. Beney is right in saying that some obligation on the part of the council to execute repairs must be implied, that line must be drawn, I should have thought, well short of including responsibility for such a trivial repair as the unsticking of this door. Even assuming, therefore, that Mr. Beney's argument is well founded, and that by implication there must be some obligation on the part of the council to execute repairs, I would not be prepared to accede to the proposition that such an obligation would include a repair such as is in question in this case.

In those circumstances, even assuming that the council had knowledge of the defects, as was alleged—and as to that I bear in mind that we did not hear the argument of Mr. Rawlinson to the contrary—I find it impossible to say that any breach of contract has been proved against them.

I think it right that I should also add this. If I had found it possible to be satisfied that a breach of contract had been proved, I should have remained far from satisfied that the damages

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claimed in this case were the natural and probable consequence of any such breach of contract. I do not think that the accident sustained by the plaintiff was of a kind which could be regarded as reasonably foreseeable on the part of the council. Even if there had been a breach of contract, therefore, I should have found it difficult to come to the conclusion that the plaintiff's claim in this case could be justified. In those circumstances, I find myself in agreement with my Lords that this appeal fails.

Appeal dismissed with costs, the costs to include the costs of the motion for leave to appeal out of time.
Order as to costs not to be enforced without further order of the court.
Order for taxation in accordance with the Legal Aid scheme.

Solicitors: *Marcan & Dean; Pennington & Son.*

M. M. H.

[CHANCERY DIVISION.]

1959
June 23.
Danckwerts J.

In re TURNER'S WILL TRUSTS. BRIDGMAN *v.* TURNER.

[1959 T. No. 587.]

Trusts and Trustee — Variation of trusts — Act of 1958 *— Protective trusts—Application for variation—"Any person in respect of any "discretionary interest of his" — Whether unborn and unascertained persons included—Whether arrangement must be for the benefit of unborn and unascertained persons—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

By his will, a testator, who died on October 2, 1926, devised and bequeathed his residuary estate to his trustees on trust for sale to divide the residue after payment of funeral and testamentary expenses, debts and legacies into two equal parts one of such parts to be divided equally between his children by his former wife (other than two children for whom he had already provided) and the other part to be divided equally between his children by his present wife. The share of each child was to be held by the trustees on protective trusts for each child during his or her life and after his or her death upon trust for such of the children or remoter issue of such child as such child should appoint and in default of and subject to any such appointment upon trust for the children of such child in equal shares. The will also contained a power for any such child of the testator to appoint a life or lesser interest in any part not exceeding one half of such child's share to any wife or husband him or her surviving. A daughter of the testator who became entitled to a life interest

[Reported by MISS V. A. MOXON, Barrister-at-Law.]

in a one-eighth share in his residuary estate, applied to the court under section 1 of the Variation of Trusts Act, 1958,[1] together with the other persons interested in the share, for an order approving on behalf of all persons (including unborn persons) who might become interested in the trust fund an arrangement whereby the trusts of the will should be varied by enlarging the daughter's protected life interest into an absolute life interest on condition that she released the powers of appointment conferred on her by the will, that she and her two children (both of whom were of age and unmarried) divided the trust fund between them in accordance with the actuarial value of their respective interests therein and that the children settled the parts of the trust fund taken by them on themselves and their respective issue:—

Held, (1) that the words "any person" in section 1 (1) (*d*) of the Variation of Trusts Act, 1958, included an unascertained or an unborn person; so that the court was under no obligation to require some benefit to be provided for unborn or unascertained persons (such as an unascertained future husband) who had a discretionary interest under a protective trust.

(2) That the proposed arrangement was for the benefit of the unborn issue of the daughter's children. The court, accordingly, would approve the arrangement.

ADJOURNED SUMMONS.

By his will, dated November 20, 1918, the testator, George Lewis Turner, devised and bequeathed his residuary estate to his trustees upon trust for sale to pay his funeral and testamentary expenses and debts and the legacies bequeathed by the will or any codicils thereto and to stand possessed of the residue upon trust to divide the same into two equal parts one of such parts to be divided equally between his children by his former wife who should survive him or die in his lifetime leaving issue surviving him (other than two children for whom he had already provided) and the other part to be divided similarly between the children of his present wife. Clause 16 of the will provided that the

[1] Variation of Trusts Act, 1958, s. 1: "1.—(1) Where property, "whether real or personal, is held "on trusts arising, whether before "or after the passing of this Act, "under any will, settlement or other "disposition, the court may if it "thinks fit by order approve on be-"half of—(*a*) any person having, "directly or indirectly, an interest, "whether vested or contingent, under "the trusts who by reason of infancy "or other incapacity is incapable of "assenting, or (*b*) any person "(whether ascertained or not) who "may become entitled, directly or in-"directly, to an interest under the "trusts as being at a future date or on "the happening of a future event a "person of any specified description "or a member of any specified class "of persons, so however that this "paragraph shall not include any "person who would be of that des-"cription, or a member of that class, "as the case may be, if the said date "had fallen or the said event had "happened at the date of the appli-"cation to the court, or (*c*) any "person unborn, or (*d*) any person "in respect of any discretionary in-"terest of his under protective trusts "where the interest of the principal "beneficiary has not failed or deter-"mined, any arrangement (by whom-"soever proposed, and whether or "not there is any other person bene-"ficially interested who is capable of "assenting thereto) varying or re-"voking all or any of the trusts . . . "Provided that except by virtue of "paragraph (*d*) of this subsection the "court shall not approve an arrange-"ment on behalf of any person "unless the carrying out thereof "would be for the benefit of that "person."

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trustees should invest the share of each child in any of the investments thereinafter authorised and should if at the time of the trust taking effect no act or event (other than the exercise of any power of appointment thereinafter given or a consent to any exercise of the power of advancement thereinafter contained) should have happened whereby the life interest given to such child would if belonging to such child absolutely have become vested in or charged in favour of some other person pay the income of the said share to such child during his or her life or until some such act or event as aforesaid should happen. Clause 17 provided that in the event of the failure or determination in the lifetime of such child of the testator of his or her life interest the trustees should during the remainder of the life of such child as they should in their absolute discretion think fit pay all or any part of the income to or apply the same for the maintenance and personal support or benefit of all or any one or more of the following, namely, such child and the wife or husband (if any) of such child and the children or remoter issue of such child for the time being in existence and any other persons for the time being entitled or interested to or in such child's share under the trusts therein contained to take effect after the death of such child in such proportions and manner as the trustees should in their absolute discretion think proper and subject to the aforementioned discretionary power the trustees should during the remainder of the life of such child hold the income or so much thereof as should not be applied under the said discretionary power upon the trusts for which the said income would be held if such child were dead. Clause 18 provided that after the death of such child the trustees should stand possessed of such child's share upon trust for such of the children or remoter issue of such child and in such manner as such child of his should by deed or deeds with or without power of revocation or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any the children or child of such child of the testator who being male should attain the age of 21 years or being female should attain that age or marry if more than one in equal shares. In the event of a failure of the above-mentioned trusts such share was to accrue to the shares of the other children of the testator if more than one in equal shares. Clause 20 gave to every child of the testator power by will or codicil to appoint to any wife or husband of such child an interest for life or any less interest in any part of such child's share not exceeding one half.

On October 15, 1924, the testator made a codicil making a change in the appointment of executors and otherwise confirming the will.

The testator died on October 2, 1926, whereupon his daugher, Freda Mabel Bridgman, one of the applicants, became entitled to a protected life interest in a one-eighth share in his residuary

estate on the trusts contained in clauses 16, 17 and 18 of the will.

The present trustees of the will were the daughter's husband, John Roddick Bridgman, who was one of the applicants, Alfred Mandeville Turner and Theodore Francis Turner.

On May 8, 1959, the daughter, and the other applicants, her husband and her two children, Nicholas Charles Haydon and Sara Haydon, both of whom were of age and unmarried, issued an originating summons asking that the arrangement set out in the schedule thereto might be approved on behalf of all persons (including unborn persons) who might become interested under the trusts declared by the will concerning the daughter's one-eighth share.

The arrangement set out in the schedule was an arrangement whereby, after payment of the costs of the present application, the interest of the daughter in the income of the trust fund should be enlarged into an interest for her life which should not be liable to fail or determine during her lifetime in the manner set out in clause 16 of the will, upon the terms that (a) the daughter would release the power conferred on her by clause 18 of the will to appoint the capital and income of the share in favour of her children and remoter issue and the power conferred on her by clause 20 to appoint an interest in the income of the trust fund to any husband who might survive her; (b) the daughter and her two children should divide the share between them in specie in accordance with the actuarial value of their respective interests therein; and (c) that the daughter's children should settle the parts of the trust fund to be taken by them respectively on trust for themselves and their respective issue. The trusts of such settlements were revocable by the daughter's children with the consent of the trustees.

John Vinelott for the applicants.

J. A. Wolfe for the respondents, the independent trustees of the will.

The following case was cited in argument: *In re Poole's Settlement Trusts.*[2]

DANCKWERTS J. referred to the provisions of the will and the proposed arrangement and continued: The question has been raised whether I can approve this arrangement, having regard to the fact that there is only a possible benefit for unborn issue which may be defeated under the proposed settlements; and that there is no provision whatever for any future husband of the testator's daughter, who might be a member of the class entitled to a share under the discretionary trust.

The first point is whether I am under an obligation to require any provision to be made for such persons at all, having regard

[2] [1959] 1 W.L.R. 651; [1959] 2 All E.R. 340.

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to the fact that their interests only arise under the possible discretionary trust which will only come into operation in the event of the daughter's life interest being forfeited under the trusts of her father's will. The relevant provision is in section 1 of the Variation of Trusts Act, 1958. [His Lordship read the section and continued:] In other words, in cases other than those covered by paragraph (*d*), the court must be satisfied that the carrying out of the arrangement would be for the benefit of the person mentioned, but in case (*d*) the court may, if it likes, disregard the question whether any benefit is provided or not.

The point has been raised whether "any person" in (*d*) in regard to the discretionary trusts includes an unborn person. My attention has been directed to the fact that in (*b*) the words "whether ascertained or not" have been inserted; and (*c*) deals with an unborn person in terms. Therefore, it is argued that I have no power to approve under (*d*) in the case of persons unborn, even though such a person is a person who would benefit from a discretionary interest under the protective trusts.

I do not think that argument is well founded. It seems to me that the words "any person" are perfectly general, and, unless restricted in some way, must include an unascertained or an unborn person: in other words, any person who might take under the provisions of the discretionary trust. It is true that there is a certain antithesis between paragraphs (*b*) and (*c*), referring to persons ascertained or not and persons unborn, and (*d*); but it does not seem to be a necessary conclusion from that that persons unborn are excluded from paragraph (*d*). It appears to me to be important that one finds the kind of provision which one would suppose the section had in mind in section 33 of the Trustee Act, 1925, where the persons who are to take under a discretionary trust under protective trusts are defined by the section as "the following persons (that is to say)—(*a*) the "principal beneficiary and his or her wife or husband, if any, "and his or her children or more remote issue, if any; or (*b*) if "there is no wife or husband or issue of the principal beneficiary "in existence, the principal beneficiary and the persons who "would, if he were actually dead, be entitled to the trust "property or the income thereof . . ." That plainly includes the possibility of the persons interested being either unborn or unascertained. Having regard to that, it seems to me that the provisions in section 1 (1) (*d*) of the Variation of Trusts Act, 1958, must have been directed to that particular statutory provision under the statutory protective trusts; and that, therefore, I am not under any obligation to require some benefit to be provided for the persons who would otherwise be members of the class coming within paragraph (*d*).

I am here concerned only with the possible case of an unascertained future husband, because it seems to me that the unborn grandchildren of the daughter do take a benefit under the proposed arrangement. Under the provisions of the will relating to

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the shares as they stand, they could only take an interest in capital if the power of appointment in favour of the issue was exercised in their favour to the exclusion of children of the daughter. That power is going to be released in the present case; and that would cut out their interest. As regards their interest under the discretionary trust, it requires the decision of the trustees to give them anything. They might be given nothing, even supposing the discretionary trust ever came into effect at all. Under the proposed settlement by the two children, they are given, directly, interests which would only be cut out in the event of the settlor being allowed by the trustees to revoke the trusts so that he could retain the capital for himself. Therefore, on balance, it seems to me plain that, so far as the grandchildren are concerned, the arrangement does confer a benefit upon them; and I am prepared to approve the arrangement accordingly.

Order accordingly.

Solicitors: *Freshfields.*

[HOUSE OF LORDS.]

ELECTRIX LTD. . . . . APPELLANTS;

AND

ELECTROLUX LTD. . . . . RESPONDENTS.

H. L. (E.)†

1959

June 15, 16, 17; *July* 6.

Trade Mark—Registration—Distinctiveness—Registrability of words the phonetic equivalent of non-registrable words—Application to register the mark "Electrix"—Trade Marks Act, 1938 (1 & 2 *Geo.* 6, *c.* 22), *ss.* 9, 10, 12 (2).

A company manufacturing electrically driven apparatus sought to obtain registration under section 12 (2) of the Trade Marks Act, 1938, of their mark "Electrix" which it had used in respect of its vacuum cleaners since 1933:—

Held, that as the word "Electrics" was inherently incapable of registration, the word "Electrix" was also unregistrable, for inasmuch as trade marks appeal to the ear as well as to the eye, the objection (whatever it might be) to the registration of a word in its proper spelling applied equally to a word which was merely its phonetic equivalent.

In re Ripley & Son's Trademark ("Pirle") (1898) 14 T.L.R. 299; 15 R.P.C. 151 and *In re Joseph Crosfield & Sons Ltd.* [1910] 1 Ch. 130; 26 T.L.R. 100; 26 R.P.C. 837; *In re H. N. Brock & Co. Ltd.* [1910] 1 Ch. 130, 131; reversing *In re Trade Marks Act*, 1905 (1909) 25 T.L.R. 695; 26 R.P.C. 681 applied.

Decision of the Court of Appeal (sub nom. *In re Electrix Ltd.'s Application*) [1958] R.P.C. 176 affirmed.

APPEAL from the Court of Appeal (Jenkins, Romer and Ormerod L.JJ.).

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† *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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This was an appeal from an order of the Court of Appeal dated March 14, 1958, reversing the judgment of Wynn-Parry J. dated July 30, 1957, whereby he upheld a decision of the Assistant Comptroller acting for the Registrar of Trade Marks dated January 21, 1957. By the said order the Court of Appeal ordered that the appellants' applications Nos. 690730, B. 718162 and B. 718163 for the registration of trade marks be refused. The appellants had applied to register the trade mark "Electrix" in respect of electric (that is, electrically driven) apparatus as set out hereunder:

Application 690730—July 14, 1950—Electric domestic vacuum cleaner and parts thereof included in Class 9.

Application B. 718163—May 22, 1953—Electrically driven floor polishing machines.

Application B. 718162—May 22, 1953—Electrically driven spraying machines and parts thereof included in Class 7.

The first application was for registration in Part A of the Register, and the other two applications in Part B.

The substantial question in this appeal was whether the word "Electrix" was registrable as a trade mark for electrical apparatus in view of:

(*a*) Its close similarity to the word "Electric" and its identity in sound with the word "Electrics," both unregistrable words.

(*b*) The use by other traders of the words "Electrics" and "Electrix" as part of their trading style to denote the nature of their business, that is, the goods in which they deal.

The facts are stated by Viscount Simonds.

K. E. Shelley Q.C. and *John Whitford* for the appellants.

Kenneth Johnston Q.C. and *Geoffrey Tompkin* for the respondents.

P. J. Stuart Bevan for the Registrar of Trade Marks.

The following case, in addition to those referred to in their Lordships' opinions, was cited in argument: *In re R. J. Lea Ltd.'s Application.*[1]

Their Lordships took time for consideration.

July 6, 1959. VISCOUNT SIMONDS. My Lords, this appeal relates to three applications by the appellants, Electrix Ltd., for the registration as a trade mark of the single word "Electrix." The first application, which was made on July 11, 1950, was for its registration in respect of "electric domestic vacuum cleaner" and parts thereof included in Class 9." The other applications were of later date and were in respect of other electrically driven machines, one of them also in Class 9, the other in Class 7. It is conceded that the two later applications stand or fall with the

[1] [1913] 1 Ch. 446; 29 T.L.R. 334; 30 R.P.C. 216.

earlier one: I will therefore say nothing more about them. All the applications were opposed by the respondents, Electrolux Ltd., but were granted by the Assistant Comptroller, whose decision was affirmed on appeal by Wynn-Parry J.[1] The respondents appealed to the Court of Appeal,[2] who unanimously reversed the decision of the learned judge. Hence the appeal to this House.

My Lords, I think that the real point in the case is a short one and not difficult to decide, but so much importance has been attached to what has been called the background of the case that I must trouble your Lordships with a short history of some of the facts which preceded the relevant applications.

In 1928 the respondents had registered the word "Electrux" as a trade mark in respect of a specification of goods which included the goods the subject of the appellants' applications. They renewed the registration in 1942 but made no use of it until 1947. In the meantime the appellants had been incorporated and from 1933 onwards, except for a period of interruption caused by the war, sold vacuum cleaners under the mark "Electrix." They were unaware of the respondents' registered mark "Electrux." Their sales were said to have been substantially increased as the result of an exhibition in the autumn of 1946 under the title "Britain can make it." In 1947 the respondents, realising that their mark "Electrux" was in danger of being struck off the register for non-user, and wishing to stop the use by the appellants of their mark "Electrix," began to use the mark "Electrux" in connection with a certain model of vacuum cleaner. They were entitled to do so and their user was bona fide. Having done so, they challenged the user by the appellants of the mark "Electrix" on the ground that it infringed their mark, and eventually brought an action to restrain it. In this action it was held by Lloyd-Jacob J., and on appeal by the Court of Appeal, that the mark "Electrix" was an infringement of "Electrux," that the latter mark was valid and that the conduct of the respondents did not amount to acquiescence. An injunction was accordingly granted as asked. The scope of the registration of "Electrux" was, however, limited in a way that does not concern the present appeal. These proceedings are relevant to the appeal in this way. The appellants as an additional defence to the action sought to obtain registration of their mark "Electrix" under the provisions of section 12 (2) of the Trade Marks Act, 1938, having previously made an application to the Registrar for such registration, and they served a motion in the action asking for an order to that effect. Lloyd-Jacob J. refused to make the order, holding that the application should first be determined by the Registrar, but granted a stay of execution of the injunction pending the Registrar's determination. The suspension was continued by the Court of Appeal. Thus the application came in

[1] [1957] R.P.C. 369. [2] [1958] R.P.C. 176.

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due course before the Registrar and I have already narrated what happened to it. The question is whether the Court of Appeal were right in holding that the word "Electrix" ought not to be registered. It is possible to feel some sympathy for the appellants, if the injunction now suspended becomes operative, for they appear to have built up a substantial goodwill in "Electrix" as a common law mark. But that cannot influence the decision which it falls to the House to make.

My Lords, I can conveniently state the problem to be solved by the citation of a single sentence from the judgment of the Court of Appeal[3]: "The doctrine," they said, "as we understand it, is that, if a given word is for any reason unregistrable "in its proper spelling, then, inasmuch as trade marks appeal "to the ear as well as to the eye, the objection (whatever it "may be) to the registration of the properly spelt word applies "equally to a word which is merely its phonetic equivalent." Applying that view of the law to the facts of the present case, the Court of Appeal held that, "electrix" being the phonetic equivalent of "electrics," and that word being unregistrable, "electrix" also was unregistrable.

In my opinion the proposition or doctrine of law, upon which the Court of Appeal founded, is accurately stated and supported by authority and reason, and it was correctly applied. The more important of the cases which establish it are cited in the exhaustive judgment of the Court of Appeal. At the risk of repetition I must refer to some of them. In *In re Edward Ripley & Son's Application*[4] the question was whether the word "Pirle" should be registered for goods in Class 34, namely, cloths and stuffs of wool, worsted and hair, the word "Pirle" being formed from the name "Ripley" with the omission of the "y." The application was refused on the ground that the word was identical in sound with "Pearl" and that "Pearl" itself was not eligible for registration, being a term of commendation. Kekewich J. upheld the refusal and so did the Court of Appeal in words which I quote because they are directly apposite[5]: "We do not see "our way," said Lindley M.R., "to accede to this application. "We cannot do it, unless we are prepared to lay down a proposition that I do not think any court should. We cannot say "that a man may register in any class of goods a word which "sounds exactly like a word that could not be registered. The "reason is obvious: it would be putting a monopoly upon the "public which would be utterly unjustifiable. That is the short "reason." My Lords, the reason was short and was obvious. The judgment too was short: I have cited the whole of it. There is not a word in it to suggest that it matters why the word is unregistrable which the word proposed to be registered sounds exactly like. And in the 70 years which have passed since those very learned judges gave that clear and emphatic judgment, there

[3] [1958] R.P.C. 176, 193, 194.
[4] (1898) 15 R.P.C. 151.
[5] Ibid. 155.

has never been a suggestion that it is material why the unregistrable word is unregistrable nor any attempt to qualify the generality of its language. That case was decided under the Acts of 1883 and 1888. The next cases that I cite were heard after the passing of the Trade Marks Act, 1905. That Act made no difference to the relevant principle. Thus, in the "*Perfection*" and "*Orlwoola*" cases,[6] *In re Joseph Crosfield & Sons Ltd.*; *In re H. N. Brock & Co. Ltd.*, Lord Cozens-Hardy M.R., dealing with both cases, said[7]: "There is one important distinction "between word marks and other marks. The former appeal to "the ear as well as, and indeed more than, to the eye. The "latter appeal to the eye only. It seems to follow that a word, "not being an invented word, ought not to be put on the register "if the spelling is phonetic and resembles in sound a word which "in its proper spelling could not be put on the register." Here again the language is general. The learned Master of the Rolls goes on to deal separately with the two marks, of which one was of a laudatory character; the other had reference to the quality or nature of the goods. In regard to "Perfection" he said[8]: "It was admitted by counsel that 'Perfect' could not be regis-"tered, and that admission is fatal to the case of the applicants," and in regard to "Orwoola" he said[9]: "It is plain that 'All "'wool' could not be registered, and indeed these words are "disclaimed on the face of the register. This word is a mark "which appeals to the ear far more than to the eye, and for "reasons which I stated in my general observations I think it is "obviously not distinctive." That is to say, "Orlwoola" could not be registered, because to the ear it sounded like the unregistrable "All wool." I must pass over the judgments of Fletcher Moulton and Farwell L.JJ., though there is much in them to support the doctrine laid down in the judgment of the Court of Appeal in the present case and nothing from which the appellants can derive comfort. But I cannot refrain from citing a short passage from the judgment of Fletcher Moulton L.J. With regard to "Orlwoola" he said[10]: "The misspelling does not affect the "words when spoken, so that we have only to decide whether "the words 'All wool' are proper for registration in respect of "such goods." That was for him the sole question, just as for your Lordships the sole question is whether the word, of which "Electrix" is the phonetic equivalent, is registrable—a question that in this case admits of only one answer. So also in the *Ogee* case[11] (*In re Garrett's Application*) Lord Cozens-Hardy M.R., reiterating that a trade mark appeals to the ear as well as to the eye, said[12]: "If the letters 'O.G.' could not be registered, it "seems to me that the word 'Ogee' ought not to be registered. ". . . The applicant may or may not have a right to 'Ogee'

[6] [1910] 1 Ch. 131, 137; 26 T.L.R. 100; 26 R.P.C. 837.
[7] [1910] 1 Ch. 131, 142.
[8] Ibid. 143.
[9] Ibid. 143, 144.
[10] Ibid. 150.
[11] [1916] 1 Ch. 436; 33 R.P.C. 117.
[12] [1916] 1 Ch. 436, 443.

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" as a common law mark, but it is not a registrable mark." It would be difficult to find words more directly applicable than these to the present case. Rather surprisingly, learned counsel for the appellants sought to rely on the speech of Lord Parker in the *W. & G.* case [13] (*Registrar of Trade Marks* v. *W. & G. Du Cros Ltd.*). In that speech there is much that is valuable. The noble and learned Lord had been counsel to the Board of Trade at the passing of the Act of 1905 and knew well the problem which led to its enactment. He pointed out that the definition of " distinctive " as meaning " adapted to distinguish " made no change in the law, for the word " distinctive " had been used in that sense in the earlier Acts. He emphasised that in order to determine whether a mark is distinctive it must be considered apart from the effects of registration, and (what is more important to the present case) that present distinctiveness in fact is not conclusive that a mark is adapted to distinguish. But neither in his speech nor in those of the other learned Lords was there suggested any qualification of the general principle that the phonetic equivalent of an unregistrable word is itself unregistrable. That was not in fact the question which had to be decided. The question was whether " W. & G.," not its phonetic equivalent, was registrable. The same may be said of the *Glastonbury* case [14] (*A. Baily & Co. Ltd.* v. *Clark, Son & Morland Ltd.*) and of the *Yorkshire Copper Works Ltd.* application [15] (*Yorkshire Copper Works Ltd.* v. *Registrar of Trade Marks*), which recently came before the House, and to the *Trakgrip* case [16] (*In re Dunlop Rubber Co. Ltd.'s Application*), which it fell to me to decide. In these and other cases that were cited, it was the question of distinctiveness that was elaborately discussed. It is obvious that in observing the prescription of section 9 (3) of the Act of 1938, viz., that " in determining whether a trade mark is adapted to " distinguish as aforesaid, the tribunal may have regard to the " extent to which (*a*) the trade mark is inherently adapted to " distinguish as aforesaid; and (*b*) by reason of the use of the " trade mark or of any other circumstances, the trade mark is " in fact adapted to distinguish as aforesaid," there is room for wide difference of opinion. It has nevertheless been consistently laid down that the discretion of the Registrar is not to be lightly overruled, and the general excellence of the judgment of the Assistant Comptroller in this case predisposes me to uphold it. But it appears to me that he has erred in principle. For, though he does not say in so many words that " electrics," of which " electrix " is the phonetic equivalent, could or could not be registered, saying merely " this does not mean that I " necessarily regard ' Electrics ' as a word which could properly

[13] [1913] A.C. 624, 633; 29 T.L.R. 772; sub nom. *In re W. & G. Du Cros Ltd.'s Applications*, 30 R.P.C. 660.

[14] [1938] A.C. 557; 54 T.L.R. 688; [1938] 2 All E.R. 377.

[15] [1954] 1 W.L.R. 554; [1954] 1 All E.R. 570; 71 R.P.C. 150.

[16] (1942) 59 R.P.C. 134.

" be registered," it is clear that he would not regard it as decisive of the unregistrability of " Electrix " that " Electrics " is unregistrable. Here he was, in my opinion, clearly wrong and, if I read his judgment aright, the learned judge fell into the same error. So also the appellants have sought to ignore the unregistrability of " Electrics " and claimed nevertheless that " Electrix " was registrable. Thus in their formal case they say: " The " appellants do not contend that the word ' Electrics ' would be " registrable," and they did not resile from this position in argument before the House. Let it not be thought that I criticise them for making the admission. It appears to me that, whether or not distinctiveness in fact was or could be acquired by " Elec- " trics," of which there was, of course, no evidence, it would be a hopeless task to persuade the tribunal that it was not inherently unregistrable. From this it follows that the word " Electrix " cannot be registered.

In my opinion the appeal must be dismissed with costs.

LORD REID. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree.

VISCOUNT SIMONDS. LORD COHEN and LORD SOMERVELL OF HARROW, who are unable to be here today, have asked me to say that they have read and concur in the opinion which I have just given.

Appeal dismissed with costs.

Solicitors: *Frere, Cholmeley & Nicholsons; Steadman, Van Praagh & Gaylor.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

Ex parte MWENYA.

1959
June 17, 18, 19; *July* 3.

Lord Parker C.J., Slade and Winn JJ.

Habeas Corpus—Protectorate—Jurisdiction—Restriction order requiring native of Northern Rhodesia to remain in certain district of Northern Rhodesia—Restriction order made by Governor of Northern Rhodesia — Whether Northern Rhodesia "foreign dominion" of Crown—Whether foreign territory—Jurisdiction to issue writ to governor — Jurisdiction of court to issue writ overseas — Whether Secretary of State for Colonies a custodian—Whether amenable to issue of writ—Habeas Corpus Act, 1862 (25 *&* 26 *Vict. c.* 20), *s.* 1.

In June and October, 1957, the Governor of Northern Rhodesia made restriction orders pursuant to powers stemming from the Emergency Powers Regulations, 1956, of Northern Rhodesia, requiring M., a native of Northern Rhodesia, to remain in the district of the Chief Mporokoso. At all material times Northern Rhodesia was a protectorate, and, according to an affidavit by the Secretary of State for the Colonies, was " a foreign country within which Her

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"Majesty has power and jurisdiction by treaty, grant, usage, "sufferance and other lawful means within the meaning of the "Foreign Jurisdiction Act, 1890, but not recognised by Her "Majesty as, nor is it, part of Her dominions, but She has power "and jurisdiction within the same." M. applied for a writ of habeas corpus directed to the Governor of Northern Rhodesia, the District Commissioner of the Mporokoso District and the Secretary of State for the Colonies, on the ground that he was unlawfully detained in that the Order in Council under which the Emergency Powers Regulations were made was invalid, and that, consequently, the restriction orders were invalid. Under the Constitution of and legislation in regard to Northern Rhodesia the Secretary of State had powers which extended beyond mere advice, but his approval or consent to the restriction orders was not required and he took no part in the detention. On preliminary objections taken by the respondents to the jurisdiction of the court to issue the writ in the circumstances, and on the assumptions (which were not admitted) (a) that M. was a British subject; (b) that, inter alia, the Order in Council was invalid, and (c) that M.'s confinement was of such a nature as to enable him, had he been confined in this country, to apply for the writ:—

Held, (1) that the court had no jurisdiction to issue the writ of habeas corpus to custodians in a protectorate such as Northern Rhodesia in respect of a detention in that protectorate; the court's power to issue the writ was a manifestation of the sovereignty of the Crown, existing by force and virtue of the common law, the concept of which was territorial, so that the court might only issue the writ throughout the Sovereign's dominions in the territorial sense to the extent which common law or statute permitted or required the Sovereign to issue it, whereas Northern Rhodesia, though under the dominion of the Crown in the sense of subjection, was not a territorial dominion of the Crown, but a foreign country into which the writ could not lawfully issue; no distinction could be made between a foreign territory which was to all intents and purposes wholly under the subjection of Her Majesty and a territory where the subjection was only partial, nor did it make any difference that the custodian in such territory was a servant of the Crown; accordingly, the application against the Governor and the District Commissioner must be dismissed.

Dictum of Kennedy L.J. in *Rex* v. *Earl of Crewe, Ex parte Sekgome* [1910] 2 K.B. 576, 624; 26 T.L.R. 439; 56 T.L.R. 3 applied.

Calvin's Case (1609) 7 Co.Rep. 1; *Rex* v. *Cowle* (1759) 2 Burr. 834 and *Ex parte Anderson* (1861) 3 E. & E. 487 considered.

Per curiam: The expression "Foreign dominion of the Crown" in section 1 of the Habeas Corpus Act, 1860, means a territorial dominion of the Sovereign overseas, and not a foreign territory over which the Sovereign exercises dominion in the sense of power.

(2) That the Secretary of State for the Colonies had not sufficient degree of control to constitute him a custodian of the body to whom the writ would issue; although the writ would issue to a person having constructive custody in the sense of power and control over the body, and there might be special circumstances in which a Secretary of State would be amenable to the writ, there was nothing in the facts of the case which would justify the court calling upon him to produce the body; the fact that he might advise and attempt to persuade Her Majesty to cause the body to be brought up did not amount to such custody as would enable the writ to issue.

Barnardo v. *Ford, Gossage's Case* [1892] A.C. 326; 8 T.L.R. 728 distinguished.

Semble: The writ would not issue to a custodian in this country

where the original and present detention was in a foreign country merely by reason of the physical presence here of the custodian.

APPLICATION for leave to issue a writ of habeas corpus ad subjiciendum.

The applicant, Andrew Mwenya, a native of Northern Rhodesia, was the subject of two restriction orders made on June 15 and October 5, 1957, by the Governor of Northern Rhodesia under which he was required to remain in the Mporokoso District of Northern Rhodesia. On November 28 and 29, 1956, restriction orders had been made against the applicant under regulation 18 of the Emergency Powers Regulations, 1956, of Northern Rhodesia, and the orders in question of June 15 and October 5, 1957, were made under section 8 and other provisions of the Emergency (Transitional Provisions) Ordinance, 1956, of Northern Rhodesia [No. 38 of 1956] for the making of restriction orders against persons in respect of whom orders had been made under the Emergency Powers Regulations, 1956. The Emergency Powers Regulations, 1956, were made pursuant to powers conferred upon the Governor by the Emergency Powers Order in Council, 1939 (as amended by the Emergency Powers Orders in Council of 1952 and 1956), which Order in Council was made under the powers contained in the Foreign Jurisdiction Act, 1890.[1]

The applicant applied for leave to issue a writ of habeas corpus directed to the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District on the ground that he was unlawfully detained, it being alleged that the Emergency Powers Order in Council, 1939, being made under the Foreign Jurisdiction Act, 1890, was a statutory order in council so far as Northern Rhodesia was concerned to which the Rules Publications Act, 1893, section 1 (1) of which required that a notice of intention to make such an order must be published in the London Gazette at least 40 days before the order was made, applied, and that, as no such notice had been published, the order, in so far as it applied to Northern Rhodesia, was void, and that, on the basis that the parent Order in Council of 1939 was void, so were the Emergency Powers Regulations, 1956, and the Ordinance of 1956 void, and that, accordingly, the restriction orders were also void.

On May 12, 1959, the court adjourned the hearing for notice of the application to be served upon the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District

[1] Foreign Jurisdiction Act, 1890: "Whereas by treaty, capitulation, "grant, usage, sufferance, and other "lawful means, Her Majesty the "Queen has jurisdiction within "divers foreign countries, and it is "expedient to consolidate the Acts "relating to the exercise of Her "Majesty's jurisdiction out of Her "Dominions: 1. It is and shall be "lawful for Her Majesty the Queen "to hold, exercise, and enjoy any "jurisdiction which Her Majesty now "has or may at any time hereafter "have within a foreign country in the "same and as ample a manner as if "Her Majesty had acquired that "jurisdiction by the cession or conquest of territory."

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Commissioner of the Mporokoso District. The following are the material parts of an affidavit sworn by the Secretary of State for the Colonies: "2. The Northern Rhodesia Protectorate is a "foreign country within which Her Majesty has power and juris- "diction by treaty, grant, usage, sufferance and other lawful "means within the meaning of the Foreign Jurisdiction Act, 1890. "The territory of the said Protectorate is foreign territory under "Her Majesty's protection. It has never been acquired by settle- "ment or ceded to or conquered or annexed by Her Majesty or "any of Her Royal Predecessors nor has Her Majesty or any of "Her Royal Predecessors recognised the same as, nor is it, part "of Her Dominions, but She has power and jurisdiction within "the same. The aforesaid Northern Rhodesia continues to exist "as a Protectorate as aforesaid since the enactment of the "Rhodesia and Nyasaland Federation Act, 1953. 3. I have not "the custody of Andrew Mwenya, nor have I control over his "custody, nor have I ordered Andrew Mwenya to remain in the "Mporokoso District or given any instruction to that effect. As "Her Majesty's Secretary of State for the Colonies I can only "advise Her Majesty with regard to the exercise of Her power "and jurisdiction in Northern Rhodesia and communicate Her "Majesty's orders and instructions to His Excellency the "Governor. Save in the sense that I am not prepared to advise "Her Majesty to approve the policy of instructing His Excellency "the Governor to revoke the restriction order made by His "Excellency in regard to Andrew Mwenya or any Order in "Council or Ordinance empowering His Excellency the Governor "to make such orders, I have not detained Andrew Mwenya or "ordered him to remain in any area, nor do I detain him nor is he "ordered by me to remain in any area, and I have not and have "not had the custody of Andrew Mwenya."

According to an affidavit sworn by the Attorney-General for the Federation of Nigeria, formerly Attorney-General for Northern Rhodesia from 1951 to 1956, the present constitution of Northern Rhodesia was created by the Northern Rhodesia Orders in Council, 1924 to 1927, and the Northern Rhodesia (Legislative Council) Order in Council, 1959 and "3. The Governor of Northern Rhodesia "is appointed by Her Majesty and is authorised to exercise on "Her Majesty's behalf all such powers and jurisdiction as Her "Majesty possesses within the territory and do and execute all "things as may fall within the terms of Orders in Council relating "to the territory or by instructions as may from time to time "be given to him (inter alia) by Her Majesty acting through one "of Her Principal Secretaries of State. The Governor must in "performing his office observe such laws as are now or shall here- "after be in force in the territory. . . . 4. The Order in Council of "1924 provided that there should be a Court of Record called the "High Court of Northern Rhodesia with full jurisdiction, civil "and criminal, over all persons and all matters within Northern "Rhodesia. . . . The civil and criminal jurisdiction of this court

" is and was so far as circumstances admit to be exercised upon " the principles of and in conformity with the subsance of the law " for the time being in force in and for England and with the " powers vested in and according to the course of procedure and " practice observed by and before Courts of Justice in England " except so far as such law may be inapplicable or may be modi- " fied by Order in Council, Regulations or Proclamations or " Ordinances of the Legislature of Northern Rhodesia. . . . 6. I " am of the opinion that the High Court of Northern Rhodesia " has authority to grant and issue writs of habeas corpus ad sub- " jiciendum and other prerogative writs and to ensure the due " execution thereof in Northern Rhodesia by virtue of the consti- " tutional provisions hereinbefore referred to and sections 10 to 12 " inclusive of the High Court Ordinance of Northern Rhodesia."

On the resumed hearing preliminary objections were taken by the respondents to the jurisdiction of the court to issue the writ.

Neil Lawson Q.C. and *B. H. Anns* for the applicant.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* for the Secretary of State for the Colonies.

B. J. M. MacKenna Q.C. and *J. G. Le Quesne* for the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District.

The following cases were cited in argument: *Ex parte Anderson* [2]; *Rex* v. *Crewe (Earl of), Ex parte Sekgome* [3]; *In re Ning Yi-Ching* [4]; *Rex* v. *Pinckney* [5]; *In re Mansergh* [6]; *Ex parte Brown* [7]; *Calvin's Case* [8]; *Richard Bourn's Case* [9]; *Rex* v. *Secretary of State for War, Ex parte Price* [10]; *Sobhuza II* v. *Miller* [11]; *North Charterland Exploration Co. (1910) Ltd.* v. *Rex* [12]; *Nyali Ltd.* v. *Attorney-General* [13]; *Anon* [14]; *Ex parte Wyatt* [15]; *Rex* v. *Cowle* [16]; *Barnado* v. *Ford, Gossage's Case* [17]; *Secretary of State for Home Affairs* v. *O'Brien* [18]; *Rex* v. *Secretary of State for Foreign Affairs, Ex parte Greenberg* [19]; *Rex* v. *Secretary of State for War, Ex parte Martyn* [20]; *and Rex* v. *Governor of Brixton Prison, Ex parte Sarno.* [21]

On June 18 the court ruled that they had no jurisdiction to issue the writ to the Governor of Northern Rhodesia or the

[2] (1861) 3 E. & E. 487.
[3] [1910] 2 K.B. 576; 26 T.L.R. 439.
[4] (1939) 56 T.L.R. 3.
[5] [1904] 2 K.B. 84; 20 T.L.R. 363.
[6] (1861) 1 B. & S. 400.
[7] (1864) 5 B. & S. 280.
[8] (1609) 7 Co.Rep. 1.
[9] (1620) 2 Cro.Jac. 543.
[10] [1949] 1 K.B. 1; 64 T.L.R. 528.
[11] [1926] A.C. 518; 42 T.L.R. 446.
[12] [1931] 1 Ch. 169; 46 T.L.R. 566.
[13] [1956] Q.B. 1; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646.
[14] (1671) Carter 221.
[15] (1836) 5 Dowl. 389.
[16] (1759) 2 Burr. 834.
[17] [1892] A.C. 326; 8 T.L.R. 728.
[18] [1923] 2 K.B. 361 (C.A.); [1923] A.C. 603 (H.L.).
[19] [1947] 2 All E.R. 550.
[20] (1949) 65 T.L.R. 102; [1949] 1 All E.R. 242.
[21] [1916] 2 K.B. 742; 32 T.L.R. 717.

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District Commissioner in respect of the applicant's alleged confinement, and the application as against them was dismissed with costs. On June 19 the court held that a prima facie case had not been made out that the Secretary of State for the Colonies had sufficient control to constitute him a custodian to whom the writ would issue and the application against him was also dismissed with costs. In each case the court reserved their reasons.

Cur. adv. vult.

July 3. LORD PARKER C.J. read the following judgment of the court.

In these proceedings Mr. Lawson moves for a writ of habeas corpus to bring up the body of one Andrew Mwenya now wrongfully detained, so it is alleged, in the Mporokoso District of Northern Rhodesia pursuant to restriction orders dated June 15 and October 5, 1957, made by the Governor of Northern Rhodesia. The ground of the application is that the orders were not validly made. It is directed to the Governor of Northern Rhodesia, the District Commissioner for the Mporokoso District and also to Her Majesty's Secretary of State for the Colonies.

The applicant is a native of Northern Rhodesia, having been born within that territory. At all material times Northern Rhodesia was a Protectorate and continues as such today despite the Rhodesia and Nyasaland Federation Act, 1953. In an affidavit by Her Majesty's Secretary of State for the Colonies sworn on June 12, 1959, it is stated that "The Northern Rhodesia "Protectorate is a foreign country within which Her Majesty "has power and jurisdiction by treaty, grant, usage, sufferance "and other lawful means within the meaning of the Foreign "Jurisdiction Act, 1890. The territory of the said Protectorate "is foreign territory under Her Majesty's protection. It has "never been acquired by settlement or ceded to or conquered "or annexed by Her Majesty or any of Her Royal Predecessors, "nor has Her Majesty or any of Her Royal Predecessors recog- "nised the same as, nor is it, part of Her dominions, but She "has power and jurisdiction within the same."

The restriction orders provided that the applicant should remain within the area of Chief Mporokoso in the Mporokoso District, which comprises an area of about 1,500 square miles. The governor's powers to make such restriction orders flow from regulation 18 of the Emergency Powers Regulations, 1956, which provide that the governor, if satisfied that for the purpose of maintaining public order it is necessary so to do, may make a restriction order against any person. Those regulations were made pursuant to the Emergency Powers Order in Council, 1939, as amended by the Emergency Powers Orders in Council, 1952 and 1956, made by virtue of the powers conferred by the Foreign Jurisdiction Act, 1890.

The case for wrongful detention sought to be made by the

applicant is based on the contention that those Orders in Council were statutory rules to which the Rules Publication Act, 1893 (repealed in 1946), applies. Section 1 (1) of that Act provided: "At least 40 days before making any statutory rules to which "this section applies, notice of the proposal to make the rules, "and of the place where copies of the draft rules may be obtained, "shall be published in the London Gazette."

That provision admittedly was not complied with, and in these circumstances the applicant contends that the Orders in Council were invalid, and further that the restriction orders, which depend ultimately upon the validity of those Orders in Council, are likewise invalid.

The respondents, on the other hand, contend that those Orders in Council were not statutory rules to which the Act of 1893 applied. The respondents further contend that in any event the restriction of the applicant's liberty of movement in the circumstances of this case does not constitute such a detention or confinement as would give him any right to relief by way of the issue of a writ of habeas corpus. Further the Secretary of State contends that such control as he can be said to have by way of advice to Her Majesty or otherwise is not sufficient to constitute him the custodian of the applicant and that, accordingly, the writ cannot issue to him. Those are the three substantive issues which arise in this case.

At the opening of the proceedings, however, a preliminary objection was taken on behalf of the respondents that in any event this court had no jurisdiction to issue the writ to custodians in a protectorate in respect of a detention in that protectorate, since the territory comprised in a protectorate is foreign territory.

For the purpose of this preliminary point the court was asked to assume: (1) that the applicant was a British subject; (2) that the said Orders in Council were invalid and that so, too, were other Orders in Council in regard to Northern Rhodesia, including that setting up a High Court having the power to issue the writ of habeas corpus; and (3) that the applicant's confinement was of such a nature as to enable him, if he had been confined in this country, to apply for the writ.

After hearing argument on this preliminary point the court, at the invitation of all parties, gave a ruling on the objection. We stated that we upheld the validity of the objection and dismissed the application as against the Governor of Northern Rhodesia and the District Commissioner.

The point, however, was not one which was decisive in favour of the Secretary of State and the proceedings accordingly continued against him.

We will now deal with this preliminary point and give the reasons for our decision thereon.

We start with this, that there is no precedent, so far as we

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know, for the issue of the writ into a protectorate. Such precedents as there are are confined to the issue of the writ into part of Her Majesty's dominions in the sense of the territorial dominions over which she is Sovereign. Thus the writ has gone to Calais, Jersey and Guernsey, Ireland, the Plantations and Canada.

Sir William Blackstone in his Commentaries, Vol. 3, p. 131, speaking of the writ, says: "This is a high prerogative writ, "and therefore by the common law issuing out of the Court of "King's Bench not only in term-time, but also during the "vacation, by a fiat from the chief justice or any other of the "judges, and running into all parts of the King's dominions: "for the King is at all times entitled to have an account, why "the liberty of any of his subjects is restrained, wherever that "restraint may be inflicted."

Again in Bacon's Abridgement, Tit. Habeas Corpus, p. (B) 2, it is said: "It hath been already observed, that the writ of "habeas corpus is a prerogative writ, and that therefore, by the "common law, it lies to any part of the King's dominions; for "the King ought to have an account why any of his subjects "are imprisoned, and therefore no answer will satisfy the writ, "but to return the cause with paratum habeo corpus, etc. "Hence it was holden, that this writ lay to Calais at the time "it was subject to the King of England. It hath been holden, "that this writ lies to the marches of Wales, as it does to all "other courts which derive their authority from the King, as "all the courts exercising jurisdiction within his dominions do; "and that being a prerogative writ, it does not come within "the rule brevia domini regis non currunt, etc., for that must "be understood of writs between party and party.

"Also, it hath been adjudged, that this writ lies to the "cinque Ports, to Berwick, although objected to have been part "of Scotland, and to the County Palatine."

In *Rex* v. *Cowle* [1] the question arose whether the court could issue to the justices of the town of Berwick a certiorari to return indictments against the defendants. The argument was that the court had no jurisdiction over Berwick where the proceedings were not according to the laws of England, but according to quite a different law. Lord Mansfield C.J., in delivering the opinion of the court, said [2]: "But, if Berwick was to be deemed "a dominion of the Crown, and no part of the realm of England; "it may be under the control and superintendence of the King "in this court.

"The constitution given to Berwick by the Crown of England, "approved by Parliament, shows it necessarily is so; much "stronger than in the case of counties palatine or Wales. The "people of Berwick have not jura regalia, or a complete juris-"diction within themselves, like a county palatine: they have

[1] (1759) 2 Burr. 834. [2] Ibid. 853, 854.

" no sovereign courts of the King within themselves, like Wales. " They are made a free borough, to hold in burgage, by rent. " Such a creature of law must necessarily be collected, as part " of a kingdom, and subordinate."

Again [3]: " Writs, not ministerially directed (sometimes called " prerogative writs, because they are supposed to issue on the " part of the King), such as writs of mandamus, prohibition, " habeas corpus, certiorari, are restrained by no clause in the " constitution given to Berwick: upon a proper case, they may " issue to every dominion of the Crown of England.

" There is no doubt as to the power of this court; where the " place is under the subjection of the Crown of England; the " only question is, as to the propriety.

" To foreign dominions, which belong to a prince who succeeds to the Throne of England, this court has no power to " send any writ of any kind. We cannot send a habeas corpus " to Scotland, or to the electorate: but to Ireland, the Isle of " Man, the Plantations, and, as since the loss of the Duchy of " Normandy, they have been considered as annexed to the Crown, " in some respects, to Guernsey and Jersey, we may; and " formerly, it lay to Calais; which was a conquest, and yielded " to the Crown of England by the Treaty of Bretigny."

We take this to be clear authority that while the writ will issue into any part of the territorial dominions of the Crown, it will not issue to foreign territories even if such territories belong to a prince who succeeds to the Throne of England.

It is true that great reliance was placed by the applicant upon Lord Mansfield's reference to a place which is under the " sub- " jection of the Crown of England," but we think that in its context it means no more than a place in a dominion of the Crown. Lord Mansfield was certainly not, we think, making a distinction between a place in a dominion and a place subjected to the Crown though not within its territorial dominion.

Again in *Ex parte Anderson* [4] the court issued a writ to the sheriff of the County of York in Canada and to the keeper of the gaol of Toronto in that county to bring up the body of John Anderson. In giving judgment, Cockburn C.J., after referring to the inconvenience which might result from the fact that the colony had both legislative and judicial independence, said [5]: " Nevertheless, it is to be observed that, in establishing a local " judicature in Canada, our legislature has not gone so far as " expressly to abrogate the right of the superior Courts at West- " minster to issue the writ of habeas corpus to that province; " which writ, in the absence of any prohibitive enactment, goes " to all parts of the Queen's dominions. Lord Coke, Lord Mans- " field, Blackstone and Bacon's Abridgement all agree that writs " of habeas corpus have been and may be issued into all parts of " the dominions of the Crown of England, wherever a subject

[3] 2 Burr. 853, 855, 856.
[4] (1861) 3 E. & E. 487.
[5] Ibid. 494.

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" of the Crown is illegally imprisoned or kept in custody. In " addition to these dicta of eminent authorities, we have actual " precedents of the issue of the writ, in very modern times, into " the Islands of Man, Jersey and St. Helena. Inasmuch, there- " fore, as the power of this court thus to issue the writ has been " not merely asserted as matter of doctrine, but carried into " effect in practice; and as the writ has issued even into domi- " nions of the Crown in which there is an independent local " judicature; we think that nothing short of legislative enactment " would justify us in refusing to exercise the jurisdiction, when " called upon to do so for the protection of the personal liberty " of the subject."

In the last-mentioned case the court was confronted for the first time with the situation that there were in the dominions in question competent courts having jurisdiction to issue the writ and this clearly caused the court to question whether they had any jurisdiction in the matter despite what appeared in the quoted authorities. The application, however, came before the court as an ex parte application. Further, it was necessary to act immediately, and the court issued the writ in order that the matter might be fully argued on the return. What in fact happened thereafter we do not know.

In subsequent cases some of the judges who had sat in *Anderson's* case [6] referred to the special circumstances of that case. Thus, in *In re Mansergh* [7] Cockburn C.J., in the course of the argument, said [8] that Lord Mansfield's statement that prerogative writs " may issue to every dominion of the Crown " of England " must be taken with considerable qualification.

Again, Crompton J. said [9]: " In *Re Anderson* [10] which has " been referred to, application was made for a habeas corpus to " Canada, and precedents were adduced so expressly in point " that, according to the great principle regulating these pre- " rogative writs, the party had a prima facie right to have the " writ issued. Besides, if a habeas corpus is improperly issued, " it may be questioned on the return to the writ. We did not " grant a rule to show cause in that case, because there was " immediate danger to the party. For these reasons that case " must not be taken as an authority that a habeas corpus will " go to a colony. The only other case mentioned was the *St.* " *Helena Case, Ex parte Lees* [10a]; but there, after the court had " refused to interfere, a writ of error had been allowed by the " Crown, and the habeas corpus was afterwards issued by a " judge at chambers merely as an ancillary step."

Further, Blackburn J. said [11]: " I have said there is no " authority for such a proceeding as this. The nearest is *In re* " *Anderson*,[12] where a habeas corpus was sent to Canada. But

[6] 3 E. & E. 487.
[7] (1861) 1 B. & S. 400.
[8] Ibid. 404.
[9] Ibid. 409.
[10] (1860) E.B. & E. 828.
[10a] (1860) E.B. & E. 834.
[11] 1 B. & S. 400, 411.
[12] 3 E. & E. 487.

"in that case the writ was granted because it was necessary to "act immediately, and it could be afterwards quashed if erro- "neous, added to which there were some very strong precedents "in favour of granting it. But that cannot be taken as a "decision of this court that we have a control over all juris- "dictions beyond seas in countries subject to the British Crown."

Again, in *Ex parte Brown*,[13] Blackburn J. said[14]: "It has "been established by various decisions that the writ of habeas "corpus can issue from this court to the Isle of Man. Whether "it can issue to the colonies abroad has not been expressly "decided; but this court, in a case where life and death were "depending, thought that there was sufficient doubt about the "matter to issue the writ to Upper Canada, leaving the effect of "it to be discussed afterwards. The facts there did not require "that the question should be decided; and immediately after that "case stat. 25 & 26 Vict. c. 20 was passed."

As mentioned in the last-quoted passage, it was as the result of *Ex parte Anderson*[15] that the Habeas Corpus Act, 1862, was passed. The Act was entitled: "An Act respecting the Issue of "Writs of Habeas Corpus out of England into Her Majesty's "Possessions Abroad," and by section 1 it was provided that: "No writ of habeas corpus shall issue out of England by autho- "rity of any judge or court of justice therein into any colony or "foreign dominion of the crown where her majesty has a law- "fully established court or courts of justice having authority to "grant and issue the said writ and to ensure the due execution "thereof throughout such colony or dominion."

It is, we think, clear that the expression "foreign dominion "of the crown" in that Act does not mean a foreign territory over which the Sovereign exercises dominion in the sense of power, but is referring to the territorial dominions of the Sovereign overseas.

It is true that on this construction it is not altogether easy to see what the distinction is between a colony and a foreign dominion of the Crown, and, indeed, this was referred to by Cockburn C.J. in *Ex parte Brown*,[16] *Rex* v. *Earl of Crewe, Ex parte Sekgome*,[17] a decision of the Court of Appeal, is, moreover, clear and binding authority as to the correctness of this construction, and the respondents do not seek to dispute that decision.

Pausing there, we should have thought that it was implicit in the Act of 1862 that it was not then thought that the writ would issue to foreign territories although they were in subjection to the Sovereign as opposed to being part of the Sovereign's dominions. True, protectorates were not as common as they later became, but they existed. The Ionian Islands had for long been a protectorate. Parts of India formed protectorates, and in India courts had been set up capable of issuing the writ. It is almost

[13] (1864) 5 B. & S. 280.
[14] Ibid. 294.
[15] 3 E. & E. 487.
[16] 5 B. & S. 280, 290.
[17] [1910] 2 K.B. 576; 26 T.L.R. 439.

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inconceivable that, were it thought that the writ issued to such foreign territories, Parliament would not have dealt with them in the same way as with the Sovereign's territorial dominions.

It is, however, on this case of *Ex parte Sekgome* [18] that the applicant principally relies. Sekgome claimed to be the Chief of a native tribe in the Bechuanaland Protectorate. By a proclamation made by the High Commissioner he was detained in custody in the protectorate on the ground that such detention was necessary for the preservation of peace within the protectorate. That proclamation was made pursuant to powers conferred by an Order in Council which was expressed to have been made "in exercise "of the powers by the Foreign Jurisdiction Act, 1890, or other- "wise in Her Majesty vested." The application for the writ was directed only to His Majesty's Secretary of State for the Colonies, the ground being that the proclamation was not validly made under the powers conferred by the Order in Council.

The Divisional Court discharged the rule nisi on two grounds: (1) that there were courts of law in the protectorate which had jurisdiction to deal with the question of the legality of the detention, and that under section 1 of the Habeas Corpus Act, 1862, the writ ought therefore not to issue; and (2) that the Secretary of State was not the custodian of the body of Sekgome.

In the Court of Appeal the court, consisting of Vaughan Williams, Farwell and Kennedy L.JJ., held that the Divisional Court were wrong in holding that Bechuanaland was a foreign dominion within the Act of 1862, and, further, that the Proclamation was validly made. As we read the case, those were the only two points decided by the Court of Appeal.

In the course of their judgments, however, the Lords Justices made observations on a number of other matters, including the question whether the writ would issue to the protectorate, and also the question whether the Secretary of State was a person having the custody of the body to whom the writ could be issued.

So far as the first question is concerned, Vaughan Williams L.J., after referring to *Ex parte Anderson*,[19] said [20]: "This being "so, I ask myself why, if the writ of habeas can be issued to "the King's territorial dominions, the writ should not be ordered "to go to any country or place under the subjection of the Crown "of England whenever it is suggested to the court in England "that a subject of the Crown is illegally imprisoned. The very "fact that Parliament by the Foreign Jurisdiction Act, 1890, and "the earlier Acts dealing with foreign jurisdiction is party to the "exercise by the King of extra-territorial jurisdiction shows that "the extra-territorial jurisdiction of the King is not a merely "personal jurisdiction. It is the King acting with the concur- "rence of Parliament, and although Cockburn C.J. in *Ex parte* "*Anderson* [21] says,[22] 'These writs of habeas corpus have been

[18] [1910] 2 K.B. 576.
[19] 3 E. & E. 487.
[20] [1910] 2 K.B. 576, 605.
[21] 3 E. & E. 487.
[22] 30 L.J.Q.B. 129, 132.

" ' issued and are to be issued into all the dominions of the Crown " ' of England whenever it has been suggested to the court that a " ' subject of the Crown is illegally imprisoned or illegally kept " ' in custody,' it is by no means clear that the Chief Justice " meant by dominions territorial dominions as distinguished from " dominions where the King with the concurrence of Parliament " exercises jurisdiction and, in that sense, dominion. It is plain " from the case of *Ex parte Anderson* [23] itself, and from the case " of *Carus Wilson*,[24] that the courts in England have not allowed " inconvenience which might arise in giving effect to the writ to " be a ground for refusing to issue it, or been deterred from " ordering the writ to go because of the possibility of disobedience " arising from the mode of possession. In the present case the " King has every means of enforcing obedience. The Crown, with " the concurrence of Parliament, has exercised jurisdiction " throughout the Bechuanaland Protectorate and has appointed " judges and police officers to execute their judgment, and has " established courts which the Crown contends, I think wrongly, " have power to issue a writ of habeas and enforce it; in short, " has established laws which the dwellers in the Protectorate, " whether natives or mere residents, must obey, and from which " they surely must be entitled to receive protection when injured. " Is the mere fact of absence of annexation and theoretical posses- " sion to deprive the Crown and those who are under the law from " the benefits and power of the writ of habeas."

Then he said [25]: " I am inclined to think that in a case where " the King legislates by proclamation, by virtue of an Act of " Parliament, such as the Foreign Jurisdiction Act, 1890, the " mere fact of the country not having been annexed, and being " extra-territorial, would not prevent the issue by the King's " Bench Division, or the judges of the High Court, of a writ of " habeas to run in a country governed by a system of laws created " under the powers of such an Act of Parliament, especially in a " case where the laws thus created apply to British subjects for " the time being resident in or resorting to the country in " question."

Farwell L.J. observed [26]: " Where a man who owes obedience " to laws imposed by England is imprisoned and kept imprisoned " without trial in a place maintained by England, and placed " under the control of an officer of the Crown who acts under " the orders of the Colonial Office, and who has acted in the " particular case with the assent and approval of and is supported " by the Colonial Office, I should be slow to conclude that the " Secretary of State could not be called on to make a return to " the writ."

As against this, Kennedy L.J., after referring to the affidavit

[23] 3 E. & E. 487.
[24] (1845) 7 Q.B. 984, 998.
[25] [1910] 2 K.B. 576, 608.
[26] Ibid. 618.

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of the Secretary of State in regard to the position of Bechuanaland (very similar in terms to that in the present case), said [27]: "If this be the true view, as, in my opinion, we ought to hold, "and the Bechuanaland Protectorate, including Gaberones, forms "no part of His Majesty's dominions, there is no authority, so "far as I am aware, which would justify the issue of the writ of "habeas corpus for which the appellant asks." While the views expressed by Vaughan Williams and Farwell L.JJ. in the passages quoted are obiter, that of Kennedy L.J. was clearly a ground for his decision (see his reference [28] to "other substantial "grounds" in the last sentence of his judgment).

The applicant naturally relies on these passages from the judgments of Vaughan Williams and Farwell L.JJ., and further relies on the fact, which seems undoubtedly to be true, that neither before the Divisional Court nor before the Court of Appeal was any argument put forward on behalf of the respondent that the writ would not issue in respect of a detention in a protectorate. The Crown only relied on the Act of 1862 and the validity of the Proclamation, and never raised the point now raised in the present case. This was probably for the very good reason that the issue of the writ was not sought to any custodian in the protectorate but only to the Secretary of State. But, in any event, the fact that the point was not taken does not mean that it is a bad point.

It is further to be observed that Vaughan Williams L.J., in forming the view which he expressed, was influenced to some extent by a doubt whether Cockburn C.J. in *Ex parte Anderson* [29] might not have meant by "dominions" not "territorial "dominions" but dominions where the King with the concurrence of Parliament exercises jurisdiction and, in that sense, dominion. We can see no warrant for this. He had read "dominion" in the Act of 1862 as referring to territorial dominions, and we should have thought it was clear that Cockburn C.J. in *Ex parte Anderson*,[30] quoting as he does from Blackstone, Bacon's Abridgement and *Rex* v. *Cowle*,[31] was also referring to dominion in the same sense.

In *In re Ning Yi-Ching* [32] Cassels J. followed the view expressed by Kennedy L.J.[33] in preference to that expressed by the other Lords Justices. In that case four Chinese subjects were detained on criminal charges in the British Concession at Tientsin with a view to their being handed over to the Japanese authorities. The writ was sought to prevent this being done. In the course of his judgment Cassels J., after referring to the view expressed by Kennedy L.J.,[33] is reported in these words [34]: "He had listened "in vain for a case in which the writ of habeas corpus had issued "in respect of a foreigner detained in a part of the world which "was not a part of the King's dominions or realm. In Tientsin

[27] [1910] 2 K.B. 576, 624.
[28] Ibid. 629.
[29] 3 E. & E. 487, 494.
[30] Ibid.
[31] 2 Burr. 834.
[32] (1939) 56 T.L.R. 3.
[33] [1910] 2 K.B. 576, 624.
[34] 56 T.L.R. 3, 6.

" Britain had merely acquired a lease of land and had been " granted by treaty the right to administer justice to its own " subjects. He was compelled to hold that in the circumstances " of the present case the writ could not issue."

It is true that the subjects concerned were not British subjects. On the other hand, it is clear that the writ is available to foreign subjects provided their detention is in territory in respect of which the writ will issue. Accordingly, we think that this case is at any rate authority for the proposition that the writ will not issue in respect of a detention in foreign territory.

Finally, reliance was placed by the applicant on *Calvin's Case*.[35] Sir Edward Coke,[36] after referring to the ordinary writs between subjects for debt, trespass, etc., which cannot " by any " means extend into any other kingdom, country or nation, though " that it be under the King's actual legiance and obedience," went on thus[36]: " But the other kind of writs that are mandatory, " and not remedial, are not tied to any place, but do follow " subjection and legiance, in what country or nation soever the " subject is, as the King's writ to command any of his subjects " residing in any foreign country to return into any of the King's " own dominions."

These are undoubtedly very wide words, but it is only right to point out that the matter in question in no way concerned the issue of a writ of habeas corpus. The passage quoted had reference to a writ out of Chancery under the Great Seal of England to the Mayor of " Burdeaux, a City in Gascoin," then being under the King's obedience, to certify whether one that was outlawed here in England was at that time in the King's service under him " in obsequio Regis."

In this state of the authorities, and having regard to the conflicting views expressed by Vaughan Williams and Farwell L.JJ. on the one hand and Kennedy L.J. on the other, we think that it is necessary to consider the matter by reference to first principles.

The writ of habeas corpus is a prerogative writ, namely, as this court conceives it, a manifestation of the sovereignty of the Crown and an instrument by which that sovereignty is exercised. It follows that there can be no power to issue this writ which is not derived from, or which is more extensive than, such sovereignty. The Crown is not sovereign over the common law but retains only such part of that unqualified plenitude of absolute power which constitutes sovereignty as the common law accords to the Crown. At the same time the prerogative is part of the common law of this country and exists by force and virtue of the law. Therefore, the writ of habeas corpus may lawfully be issued only in cases where the common law or some statute permits or requires the Sovereign to issue it. The Sovereign herself cannot issue the writ otherwise than through this court, which derives any

[35] (1609) 7 Co.Rep. 1.

[36] 7 Co.Rep. 1, 34.

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jurisdiction it has from her, and in which, in contemplation of law, she is always present.

The concept of sovereignty of any ruler or state is in its aspect of power essentially related to the *area* throughout which the sovereign power is lawfully exercisable, that is, is exercisable without restraint or hindrance by any competing sovereignty. It is self-evident, in the opinion of the court, that throughout the territorial dominions of the Crown—that is all territory belonging to the Crown, as distinct from territory belonging to any person who is for the time being King or Queen (which if abroad would remain for this purpose "foreign")—the Crown possesses full sovereignty provided that, or to the extent that, the common law has not imposed limitations upon that sovereignty. Thus, by the Coronation Oath the British Sovereign undertakes to "govern the people of the United Kingdom of "Great Britain and Northern Ireland and the Dominions thereto "belonging, according to the Statutes in Parliament agreed on "and the laws and customs of the Realm."

Looked at in this way, the undoubted duty of the Sovereign to protect her subjects, and the undoubted right of the subject to protection, are limited to protection in the Sovereign's dominions.

The alternative view for which the applicant contends involves the proposition that a British subject in say France or the United States of America is entitled to protection by means of the writ of habeas corpus.

Indeed, Mr. Lawson, for the applicant, does not shrink from this, maintaining that the fact that the issue of the writ may be utterly ineffective does not mean that there is no power to issue it. We cannot accede to this argument which involves a trespass on the sovereignty of other countries. Moreover, it is we think inconsistent with the authorities quoted down to and including *Ex parte Anderson*,[37] and we prefer the view expressed by Kennedy L.J. in *Ex parte Sekgome* [38] to that expressed by Vaughan Williams and Farwell L.JJ. Mr. Lawson did suggest that there might be a difference in the case of a foreign territory which was, as here, to all intents and purposes wholly under the subjection of Her Majesty, and a territory where the subjection was only partial. In our view no such distinction can or should be made. It is not for this court to inquire as to the degree of subjection which exists by reason of any treaty, grant, usage or sufferance. Mr. Lawson also contended that provided that the custodian was a Crown servant it mattered not where the body was detained. Again we can see no ground for saying that the writ will issue into foreign territory whenever the gaoler is a Crown servant.

It was for these reasons that the court ruled against the applicant on the preliminary point and dismissed the application against the Governor of Northern Rhodesia and the District Commissioner.

[37] 3 E. & E. 487.

[38] [1910] 2 K.B. 576, 608.

The case then proceeded against the Secretary of State for the Colonies, when for convenience the first point argued was whether the Secretary of State had in the circumstances a sufficient degree of control to constitute him a custodian of the body to whom the writ could issue. The applicant again relied on the case of *Ex parte Sekgome*.[39] In that case, as we have already said, the Divisional Court held that the Secretary of State was not the custodian of the body. Vaughan Williams, while not deciding the matter, expressed some doubt whether this view of the Divisional Court was correct. Thus, he said[40]: "As to the second preliminary objection on which the discharge "of the rule for a habeas was based by the Divisional Court, "namely, that Lord Crewe, to whom the rule nisi is addressed, "has not the custody of the body of Sekgome, I am by no means "satisfied, having regard to the statute 16 Car. 1, c. 10, ss. 6 "and 8, that a writ of habeas must necessarily be addressed to "the governor of the gaol or gaoler or other the official in com- "mand of the gaol, and in that sense having the actual custody "of the imprisoned person claiming to be entitled to the pro- "tection of the writ of habeas corpus. I am disposed rather to "say that the writ may be addressed to any person who has such "control over the imprisonment that he could order the release "of the prisoner."

Again, Farwell L.J. said[41]: "I must not, however, be "taken to assent to the view . . . that the Secretary of State "would not be the proper person to make a return to a writ of "habeas corpus if there had been no proclamation of December "5, 1906." Further down he says[41]: "I should be slow to "conclude that the Secretary of State could not be called on to "make a return to the writ."

Kennedy L.J., however, expressed a contrary view at page 629, where he said[42]: "I am of opinion that the Secretary of "State for the Colonies is not a person to whom such a writ "can properly be directed. It appears to me that, in the case "of the executive or administrative superior of the actual custo- "dian of a person in detention who applies for a writ of habeas "corpus, it may be right and proper that the writ, if issued, "should be directed to him either with or without the inclusion "of the actual custodian, if that executive or administrative "superior is a person whose authority the custodian must rely "upon in order to justify the detention, and to whom obedience "must be rendered by the custodian, if he orders a release. I "am inclined to think that the High Commissioner, who is the "chief executive and administrative official of the territory, is "a person to whom in this present case the writ might properly "have been directed. But I know of no authority, and cer- "tainly I can find no guidance of principle, to justify the "appellant's contention that a writ of habeas corpus in this

[39] [1910] 2 K.B. 576.
[40] Ibid. 576, 592.
[41] Ibid. 618.
[42] Ibid. 629.

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" case can properly be directed to His Majesty's Secretary of " State for the Colonies, on the ground that, if it approves itself " to his conscience and judgment, it is his duty to advise His " Majesty himself to give, or to authorise a Secretary of State " to give, instructions to the High Commissioner to withdraw " the Proclamation of December 5, 1906, and to order Sekgome's " release from detention under that proclamation."

In *In re Ning Yi-Ching*[43] Cassels J. again preferred the view of Kennedy L.J.[44] He is reported in these words: " It had further " been contended that the writ could not issue to Lord Halifax " because he was not in control of the prisoners but was only " acting in an advisory capacity. In his view that contention " was well founded, although it did not follow that he thought " that in a proper case the writ would not issue against a " Secretary of State."

Reliance was further placed by the applicant on *Barnardo* v. *Ford*,[45] and *Rex* v. *Secretary of State for Home Affairs, Ex parte O'Brien*.[46] Both those cases are authority for the proposition that the writ will issue not only to the actual gaoler but to a person who has power or control over the body. Further, in *O'Brien's* case[46] the writ was issued to the Secretary of State for Home Affairs, who had in fact handed the physical custody of the body over to the Government of the Irish Free State. It is clear, however, from the facts of that case, that the Secretary of State had not only been responsible for the original detention but that there were strong grounds for thinking that in handing over the body to the Government of the Irish Free State he had not lost all control over it. In those circumstances the court decided to issue the writ in order that the full facts could be investigated and argument heard on the return.

The position here is quite different. The restriction orders under which the applicant is detained were not made by the Secretary of State. His approval or consent were not required and there is no evidence that he took any part in the detention. No doubt the writ will issue not only to a person who has the actual custody but also to a person who has the constructive custody in the sense of having power and control over the body. Here, however, we can find no custody by the Secretary of State in any form.

We were referred to a number of provisions in the constitution of, and in other legislation in regard to, Northern Rhodesia under which the Secretary of State is specifically given certain powers, and powers which extend beyond advice. But we find it impossible to say that as a result of those powers he can be said to have the custody of the body in any sense. Apart from the powers given by such legislation the only powers of the Secretary of State arise by reason of his constitutional position under which

[43] 56 T.L.R. 3.
[44] Ibid. 6.
[45] [1892] A.C. 326; 8 T.L.R. 728.
[46] [1923] 2 K.B. 361; [1923] A.C. 603.

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he advises Her Majesty. The fact, however, that he can advise and attempt to persuade Her Majesty to cause the body to be brought up does not mean that he has such a control as will enable the writ to issue. Nor is it in our view relevant that if the writ were issued the Secretary of State might well feel it proper to influence the production of the body. Accordingly, while agreeing that there may be special circumstances in which a Secretary of State is amenable to the writ, we can find nothing in the facts of this case which would justify us in calling upon him to produce the body. That being so, we intimated our decision to that effect and this made it unnecessary to proceed further with the case.

Finally, we should mention another point that was raised, namely, that even if the Secretary of State could be regarded as the custodian of the body the writ would not issue to a custodian in this country where the original and present detention was, as in the present case, in a foreign territory. There may be some substance in the submission that the phrase "issue "the writ into . . ." properly means, as seems to have been assumed in *Sekgome's* case,[47] "issue the writ in respect of a "detention in. . . ." Having regard to the views expressed above, it is unnecessary to come to a decision on this point. We only mention it in order to state that nothing that we have said should be read as expressing the view that if, for instance, the Governor or the District Commissioner paid a visit to this country he would be amenable to the writ in respect of the detention complained of, merely by reason of his physical presence here.

Application dismissed with costs.

Solicitors: *Potel, Tattersall & Lake; Treasury Solicitor; Charles Russell & Co.*

J. F. L.

[47] [1910] 2 K.B. 576.

[QUEEN'S BENCH DIVISION.]

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July 8, 9, 13.

Gorman J.

[1959 A. No. 18.]

Libel and Slander—Libel—Privilege—Absolute privilege—Judicial Tribunal — Disciplinary Committee of Law Society — Publication of order and findings relating to complaint against solicitor—Statements implicating third party not solicitor—Whether publication protected by absolute privilege—Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 46 (1), 49—*Solicitors (Disciplinary Proceedings) Rules,* 1957 (*S.I.* 1957, *No.* 2240), *r.* 21.

The Disciplinary Committee of the Law Society constituted and

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conducted in accordance with section 46 of the Solicitors Act, 1957,[1] and the Solicitors (Disciplinary Proceedings) Rules, 1957,[2] made thereunder, inquired into allegations of professional misconduct made against a certain solicitor. Arising out of the publication of the committee's findings and order, in which they found that the allegations against the solicitor had not been substantiated, the plaintiff (who was not a solicitor) brought a libel action against the members of the committee, alleging that certain statements in the findings and order which related to him were defamatory. The defendants set up a claim for absolute privilege in respect of the publication complained of and an order was made that the claim for privilege should be disposed of before the trial of the action:—

Held, that the inquiry of the Disciplinary Committee, which was a statutory committee, was an authorised inquiry in the nature of a judicial inquiry which exercised judicial functions; accordingly, the publication of its findings and order, which occurred in the course of and formed part of its proceedings, was absolutely privileged and no action for defamation would lie in respect thereof.

Royal Aquarium and Summer and Winter Garden Society Ltd. v. *Parkinson* [1892] 1 Q.B. 431; *Copartnership Farms* v. *Harvey-Smith* [1918] 2 K.B. 405; 34 T.L.R. 414; *O'Connor* v. *Waldron* [1935] A.C. 76; 51 T.L.R. 125 considered.

PRELIMINARY POINT OF LAW.

On May 23, 1958, an application was made by a solicitor acting on behalf of the Law Society to a Disciplinary Committee of the Society set up by virtue of section 46 (1) of the Solicitors Act, 1957, asking that a certain solicitor might be required to answer allegations of professional misconduct as a solicitor. The allegations concerned the conduct of a clerk in his employ. The Disciplinary Committee was composed of the three defendants, Sir William Charles Crocker, Sir Walter Charles Norton and Sir Leslie Peppiatt. On June 12, 1958, the plaintiff, Jasper Jocelyn Addis, an inquiry agent, presented a written request to the Committee asking to be heard in denial of so much of the allegations

[1] Solicitors Act, 1957, s. 46: "(1) The Master of the Rolls shall "appoint from among members of "the Council [of the Law Society] "and such former members of the "Council as are practising as solici- "tors in England a disciplinary com- "mittee consisting of such number of "persons, not being less than three "nor more than nine, as he may "from time to time think fit, and "may from time to time remove any "member from, or fill any vacancy "in, or, subject to the limits afore- "said, increase the number of the "members of, that committee. . . . "(3) The quorum of the disciplinary "committee . . . shall for all purposes "be three: Provided that the decision "of the committee . . . on an applica- "tion or complaint may be announced "by a single member thereof. (4) . . . "the disciplinary committee, with the "concurrence of the Master of the "Rolls, may from time to time make "rules for regulating the making to "the committee, and the hearing and "determining by the committee . . . "of applications or complaints under "this Act. . . ."

S. 49: "Every order made by the "disciplinary committee . . . on an "application or complaint made to "the committee under this Act shall "be prefaced by a statement of their "findings in relation to the facts of "the case and shall be signed by the "chairman of the committee or by "some other members of the commit- "tee authorised by the committee in "that behalf. . . ."

[2] Solicitors (Disciplinary Proceedings) Rules, 1957, r. 21: "The com- "mittee shall hear all applications in "private, but shall pronounce their "findings and order in public."

in the application as he alleged falsely referred to him. His application was refused. On June 26, 1958, the Committee heard the application against the solicitor in private as provided by Rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, made pursuant to the Act of 1957 and on August 14, 1958, published their Findings and Order as provided by Rule 21. The Committee found that the allegations against the solicitor had not been substantiated. In their Findings and Order they set out certain evidence given by the respondent solicitor and certain references were made therein to the plaintiff which the plaintiff alleged were libellous of him. He accordingly issued a writ against the three members of the Committee, claiming that the Findings and Order was falsely and maliciously published by the first defendant with the knowledge and consent of the second and third defendants, and of which all three were joint authors, and the document purported to be published concerning the affairs of the Law Society, of which he was not a member. In his statement of claim he referred specifically to certain paragraphs in the Findings and Order.

In their defence the defendants claimed that the publication complained of was made by them as members of the Committee set up under sections 46 to 48 of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957, made thereunder, being their Findings, Order and determination of the application of May 23, 1958, and that the publication occurred in the course of and formed part of proceedings before a statutory tribunal exercising judicial functions and was therefore absolutely privileged. Alternatively, they pleaded that the publication was protected by qualified privilege. In his reply the plaintiff alleged malice in respect of the defence of qualified privilege.

An application made by the defendants under R.S.C., Ord. 25, r. 4, to strike out the statement of claim was allowed but Devlin J. allowed the plaintiff's appeal against that order. Ultimately, on May 11, 1959, an order was made in chambers that the following question of law, or alternatively of law and fact, should be tried as a preliminary issue before the trial of the action: Whether the publication of the words complained of was absolutely privileged, and whether the publication was made under the provisions of and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957.

The plaintiff in person.

T. G. Roche Q.C. and *Helenus Milmo* for the defendants.

The following cases (other than those referred to in the judgment) were cited in argument: *Clarke* v. *Molineux*[3]; *Rex* v. *Wiltshire Appeal Tribunal, Ex parte Thatcher.*[4]

[3] (1878) 3 Q.B.D. 239.

[4] (1917) 86 L.J.K.B. 121.

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GORMAN J. stated the facts and continued: In the course of the conduct of this case, from time to time words have been rather widely use din speaking of the body known as "the Law "Society"; and I have pointed out that the Disciplinary Committee is a body which is constituted in accordance with the Solicitors Act, 1957, and that it is quite wrong to refer to it either as "the Law Society" or as "a committee of the Law "Society."

The constitution of the statutory committee known as the Disciplinary Committee is laid down in section 46 of the Solicitors Act, 1957. [His Lordship read section 46 (1), (3), (4) of the Act and continued:] Section 47 deals with other jurisdiction conferred on the Disciplinary Committee, and section 48 deals with appeals against orders of the Disciplinary Committee. Section 49 deals with additional provisions with regard to orders of the Disciplinary Committee; and section 50 deals with the jurisdiction of the Supreme Court over solicitors, which has been referred to by Mr. Roche on behalf of the defendants in this case as "the concurrent jurisdiction."

In accordance with the power given in the Act the Solicitors (Disciplinary Proceedings) Rules, 1957, were made, which came into operation on December 31, 1957, and are in fact the rules governing the matter with which the court is concerned.

It is clear from the evidence given on behalf of the defendants that the three members of this Disciplinary Committee were properly appointed under the Act and Rules.

Criticism has been made by the plaintiff of a large number of the Rules which govern the proceedings which have been called in issue here.

After the hearing of the application in this case there were published what have been called "Findings and Orders"; and I accept completely the evidence of the secretary of the committee as to the manner of their publication. The plaintiff's case is that the findings and orders of this committee so published libelled him. He says that the defence of absolute privilege does not apply, and, further, he denies that the publication was made under the provisions and in accordance with the authority of the Act and the rules made thereunder.

Mr. Roche, at the opening of this case, quite properly accepted that the onus was upon the defendants, and it is upon the submissions which he made that I have arrived at my view in this case.

It is necessary to refer to some of the authorities which Mr. Roche and the plaintiff have brought to my notice, but I do not propose to deal with all the submissions made on all those cases. I have the cases in my mind and, if I merely refer to them, it must not be taken that I am referring only to certain passages in them.

The first case to which I was referred was *Munster* v. *Lamb*.[1]

[1] (1883) 11 Q.B.D. 588.

That case is of importance as stating, somewhat historically, what is meant by "privilege." In that case Brett M.R. said [2]: "There have been decisions with regard to three of these classes, "namely, judges, parties and witnesses, and it has been held "that whatever they may have said in the course of an inquiry "as to the administration of the law has been said upon a "privileged occasion, and that they are not liable to any action "for libel or slander." Later he said,[3] referring to *Scott* v. *Stansfield*,[4] that it has been "held that all judges, inferior as "well as superior, are privileged for words spoken in the course "of a judicial proceeding, although they are uttered falsely and "maliciously and without reasonable or probable cause. The "ground of the decision was that the privilege existed for the "public benefit: of course it is not for the public benefit that "persons should be slandered without having a remedy; but upon "striking a balance between convenience and inconvenience, "between benefit and mischief to the public, it is thought better "that a judge should not be subject to fear for the consequences "of anything which he may say in the course of his judicial "duty." There are other passages in the case to a like effect.

The plaintiff in this case has argued in person, and, in those circumstances, one is at all times supremely anxious that nothing should be omitted by way of argument by reason of the fact that a plaintiff is appearing in person; and evidence was admitted and expressions were used by the plaintiff seeming to impute the presence of bad faith on the part of the three defendants. For example, comment was made about the date referred to in the findings and orders of the issue of a writ; other expressions have been used such as "This was a phoney tribunal," and I allowed certain questions to be put and certain expressions to be used because I was told that they were relevant to the submission the plaintiff was making that the publication of the Findings and Order was not protected by absolute privilege.

Mr. Roche submitted that such evidence and such observations were irrelevant having regard to the matter to be determined in this case. I am quite satisfied that, in so far as questions were put and observations made going to the question of the bad faith of the members of this committee, they were, on the authorities, quite irrelevant and outside the matters which I have to determine. Further, I find no evidence of bad faith at all on the part of the three defendants.

The next case to which I wish to refer, which is a very important one, is *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*.[5] The headnote reads: "A meeting "of the London County Council for granting music and dancing "licences . . . is not a court within the meaning of the rule by "which defamatory statements made in the course of proceed-"ings before a court are absolutely privileged."

[2] 11 Q.B.D. 588, 601.
[3] Ibid. 603.
[4] (1868) L.R. 3 Ex. 220.
[5] [1892] 1 Q.B. 431.

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In the course of that case the principles governing the position of courts or tribunals which are concerned with matters of the kind with which I am now concerned were set out and Lord Esher M.R. said [6]: "It was argued, in the first place, on behalf "of the defendant, that he was exercising a judicial function "when he spoke the words complained of, and therefore was "entitled to absolute immunity in respect of anything he said. "It is true that, in respect of statements made in the course of "proceedings before a court of justice, whether by judge, or "counsel, or witnesses, there is an absolute immunity from "liability to an action. The ground of that rule is public policy. "It is applicable to all kinds of courts of justice; but the doctrine "has been carried further; and it seems that this immunity "applies wherever there is an authorised inquiry which, though "not before a court of justice, is before a tribunal which has "similar attributes. In the case of *Dawkins* v. *Lord Rokeby* [7] "the doctrine was extended to a military court of inquiry. It "was so extended on the ground that the case was one of an "authorised inquiry before a tribunal acting judicially, that is to "say, in a manner as nearly as possible similar to that in which "a court of justice acts in respect of an inquiry before it. This "doctrine has never been extended further than to courts of "justice and tribunals acting in a manner similar to that in "which such courts act." That statement by Lord Esher M.R. is of the first importance in considering the present case.

Fry L.J. made certain other observations and Lopes L.J. dealt with the wide question of absolute privilege. He said [8]: "The authorities establish beyond all question this: that neither "party, witness, counsel, jury, nor judge, can be put to answer "civilly or criminally for words spoken in office; that no action of "libel or slander lies, whether against judges, counsel, witnesses, "or parties, for words written or spoken in the course of any "proceedings before any court recognised by law, and this though "the words written or spoken were written or spoken maliciously, "without any justification or excuse." There were other passages to which I was referred by counsel, but I think I have set out sufficient to indicate the importance of that case.

Returning to the present case, much of the plaintiff's argument has been directed to putting forward the thesis that it is absurd to say that the test laid down by Lord Esher M.R.[9] applies in a case of this kind. To summarise his argument, he said, first, that this committee had not similar attributes to a court of justice, nor could it be said that it acted in a manner similar to that in which such courts act. He contested the whole position by saying that, accepting what was laid down by Lord Esher M.R.,[9] the facts in the present case show that the powers of this committee and the manner of setting it up are all quite different from those of a

[6] [1892] 1 Q.B. 431, 442.
[7] (1875) L.R. 7 H.L. 744.
[8] [1892] 1 Q.B. 431, 451.
[9] Ibid. 442.

court of justice, and it would be wrong to apply to this committee the protection of privilege.

The next case was *Lilley* v. *Roney*,[10] which was a case under the Solicitors Act, 1888, under which the power of the court was different from the power in the present case.

Next I was referred to *Barratt* v. *Kearns*.[11] The headnote reads: "A Commission, issued by the bishop of a diocese under "the Pluralities Act, 1838, and the Pluralities Acts Amendment "Act, 1885, to inquire into the inadequate performance of the "ecclesiastical duties of any benefice, creates a judicial tribunal, "and the occasion on which a witness gives evidence before the "Commissioners is absolutely privileged, and no action is main-"tainable in respect of evidence so given." The words of Lord Esher M.R. in *Royal Aquarium Society* v. *Parkinson*[12] were cited with approval by Collins M.R. in *Barratt* v. *Kearns*.[13] In view of what has been said by the plaintiff, I will refer to one matter in the judgment of Cozens-Hardy L.J.,[14] in which he dealt with the position that the evidence before the commissioners was not given upon oath.

Co-partnership Farms v. *Harvey-Smith*[15] is another case of interest and some little importance. That was decided by Sankey J., and it was considered in the later case of *Gerhold* v. *Baker*.[16] The headnote reads: "The local military tribunal constituted "under the Military Service Act, 1916, and the Military Service "Regulations (Amendment) Order, 1916, and the regulations "annexed thereto is a judicial body and defamatory statements "made by a member in the course of proceedings before it are "absolutely privileged."

Sankey J., who dealt with the matter I am considering in this case, said[17]: "A number of cases have been cited, but in my "opinion there cannot be any controversy upon the principle of "law which is applicable to the present case. The principle I "conceive to be this, that where a tribunal is a court of justice, "or a body acting in a manner similar to that in which a court "of justice acts, any statement made by a member thereof is "absolutely privileged and no action can be brought thereon." He then approached the question in a different manner by putting to himself this question[18]: "The question which I have to decide "is, therefore, under which category does this local tribunal fall? "Does it come within that which I may describe shortly as a "judicial tribunal, or does it come within a purely administrative "tribunal?" The plaintiff has urged before me in the present case that this committee is a purely domestic tribunal exercising administrative functions amongst the profession of solicitors, and to say that it is a judicial tribunal is wrong.

[10] (1892) 61 L.J.Q.B.(N.S.) 727.
[11] [1905] 1 K.B. 504.
[12] [1892] 1 Q.B. 431, 442.
[13] [1905] 1 K.B. 504, 510.
[14] Ibid. 511.
[15] [1918] 2 K.B. 405; 34 T.L.R. 44.
[16] [1918] W.N. 368; 35 T.L.R. 102.
[17] [1918] 2 K.B. 405, 408.
[18] Ibid. 409.

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In *Co-partnership Farms* v. *Harvey-Smith* [18] Sankey J. dealt with the matter by referring to three heads, the constitution, the functions, and the procedure of the tribunal; and in the course of the judgment, in considering the true nature of the tribunal, he directed his mind to those three matters. Having dealt with them, he came to the view that the tribunal was in fact a judicial body and that the proceedings were absolutely privileged.

The next case was *Gerhold* v. *Baker*,[19] which was a case in the Court of Appeal. Bankes L.J. said that the contention made in that case that the occasion was absolutely privileged was not well founded, and then went on to say [20]: "The law was well estab- "lished, and was accurately stated by Sankey J. in *Co-partnership* "*Farms* v. *Harvey-Smith*,[21]" and then he read out and cited with approval the words I have just read from the judgment of Sankey J. in that case.

The next case was *O'Connor* v. *Waldron*.[22] That was an inquiry under the Combines Investigation Act, and was a Privy Council case. It was held that the inquiry was not an absolutely privileged occasion. Lord Atkin quoted with approval Lord Esher M.R. in the *Royal Aquarium* case.[23] He said [24]: "In their "Lordships' opinion the law on the subject was accurately stated "by Lord Esher in *Royal Aquarium, etc.* v. *Parkinson*,[25] where "he says that the privilege 'applies wherever there is an autho- "'rised inquiry which, though not before a court of justice, is "'before a tribunal which has similar attributes. . . . This "'doctrine has never been extended further than to courts of "'justice and tribunals acting in a manner similar to that in "'which such courts act.'"

The decision in that case was against the application of absolute privilege. Lord Atkin said that the Judicial Committee negatived a contention in an earlier case, *Proprietary Articles Trade Association* v. *Attorney-General for Canada*,[25a] and went on [26]: "It seems clear from the judgment that they came to the conclu- "sion that the sections dealing with the investigations by com- "missioners and others were merely administrative machinery "for inquiry whether offences had been committed," thereby putting another facet on the distinction between a judicial inquiry and an administrative inquiry.

Other authorities were referred to later, and I shall deal with them in their order. Based on those authorities, the submission made on behalf of the defendants was that the committee was not an administrative tribunal; it was an authorised inquiry; it was by nature of a judicial inquiry; and that, as such, it was not merely performing administrative functions and it was right that its findings should be protected by absolute privilege. I do

[18] [1918] 2 K.B. 405, 409.
[19] [1918] W.N. 368; 35 T.L.R. 102.
[20] [1918] W.N. 368, 369.
[21] [1918] 2 K.B. 405, 408.
[22] [1935] A.C. 76; 51 T.L.R. 125.
[23] [1892] 1 Q.B. 431, 442.
[24] [1935] A.C. 76, 81.
[25] [1892] 1 Q.B. 431, 442.
[25a] [1931] A.C. 310; 47 T.L.R. 250.
[26] [1935] A.C. 76, 82.

not intend to go through all the references made by Mr. Roche to various sections of the Solicitors Act, 1957, and to the rules; I have them in my mind. Having regard particularly to the fact that the plaintiff conducted his case in person I shall quite shortly set out his submissions on certain sections of the Act and rules.

The submissions he made were these. He did not dissent from the principles to be applied as laid down in the authorities to which I have referred, but he argued that the tribunal had to be equivalent to a court of law, acting in a similar manner and with similar attributes. Putting that forward as a general principle, he said that on consideration of the authorities, it would not be right to say that this committee was a tribunal to which the protection of absolute privilege should be attached. He said, first, that the difficulty in the way of the defendants' case was that rule 21 of the Solicitors (Disciplinary Proceedings) Rules, 1957, provides that the committee shall hear all applications in private; and he dealt with the question of secrecy as a strong factor against the defendants' argument that absolute privilege applied. He said that in judicial tribunals the judge should be independent; the judge should take an oath. He said that the test to be applied in deciding whether or not proceedings are judicial proceedings is the rule which forbids tribunals to have a self-interest. He said that there ought not to be two possible convictions and the fact that section 50 of the Act of 1957 gives what Mr. Roche has referred to as the concurrent jurisdiction of the court over solicitors, shows that the first proceedings under the Act and Rules are intended to be purely administrative, and that it would not be right to say that here were two judicial tribunals exercising concurrent jurisdiction. The plaintiff then referred to *Leeson* v. *General Council of Medical Education & Registration*,[27] to Richard O'Sullivan on the Law of Defamation (1958) and to *Abbott* v. *Sullivan*.[28] He said that one of the fundamental principles of justice was that a person should be allowed to reply to allegations. That goes to the question of the good faith of the tribunal. It would appear that the plaintiff made an application to appear before the committee and give evidence, but that was not allowed by the committee. I have already dealt with that matter.

Continuing his argument, the plaintiff said that the question whether the committee is a domestic tribunal has to be decided on the particular facts of the particular case; and, if there is any doubt, the immunity given by the doctrine of absolute privilege should not be extended. He commented upon the fact that the committee had no power to compel witnesses; that subpoena could not be issued by the committee, but only by persons appearing before the committee. He also dealt with affidavit evidence; and with rules 27, 29, 30 and 31; and he

[27] (1889) 43 Ch.D. 366.

[28] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

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submitted that in substance this committee is not substantially judicial but is a domestic disciplinary court to be likened to that of a club. He also referred to the Evidence Act, 1938, in view of the provision in rule 34 that "the Evidence Act, 1938, "and the Evidence and Powers of Attorney Act, 1940, shall "apply in relation to proceedings before the committee in the "same manner as they apply in relation to civil and criminal "proceedings."

The plaintiff also submitted that there is another matter for consideration in that it is laid down in rule 21 that the committee "shall hear applications in private, but shall pronounce their "Findings and Orders in public"; and he contended that the committee, by having published its Findings and Order in the manner in which they were published, had gone beyond its jurisdiction. He also said that nowhere in the Act or Rules does the word "court" appear in relation to this committee, and that it was a sham court. He referred to *Seaman* v. *Netherclift*[29] in which *Allardice* v. *Robertson*,[30] a Scottish case, was not disapproved. I say no more about *Seaman* v. *Netherclift*[31] because it was discussed in a later case, *Law* v. *Llewellyn*,[32] in which it was said that the earlier Scottish case never was the law of this country.

The plaintiff referred to the Defamation Act, 1952, and summarised his case in this way: At the highest, this is an internal administrative tribunal administering discipline in private within a private profession to members of this profession, with power limited to fining, striking off the roll of solicitors or suspending their certificates, and that these matters are purely domestic matters and are not such matters as would make the committee into a court approximating to a court of law. He referred to *Allbutt* v. *General Council of Medical Education and Registration*,[33] to the Perjury Act, 1911, and said that it was dangerous to extend immunity, which would be done by saying that this committee had the doctrine of absolute privilege attached.

I do not propose to go through the rest of the plaintiff's submissions. I have his submissions, the regulations, and the Act all in my mind. The matters with which the plaintiff dealt were referred to by Mr. Roche in his reply, and I have had the benefit of a very full argument on both sides.

Bearing in mind the fact that the onus is on the defendants, I have to decide which of the contentions is right, and I have no doubt, having thought over the matter carefully, having considered the authorities and the submissions, that the submissions made by the defendants are right. Having regard to that which is submitted to me in the Order under question, I am clearly of the opinion that the publication of the words complained of was absolutely privileged, and that it was made under the provisions

[29] (1876) 2 C.P.D. 53.
[30] 1 Dow. & Cl. 495.
[31] 2 C.P.D. 53.
[32] [1906] 1 K.B. 487.
[33] (1889) 23 Q.B.D. 400.

of and in accordance with the authority of the Solicitors Act, 1957, and the Solicitors (Disciplinary Proceedings) Rules, 1957. Having regard to all the submissions made to me, I have no doubt that that is a right decision.

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ADDIS v. CROCKER.

Judgment for defendants with costs. No order as to leave to appeal. Stay of execution as to costs for 21 days and thereafter pending hearing of appeal, if notice given within 21 days. By consent stay all further proceedings in Addis v. Bateson, 1959 No. 667, pending hearing of appeal in this action or further order.

Solicitor: *Charles Russell & Co.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

D. F. MOUNT LTD. *v.* JAY & JAY (PROVISIONS) CO. LTD.

1959 *July* 1, 2, 17.

Salmon J.

Sale of Goods—Lien of unpaid seller—Transfer to buyer of document of title—Transfer by him to sub-buyer of new document of title—Goods at wharf sold to buyer for resale—Delivery order by seller in favour of buyer—Fresh delivery order by buyer on resale—Effect on unpaid seller's right of lien—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 25 (2), 47, *proviso.*

On October 3, 1957, the defendants, owners of a consignment of canned peaches in cartons lying at a wharf, sold part of the consignment to M. for resale to two of M.'s customers, agreeing that the purchase price should be paid by M. out of the moneys received from his customers. The defendants made out delivery orders in favour of M. which were indorsed by M. "please transfer to our sub-" order" and sent them to the wharfingers. On October 4, M. sold the goods to the plaintiffs and at the same time agreed to repurchase them a week later at a price which would give the plaintiffs a small profit. M. made out a fresh delivery order in the same form as those made out by the defendants in his favour, except that it was in favour of the plaintiffs and signed by him, and sent it to the plaintiffs, receiving in return their cheque for the purchase price. A week later, the plaintiffs sent that delivery order to the wharf and, in pursuance of their agreement with M., sent him a delivery order in respect of the goods made out in his favour, receiving from M. a cheque for the higher price of the goods. M.'s cheque was dishonoured, whereupon the plaintiffs cancelled the delivery order in his favour. Meanwhile, the defendants, who had not been paid, cancelled their contract with M. and requested the wharfingers to cancel the delivery orders of October 3 made out in

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his favour. M. was subsequently prosecuted to conviction for obtaining money by fraud from the plaintiffs. An interpleader summons was issued by the wharfingers to decide who was entitled to the goods:—

Held, (1) that the defendants had assented to M. reselling the goods in the sense that they intended to renounce their rights against the goods and to take the risk of M.'s honesty, and, accordingly, had assented to the resale within the meaning of section 47 of the Sale of Goods Act, 1893.[1]

Mordaunt Bros. v. *British Oil and Cake Mills Ltd.* [1910] 2 K.B. 502 applied.

Per curiam. In the absence of assent by the defendants to the resale by M., their rights as unpaid sellers under section 47 would not have been defeated by the proviso, since, on the plain language of the proviso, it applied only where a document of title had been transferred to a buyer, and the same document was then transferred by him to a person taking in good faith and for valuable consideration.

(2) That section 25 (2) of the Act did not apply only where the buyer transferred the actual document of title in his possession with the consent of the seller, for the purpose of the subsection was to protect an innocent person in his dealings with a buyer who appeared to have the right to deal with the goods, and in such cases it provided that any transfer of the goods or documents of title held by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer should be as valid as if expressly authorised by the seller; accordingly, the plaintiffs were entitled to the delivery of the goods.

Interpleader Summons.

The following statement of facts is summarised from the judgment. In September, 1957, the defendants, Jay & Jay (Provisions) Co. Ltd., merchants, bought 500 cartons each containing 48 tins of Dorchester brand Australian Standard Yellow Cling sliced peaches for 21s. 10½d. per dozen tins, part of a consignment of 4,500 cartons imported by another firm and lying in the warehouse of Delta Storage Ltd. at Delta Wharf, Greenwich. Towards the end of September the defendants' managing director told one Merrick that the goods were for sale and on October 3 he agreed

[1] Sale of Goods Act, 1893, s. 25 (2): "Where a person having bought "or agreed to buy goods obtains, "with the consent of the seller, "possession of the goods or the documents of title to the goods, the "delivery or transfer by that person, "or by a mercantile agent acting for "him, of the goods or documents of "title, under any sale, pledge, or "other disposition thereof, to any "person receiving the same in good "faith and without notice of any lien "or other right of the original seller "in respect of the goods, shall have "the same effect as if the person "making the delivery or transfer "were a mercantile agent in possession of the goods or documents of "title with the consent of the owner."

S. 47: "Subject to the provisions "of this Act, the unpaid seller's right "of lien or retention or stoppage in "transitu is not affected by any sale, "or other disposition of the goods "which the buyer may have made, "unless the seller has assented thereto: Provided that where a document of title to goods has been "lawfully transferred to any person "as buyer or owner of the goods, "and that person transfers the document to a person who takes the "document in good faith and for "valuable consideration, then, if "such last-mentioned transfer was by "way of sale, the unpaid seller's right "of lien or retention or stoppage in "transitu is defeated. . . ."

to sell to Merrick 150 cartons at 22s. per dozen tins for resale by Merrick to one of his customers. It was agreed that the profit should be divided equally between Merrick and the defendants. Later the same day the defendants' managing director also agreed to sell Merrick a further 100 cartons at 21s. 9d., also for resale requesting to be paid at once. Merrick made it plain that he would pay the defendants for the goods with the moneys he received from his customers. Two delivery orders were made out by the defendants in favour of Merrick. They were addressed to the wharfingers, dated October 3, 1957, and stated "Please "supply Messrs. L. S. T. Merrick . . . the under-mentioned goods "entered by us in the ship *Newcastle Star*. . . . Charges from "seven days to be paid by goods." The goods were described and the signature of the defendants added. The second delivery order was in precisely the same terms. Merrick added his name and address, which had been inadvertently omitted from the delivery orders, indorsed them "Please transfer to our sub-order" and sent them on to the wharfingers. They were received by the wharfingers well before November 6, 1957. The defendants never received any part of the purchase price from Merrick.

Meanwhile, on October 4, 1957, Merrick had offered to sell the 250 cartons to the plaintiffs at 20s. 6d. per dozen tins, making a total sale price of £1,019 17s. 6d. The plaintiffs agreed to buy and at the same time accepted an offer made by Merrick to repurchase the cartons a week later at a price which would give the plaintiffs a profit of 6d. a dozen tins. On October 4 Merrick gave the plaintiffs a delivery order in respect of the cartons against which the plaintiffs gave him a cheque for £1,019. That delivery order, except that it was signed by Merrick and made out in favour of the plaintiffs, was in the same form as those made out by the defendants on October 3 and sent by Merrick to the wharfingers. Merrick cashed the plaintiffs' cheque. On October 11, 1957, the plaintiffs sent the delivery order which they had received from Merrick to the wharf and on the same day sent Merrick a delivery order for the cartons. The following day Merrick sent the plaintiffs a cheque for £1,045 in pursuance of his agreement to repurchase the cartons, but the cheque was dishonoured and consequently the plaintiffs purported to cancel the delivery order made out by them in favour of Merrick.

On November 6 the defendants, who had been unable to obtain payment from Merrick, wrote to him cancelling their contract with him and wrote to the wharfingers requesting them to cancel the delivery orders of October 3, 1957, made out in Merrick's favour. Subsequently Merrick was prosecuted to conviction for obtaining £1,019 17s. 6d. by fraud from the plaintiffs.

The plaintiffs claimed that they were entitled to delivery of the cartons still in the wharf and the defendants claimed to be entitled to exercise all the rights of an unpaid seller in respect of them. The wharfingers issued an interpleader summons to decide who was entitled to the delivery of the cartons.

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S. C. Silkin for the plaintiffs.

S. H. Noakes for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 17. Salmon J. stated the facts, held that the transaction between Merrick and the plaintiffs was a sale and continued: The case raises the familiar problem—which of two innocent persons, the plaintiffs or the defendants, shall suffer for the trickery of a rogue.

The plaintiffs rely first on section 47 of the Sale of Goods Act, 1893. [His Lordship read section 47, and continued:] There is a proviso to the section, with which I shall deal in a moment. The plaintiffs contend that the defendants assented to the sale or disposition of the 250 cartons by Merrick to the plaintiffs, and thereby lost their right as unpaid sellers to the lien which they would otherwise have had upon the cartons. The defendants contend that if they assented to the sub-sale by Merrick, their assent was not an assent within the meaning of section 47, and rely upon *Mordaunt Brothers* v. *British Oil & Cake Mills Ltd.*[1] It is clear from Pickford J.'s judgment[2] in that case that the assent contemplated by section 47 means "an assent given in such cir- "cumstances as show that the unpaid seller intends that the sub- "contract shall be carried out irrespective of the terms of the "original contract" and must be "such an assent as in the cir- "cumstances shows that the seller intends to renounce his rights "against the goods." Pickford J. held that there had been no such assent on the part of the sellers.

The facts of that case are, however, very different from those of the present case. There the sellers had at no time any reason to doubt the buyer's ability to pay, and were not informed of the sub-sale until after the sale was effected. Pickford J. held that the sellers had assented to the sub-sale merely in the sense that they acknowledged its existence and the right of the sub-buyer to have the goods subject to their own paramount rights under the contract with the original buyer to hold the goods until paid the purchase price.

In the present case the defendants were anxious to get rid of the goods on a falling market. They knew that Merrick could only pay for them out of the money he obtained from his customers, and that he could only obtain the money from his customers against delivery orders in favour of those customers. In my view, the true inference is that the defendants assented to Merrick re-selling the goods, in the sense that they intended to renounce their rights against the goods and to take the risk of Merrick's honesty. The defendants are reputable merchants and I am sure

[1] [1910] 2 K.B. 502. [2] Ibid. 507.

that it was not their intention to get rid of their goods on a falling market through Merrick on the basis that if he defaulted, they could hold the goods against the customers from whom he obtained the money out of which they were to be paid.

The sale of the 250 cartons was a sale of unascertained goods. In my judgment, however, there is no reason why section 47 should not apply to unascertained goods, although I respectfully agree with Pickford J. that an inference can in some circumstances more readily be drawn against the seller in the case of a sale of specific goods than in the case of a sale of unascertained goods. I hold that the defendants assented to the sale of the cartons by Merrick within the meaning of section 47.

This is enough to dispose of the case, but I will deal briefly with some of the other points which have been canvassed. Mr. Silkin argues that even had there been no sufficient assent by the defendants, he would be entitled to succeed under the proviso to section 47. [His Lordship read the proviso and continued:] It is conceded that the plaintiffs took that delivery order in good faith and for valuable consideration. Mr. Noakes argues, however, that there has been no transfer by Merrick within the meaning of the proviso. The material words to consider are: "... where a document of title to goods has been lawfully trans- "ferred to any person as buyer, ... and that person transfers the "document to a person. ..."

It seems to me that these words confine the proviso to cases where a document is transferred to the buyer and the same document is then transferred by him to the person who takes in good faith and for valuable consideration. If Merrick had indorsed the delivery orders he received from the defendants and transferred them to the plaintiffs, the proviso would, in my judgment, have applied; but he did not do so. He sent those delivery orders to the wharf, and made out a fresh delivery order in favour of the plaintiffs.

It is strange that there appears to be no authority on this point. It is clear that the person who transfers the document of title to the buyer may originate it himself and need not have received it from some third party in order to "transfer" it within the meaning of the proviso: see *Ant. Jurgens Margarinefabrieken* v. *Louis Dreyfus & Co.*[3] In my judgment, however, on the plain language of the section, it must be that very document which is transferred by the buyer for the proviso to operate. I am conscious that this construction leads to a very artificial result, but I cannot avoid it without doing violence to the plain language of the section.

Mr. Silkin, however, also relies on section 25 (2) of the Sale of Goods Act, 1893. [His Lordship read the subsection and continued:] It seems to me that the language of this subsection

[3] [1914] 3 K.B. 40.

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is less rigorous than that of the proviso to section 47 and does not compel me to hold that the subsection applies only in those cases where the buyer transfers the same document as that of which he is in possession with the consent of the seller. I would observe that there seems to be no authority on this point.

The object of the subsection is to protect an innocent person in his dealings with a buyer who appears to have the right to deal with the goods in that he has been allowed by the seller to be in possession of the goods or documents of title relating to them. In such a case the subsection provides that any transfer of the goods or documents of title by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer shall be as valid as if expressly authorised by the seller.

In the present case the defendants sent the documents of title to Merrick with the intention that they should enable him to obtain money from his customers. With the help of these documents, which he sent to the wharf so that the wharfingers would give a reassuring reply to any inquiry that the plaintiffs might make, or at least not query any delivery order they received from the plaintiffs, Merrick managed to obtain a substantial sum of money from the plaintiffs.

In my view, the transfer by Merrick of the delivery order dated September 4 [instead of October 4] was, by virtue of section 25 (2), as valid as if expressly authorised by the defendants.

The plaintiffs further relied upon custom. The only custom I find proved is the custom for delivery orders to state on their face the number of days (usually seven) from their date after which the person in favour of whom the delivery order is made out shall be liable to the wharfinger for his charges. When the wharfinger receives the delivery order from such person and registers it in his books, he is by custom entitled, without further notice, to charge such person warehousing charges from the date specified in the delivery order. This is a narrower custom than that for which the plaintiffs contended.

Scrutton L.J. pointed out in *Laurie & Morewood* v. *Dudin & Sons* [4] that in the absence of proof of attornment by custom, there must be some sort of communication from the wharfinger to the person holding the delivery order to constitute an attornment.

In the present case the wharfingers made no communication to the plaintiffs, but there exists the custom to which I have referred. I am not sure of its relevance here, since these proceedings are not against the wharfingers. It may well be, however, that after seven days from the date of the delivery order, the wharfingers would be precluded from denying the rights, at any rate, of any innocent party from whom they had received it. As I hold, however, the clear view that the plaintiffs are entitled to succeed

[4] [1926] 1 K.B. 223, 237; 42 T.L.R. 149.

against the defendants under the Sale of Goods Act, 1893, I need discuss custom no further. There will be judgment for the plaintiffs.

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Judgment for the plaintiffs with costs. Declaration that the plaintiffs were entitled to the delivery of the cartons.

Solicitors: *Gershon, Young & Co.; Gouldens.*

E. M. W.

[CHANCERY DIVISION.]

In re SUTHERLAND, DECD.
WINTER AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

1959
June 10, 11, 19.

Danckwerts J.

[1958 S. No. 1143.]

Revenue—Estate duty—Valuation—Shares—"Contingent liabilities"—Control of company by deceased—Company in receipt of capital allowance in respect of assets leaving expenditure unallowed—Sale by company of assets after death of deceased giving rise to balancing charges — Balancing charges resulting in additional assessments to income tax and profits tax — Whether additional assessments "contingent liabilities"—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 50 (1), 55 (1) (2) (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch. II*)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 292 (1), 297.

The deceased had control of a company within the meaning of section 55 of the Finance Act, 1940, during the five years ending with his death on March 29, 1953, so that the shares which he held in the company fell to be valued for estate duty purposes by reference to the net value of the company's assets pursuant to sections 50 and 55 of the Act of 1940. The assets of the company included five ships for which, at the deceased's death, the company had received capital allowances under Part X of the Income Tax Act, 1952, leaving a sum as "expenditure unallowed" as defined by section 297 of the Act of 1952. The ships were sold during the period November, 1953, to February, 1954, for a sum greater than the expenditure unallowed, and this gave rise to balancing charges under section 292 of the Act of 1952, resulting in additional income tax and profits tax assessments at the current rates. On a summons to determine whether under section 50 (1) of the Finance Act, 1940,[1] as applied by section

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[Reported by MARGARET THOMAS, Barrister-at-Law.]

[1] Finance Act, 1940, s. 50: "(1) In determining the value of the "estate for the purpose of estate duty "the provisions of subsection (1) of "section seven of the Finance Act, "1894, as to making allowance for "debts and incumbrances shall not "have effect as respects any debt or "incumbrance to which assets of the "company passing on the death by "virtue of section forty-six of this "Act were liable, but the commissioners shall make an allowance "from the principal value of those

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55 (2) (*a*) of that Act, any allowance could be made for the balancing charge (giving rise to income tax and profits tax) in valuing the shares of the company for estate duty purposes at the deceased's death:—

Held, that the words "contingent liabilities" in section 50 (1) of the Act of 1940 were limited to a conditional event under an existing obligation, and that there could be no such liability when the events which had to occur before the charge could arise had still to happen; and that since at the date of the deceased's death the happening of the events which gave rise to the balancing charge were still wholly uncertain and depended upon a number of factors which might never exist for years, if at all, the balancing charge was not a contingent liability within the section and no allowance could be made.

In re Duffy [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756 applied.

ADJOURNED SUMMONS.

The following statement of the facts is taken substantially from the judgment: At his death on March 29, 1953, the deceased, Sir Arthur Munro Sutherland, was the owner of 98,700 £1 shares in the capital of B. J. Sutherland & Company Ltd., of which company he had had control during the five years ending with his death. Consequently, for purposes of estate duty, the shares had to be valued by reference to the net value of the assets of the company in accordance with the provisions of sections 50 and 55 of the Finance Act, 1940, instead of by reference to the then open value of the shares pursuant to section 7 (5) of the Finance Act, 1894.

The assets of the company at the date of the deceased's death included five ships, the value of which at that date had been agreed with the Estate Duty Office to be £1,150,000. The cost of these ships to the company for income tax purposes had been agreed to be £847,907, and at the date of the deceased's death the company had received capital allowances under the provisions

"assets for all liabilities of the company (computed, as regards liabilities which have not matured at the date of the death, by reference to the value thereof at that date, and, as regards contingent liabilities, by reference to such estimation as appears to the commissioners to be reasonable) . . ."

S. 55 (as amended): "(1) Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(*a*) the deceased had the control of the company at any time during the five years ending with his death . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of subsection (5) of section seven of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection. (2) For the purposes of such ascertainment as aforesaid— (*a*) the net value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with the said subsection (5), less the like allowance for liabilities of the company as is provided by subsection (1) of section fifty of this Act in relation to the assets of a company passing on a death by virtue of section forty-six of this Act, but subject to the modification that allowance shall be made for such a liability as is mentioned in paragraph (*b*) of that subsection unless it also falls within paragraph (*a*) thereof. . . ."

of Part X of the Income Tax Act, 1952, leaving "expenditure "unallowed" (as defined by section 297 of the same Act) of £290,749. In the event of a sale of the ships for a sum in excess of the amount of such expenditure unallowed, under section 292 of the Income Tax Act, 1952, a balancing charge would be imposed of an amount equal to such excess, resulting in an assessment to income tax and profits tax at the rates appropriate to the year in respect of which such assessment was made.

The ships were in fact sold between November, 1953, and February, 1954, for sums amounting in the aggregate to £1,070,505. This gave rise to balancing charges to £548,318, resulting in an additional income tax assessment on the company for the year 1953–54 at 9s. in the pound, amounting to £246,743 2s., and an additional profits tax assessment at the rate of 22½ per cent. for the chargeable accounting period ending on March 31, 1953, amounting to £123,371 11s. The aggregate of this additional tax liability was £370,114 13s.

The executors of the deceased took out this summons to determine whether, on the true construction of section 50 (1) of the Finance Act, 1940, as applied by section 55 (2) (*a*), any allowance should be made in valuing for estate duty at the deceased's death the shares on the basis of the net value of the assets of the company by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a sale of the ships by reason of and up to the amount of the capital allowances received by the company.

Sir John Senter Q.C. and *R. A. Watson* for the executors.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Commissioners of Inland Revenue.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

June 19. DANCKWERTS J. read the following judgment. [His Lordship stated the facts as set out above and continued:] The question raised by the originating summons is whether in valuing the assets of the company at the date of the deceased's death any deduction ought to be made in respect of a claim for additional income tax and profits tax which might arise upon a sale of the ships for an amount in excess of the expenditure unallowed in the manner in which such event afterwards happened.

The answer depends upon the true construction of sections 55 and 50 of the Finance Act, 1940. Section 55 must be read first. [His Lordship read sections 55 and 50 and continued:] The value of the assets of the company ascertained according to section 55 is to be the value of all the shares and debentures of the company so that the value of the shares passing on the death of the

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deceased represents, of course, an appropriate fraction of the total value.

It is unnecessary to refer to the well known provisions of section 7 (1) and (5) of the Finance Act, 1894. The whole question turns, I think, upon the construction of the words "contingent liabilities" in section 50 of the Act of 1940. In the Oxford New English Dictionary (Murray) among the meanings given to the word "liability" are the following: "1. Law. The "condition of being liable or answerable by law or equity. "3. That for which one is liable; esp. pl. the debts or pecuniary "obligations of a person or company." And for the word "liable": "1. Law. Bound or obliged by law or equity, or in "accordance with a rule or convention; answerable for; legally "subject or amenable to."

Under the word "contingent" are given the following meanings: "2. Liable to happen or not; of uncertain occurrence "or incidence. 8. Dependent for its occurrence or character on "or upon some prior occurrence or condition. 9. Law. Depen- "dent on a pre-contemplated probability; provisionally liable to "exist or take effect; conditional; not absolute."

At the date of the deceased's death there clearly was no presently existing liability for any balancing charge or the income tax and profits tax liabilities which would result from the balancing charge. But the section refers to liabilities which have not matured at the date of the death and to contingent liabilities. Liabilities which have not matured are obviously liabilities which are then binding upon the company, but which will not become payable until a future date. Contingent liabilities must be something different from the first-named liabilities. The liability of the company to a balancing charge and the consequential income tax and profits tax could arise from the capital allowances which had been received by the company if there was a sale of the ships, if the sale moneys exceeded the amount of the expenditure still unallowed, if the charge for a balancing charge and income tax and profits tax still remained part of the taxation for the relevant year, and if the company continued to carry on business; and the rate of income tax and profits tax would depend upon the Finance Act regulating the rates of taxation for the relevant year. All these are contingencies, and an event does not seem to me to be less a contingency because, as in the case of the sale of the ships, it is one which is brought into being at the will of the person who will become liable to the charge, and not independently of his will or decision. But if the liability at the date of the deceased's death *is* a contingent liability within the meaning of section 50 of the Finance Act, 1940, it is not, as it seems to me, to be measured by the amount of the income tax and profits tax which in fact became assessable upon the company by reason of the actual sale by the company of the ships in 1953–54. It is something which has to be estimated at the deceased's death, and

presumably without knowledge of the facts of the sale which actually took place in 1953–54.

With so many contingencies of unknown result affecting the matter, the proper estimation (which is referred to the commissioners) is obviously a matter of extreme difficulty. But the even more difficult contingencies of the rates of income tax and the circumstances of the relevant taxpayer were not considered beyond the abilities of a jury in deciding the amount of damages for personal injury by the House of Lords in *British Transport Commission* v. *Gourley*.[1]

I can see that, viewing the matter from the date of the deceased's death, when there might not be a sale of the ships for years, or, I suppose, at all, the price must be quite unknown, and as the continuance of the provisions for balancing charges, and the rates of income tax and profits tax are matters dependent upon the will of Parliament, the estimation of the prospective liability (if any) must be a matter of the greatest difficulty. But I have difficulty in seeing why these are not all contingencies of one sort or another and why the liability which might arise therefrom is not a contingent liability.

The substantial point which remains is whether I am bound by the decision of the Court of Appeal in *In re Duffy*[2] nonetheless to reject the contentions of the plaintiff executors in the present case and give judgment for the defendants. In *In re Duffy*[2] the point was whether income tax payable at the standard rate for the financial year 1943–44, assessed by reference to the profits of the year 1942–43, during which the deceased died on June 24, 1942, was a contingent liability of the deceased's company for the purposes of sections 50 and 55 of the Finance Act, 1940 (the same sections as those which are relevant in the present case). Lord Greene M.R. said[3] that once the point in the controversy was properly appreciated, he did not find that it was a particularly difficult one to deal with. I think that I appreciate the point in the present controversy sufficiently, but I do not find the solution particularly easy.

The argument in favour of allowance against the company's assets of the amount of the income tax assessment is stated by Lord Greene as follows[4]: "What is said is this: The profits "earned in the year during which the deceased died will form "the basis of the assessments for income tax in respect of the "next year. Therefore, the profits which are earned during that "year in which the deceased died carry, so to speak, in gremio "a liability for tax in respect of the financial year which will "only begin after the death of the deceased."

Lord Greene treats the question as one of the construction of the word "liabilities." He says[5] (referring to section 50 (1)

[1] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[2] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756.

[3] [1949] Ch. 28, 32.

[4] Ibid. 33.

[5] Ibid. 36.

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of the Finance Act, 1940): "The words in brackets deal with "two sub-classes of liabilities. Neither of those sub-classes can "go beyond the head class of liabilities. In other words, in order "to fall within one or other of those two sub-classes, a thing "must be a liability. Those two sub-classes are as follows: "firstly, the liabilities 'which have not matured at the date of "'the death.' That has a very simple meaning. The other "class is as regards 'contingent liabilities,' which are to be "valued by reference to an estimate. In that context what I "have to ask myself is this: What is the meaning of 'liabilities,' "and, in particular, what is its meaning in the phrase 'contin-"'gent liabilities'? It is to that simple point that this "controversy comes down."

Then, after referring to certain arguments of counsel on the nature of income tax, Lord Greene puts his conclusion in these words [6]: "But, quite apart from all these considerations, taking "the construction of these words, I find it impossible to give "them a meaning extending beyond what is always perfectly "ascertainable without any doubt whatsoever, namely, an "existing legal liability, actually existing in law at the relevant "date. The words cannot be stretched so as to cover something "which in a business sense is morally certain and for which "every business man ought to make provision but which in law "does not become a liability until a subsequent date." Somervell and Evershed L.JJ. concurred in this judgment.

I must confess that I feel doubt whether Lord Greene's judgment did not concentrate unduly on the word "liability" to the exclusion of the qualifying (and, I should have thought, extending) adjective "contingent," but I think I can appreciate what was in his mind. Some of the meanings attributed to the word "contingent" in the dictionaries certainly suggest that a possibility would satisfy the intention of the word. But Lord Greene plainly suggests that the meaning should be limited to a conditional event under an existing obligation (in the same way perhaps, for instance, in the case of rights that an interest under the will of a deceased person may be contrasted with the mere spes successionis of the heir of a living person). Anyhow, as it seems to me, it is a definite construction put by the Court of Appeal upon the material section on which the present case depends, and I must, I apprehend, treat it as binding upon me.

It was argued that the language of the Court of Appeal in *In re Duffy* [7] was quite inconsistent with that of the House of Lords in *British Transport Commission* v. *Gourley*.[8] But there does not appear to have been any consideration of *In re Duffy* in the latter case, and the subject-matter was, of course, different. I do not think that I can regard the decision of the Court of

[6] [1949] Ch. 28, 37.
[7] [1949] Ch. 28.
[8] [1956] A.C. 185.

Appeal in *In re Duffy* as no longer binding, and I feel that I am compelled to apply the interpretation which the Court of Appeal put upon the expression "contingent liabilities."

A great deal of the argument before me was devoted to the question which were the sections which imposed the charge, and as to the distinction between liability and assessment. Reliance was placed on passages in *Inland Revenue Commissioners* v. *Wood Bros. (Birkenhead) Ltd.*,[9] *Kirkness* v. *John Hudson & Co. Ltd.*,[10] *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[11] and *Whitney* v. *Commissioners of Inland Revenue*,[12] as well as *British Transport Commission* v. *Gourley*.[13] I did not find, however, any of the passages, when lifted out of the different contexts in which they appeared, in any way conclusive in regard to the question to be decided in the present case.

Further, the existence at the death of the deceased of sections (in the present case section 55) which will impose a charge in certain events does not really carry the problem any further. It is still necessary that the events shall occur before the charge under the statute can come into existence. Thus one is driven back to the basic question: Is it proper to say that there is a contingent liability under the charging sections when the events which must occur before the charge can arise have still to happen, and such happening is still wholly uncertain and is dependent upon a number of factors which may never exist for a number of years, if at all?

The Court of Appeal have said that in such a situation there is no liability, even of a contingent nature, and, as I see it, their view is binding upon me and I must follow it. If I have misinterpreted the view of the Court of Appeal in this matter, the position will have to be corrected in a higher court. I must answer the question asked in the summons by saying that no allowance ought to be made.

Order accordingly.

Costs for the defendants.

Solicitors: *Hyde, Mahon & Pascall for Keenlyside & Forster, Newcastle-upon-Tyne; Solicitor of Inland Revenue.*

[9] [1959] 2 W.L.R. 47; [1959] 1 All E.R. 53.

[10] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345; 36 T.C. 28.

[11] [1957] A.C. 32; [1956] 2 W.L.R 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

[12] [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88.

[13] [1956] A.C. 185.

[CHANCERY DIVISION.]

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May 5, 6, 7, 8;
July 21.

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Revenue —Income tax — Employment — Medical specialist — National Health Service—Part-time appointment with regional hospital board —Assessment—Whether appointment an "office"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schs. D, E* (*as amended by Finance Act,* 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 18); *Income Tax Act,* 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 122, 156.

The National Health Service Act, 1946, "An Act to provide "for the establishment of a comprehensive health service for "England and Wales and for purposes connected therewith," by section 3 (1), laid upon the Minister of Health the duty to provide, inter alia, the services of specialists, whether at a hospital, a health centre, a clinic, or at the home of the patient. The Minister carried out his duties by delegating certain of them to Regional Hospital Boards which, subject to regulations and directions made by the Minister, administered the hospital and specialist services in their area and appointed the officers required to be employed for those purposes. The Act provided that such officers should be officers of the board and that their remuneration, subject to regulations, was to be determined by the board; two categories, consultants and senior hospital medical (or dental) officers, constituted the "specialists" of the service. Specialists might hold whole or part-time appointments; they might have private patients, undertake "locum tenens" work in respect of a National Health Service appointment and lecture to students. In addition to their ordinary duties they might make domiciliary visits to patients within the area laid down in their contract; for such visits a specialist took his own apparatus to the patient's home, examined him and reported to the general practitioner.

Five specialists holding part-time appointments under the National Health Service appealed to the special commissioners against, inter alia, certain assessments to income tax under Schedule E on the ground that in computing their profits or gains for the relevant years their remuneration in respect of such appointments, and payments made in respect of domiciliary visits to patients under the service, had been wrongly included and should have been assessed under Case II of Schedule D. The commissioners found that the part-time appointments were offices within the

[Reported by MARGARET THOMAS, Barrister-at-Law.]

meaning of Schedule E to the Income Tax Act, 1918,[1] and section 156 of the Income Tax Act, 1952, and that the remuneration therefrom accordingly came under the dominance of that schedule, but that since the appointments were a necessary part of the exercise of their profession by the specialists and merely incidental thereto the remuneration fell to be assessed as part of their professional earnings under Schedule D.[2] On appeal by the Crown:—

Held, (1) that a specialist carrying out his duties under a part-time National Health Service appointment was not rendering services as a private professionally skilled and qualified individual to a private citizen, but was the instrument of the Minister of Health in carrying out his duty to provide the service; he was thus carrying out a public function and was the holder of a public office, the profits or gains from which fell to be assessed under Schedule E, and the expenses attendant thereon must be deducted under the rules applicable to that schedule. The fact that the exercise of that office might be described as an incident of the profession of a medical specialist did not alter the position; a specialist when carrying out his National Health Service duties was performing the duties of an office the profit or gains from which fell to be assessed under Schedule E, and when attending private patients was exercising his profession, the profits or gains from which were to be assessed under Schedule D.

(2) That the making by a specialist of domiciliary visits within the area of the board concerned was part of the exercise of the public office held under the Act, and that in carrying out the work of a locum tenens in respect of a National Health Service appointment a specialist was for the time being exercising the functions and holding the public office of another, so that the remuneration from those offices also must be assessed under Schedule E, and the

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[1] Income Tax Act, 1918, Sch. E: "Tax under Schedule E shall be charged in respect of every public office or employment of profit. . . . 6. The tax shall be paid in respect of all the public offices and employments of profit . . . hereinafter respectively described, namely . . . (*k*) all other public offices, or employments of profit which are of a public nature."

Finance Act, 1922, s. 18: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E, and the rules applicable to that schedule shall apply accordingly subject to the provisions of the Act."

Income Tax Act, 1952, s. 156: "The Schedule referred to in this Act as Schedule E is as follows—Schedule E: 1. Tax under this Schedule shall be charged in respect of every public office or employment of profit. . . . 2. Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule."

[2] Income Tax Act, 1918, Sch. D, para. 1: "Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing— . . . (ii) to any person . . . from any trade, profession, employment, or vocation. . . ."

Income Tax Act, 1952, s. 122: "The Schedule referred to in this Act as Schedule D is as follows—Schedule D: 1. Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing— . . . (ii) to any person . . . from any trade, profession, employment or vocation . . . Provided that profits or gains arising or accruing to any person from an office, employment or pension shall not, by virtue of this paragraph, be chargeable to tax under this Schedule unless they are chargeable to tax under Case V of this Schedule or under Chapter IV of Part VII of this Act."

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expenses attendant thereon deducted under the rules applicable to that schedule. The commissioners, accordingly, had come to a wrong decision.

Macmillan v. *Guest* [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190; *Razzel* v. *Snowball* [1954] 1 W.L.R. 1382; [1954] 3 All E.R. 429, and dictum of Lord Atkin in *Fry* v. *Salisbury House Estate Ltd.* [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266 applied.

Davies v. *Braithwaite* [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198, and *Household* v. *Grimshaw* [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366 distinguished.

APPEALS from the Commissioners for the Special Purposes of the Income Tax Acts.

The first and main appeal was in respect of Dr. Harold Leslie Ross, who for the relevant years of assessment held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board. The second appeal was in respect of Dr. Arnost Hirtenstein, who held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board, and also undertook certain lecture work to nurses. The third appeal was in respect of Dr. Alfred Gordon Marshall, who held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth appeal was in respect of Dr. Herman Peter Tarnesby, who held two part-time appointments as a psychiatrist, one with the North West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of National Health appointments. The fifth appeal was in respect of Charles Edwin Drew, who held three appointments as a consultant thoracic surgeon, one with the Westminster Hospital, a teaching hospital, another with the South West Metropolitan Regional Hospital Board, and the third as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum tenens work in respect of National Health appointments and in addition lectured to medical students.

The consultants all had private patients.

The following are extracts from the case stated, as amended, in respect of Dr. Ross; the other cases, which raised similar questions of principle, are not set out.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on March 23, 26, 27, 28, and April 23, 24, 25, 1956, and April 23, 1957, Dr. Harold Leslie Ross (hereinafter called "the respondent") appealed against assessments to income tax under Schedule E for the years 1951–52, 1952–53, and 1953–54, and under Schedule D for the years 1952–53, 1953–54, and 1954–55.

The grounds of the appeal were, first, as regards the assessments made under Schedule E, that in computing the profits or

gains of the respondent for the accounting periods relative to the assessments under appeal his remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits had been included contrary to law, and that the assessments should be reduced accordingly, and, secondly, as regards the assessments made under Schedule D, that the assessments being estimated should be adjusted in accordance with the accounts of the profits or gains of the respondent for the accounting periods relative to the assessments. . . .

3. The following conclusions of mixed fact and law were agreed between the parties and admitted at the hearing of the appeal: (1) The National Health Service Act, 1946 ("the Act") laid upon the Minister of Health ("the Minister") the duty to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness; and for that purpose the Minister was under a duty to provide or secure the effective provision of services in accordance with the Act [s. 1 (1) (2)]. . . .

(3) The services provided were the following: (i) hospital and specialist services [Part II]; (ii) health services provided by local health authorities [Part III]; (iii) general medical and dental services, pharmaceutical services and supplementary ophthalmic services [Part IV]; and in addition Part V of the Act contains special provisions as to Mental Health Services. . . .

(5) The Act required the Minister as from the appointed day (July 5, 1948) to provide throughout England and Wales, to such extent as he considered necessary to meet all reasonable requirements, accommodation and services of the following descriptions: (a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of a hospital; (c) the services of specialists, whether at a hospital, a health centre provided by a local health authority under Part III of the Act, or a clinic, or, if necessary on medical grounds, at the home of the patient. Accommodation and services so provided are referred to as "hospital and specialist services" [s. 3 (1)]. . . .

(11) Subject to the exercise of functions by hospital management committees, it was the duty of a regional hospital board, "subject to and in accordance with regulations and such direc- "tions as may be given by the Minister, generally to administer "on behalf of the Minister the hospital and specialist services "provided in their area," and, in particular, to appoint officers required to be employed at or for the purposes of any hospital providing such services, other than a teaching hospital [s. 12 (1)]. . . .

(14) It was the duty of the board of governors of every teaching hospital, in accordance with regulations and such directions

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as might be given by the Minister, generally to manage and control the hospital on behalf of the Minister, and in particular to appoint officers required to be employed at or for the purposes of such hospital [s. 12 (3)]. . . .

(17) The qualified medical staff of the hospital service was divided into a number of different categories, two of which were: (a) consultants; (b) senior hospital medical (or dental) officers. These two categories constituted the " specialists " of the service. The other categories were mainly of junior grades generally consisting of whole-time officers, many of whom were required to reside at the hospitals where they worked.

(18) The Act provided that all officers employed for the purposes of any hospital providing hospital and specialist services, other than a teaching hospital, should be officers of the regional hospital board for the area in which the hospital is situated; that all officers employed for the purpose of a teaching hospital should be officers of the board of governors of that hospital; and that the remuneration of all such officers should, subject to regulations, be determined by the regional hospital board or the board of governors concerned [s. 14 (1)]. By section 79 (1) of the Act the word " officer " included servant.

(19) Some of the consultants in the service held whole-time appointments. The great majority of the consultants, however, only held part-time appointments. . . .

(23) Before any formal regulations were made under section 66 of the Act, there had been negotiations between the Minister and the professional negotiating committee concerned, and between whom terms and conditions of service were worked out for hospital medical and dental staff based on the recommendations contained in what came to be known as the " Spens Specialist Report," and eventually the Minister published a printed document, dated June 7, 1949, containing such terms and conditions. That document was described as " Terms and Conditions of Service of " Hospital Medical and Dental Staff (England and Wales) " (" the Terms of Service "). [Ministry of Health Report, 1950, Command 8342, p. 14]. . . .

(25) It was not until 1951 that formal regulations under section 66 of the Act were made by the Minister. Those were called the National Health Service (Remuneration and Conditions of Service) Regulations, 1951 [S.I. 1951, No. 1373], and were in very general form. . . .

(27) The Terms of Service set out the method by which the remuneration of the part-time consultant should be calculated. The average amount of time required to perform the duties attaching to the post was first assessed in terms of hours per week. That aggregate number of estimated hours per week was then divided by $3\frac{1}{2}$, so as to give a figure of " notional half-days " (also called " sessions ") per week for which the consultant would be employed, and the remuneration of the part-time consultant

was then obtained. . . . The Terms of Service provided for the fees payable for exceptional consultations, and for fees payable for locum tenens work.

(28) The Terms of Service related to remuneration in respect of domiciliary consultations. . . . Domiciliary work was quite independent of and different from the part-time consultant's work under his ordinary appointment with the regional hospital board. The domiciliary consultation was a visit by the consultant to a patient in his home at the request of the patient's general practitioner. . . .

(30)–(34) The Terms of Service dealt with private practice and retention of fees, and provided for retirement age. Normally that was 65, but there were provisions for extending it to 70, and for continuing in an honorary capacity. They gave the consultant the right to appeal to the Minister, if he thought the appointment was unfairly terminated, and dealt with the question of leave: part-time consultants were entitled to leave on the specified basis. They also gave the right to reimbursement of travelling, subsisting and other expenses to the specified extent.

(35) A part-time consultant (whether honorary or paid) on the staff of a hospital providing hospital and specialist services might make arrangements for the treatment of his private patients at that or any other such hospital, and . . . the hospital made the special accommodation available for that purpose [s. 5 (2)]. . . .

(45) All general practitioners were assessed under Case II, Schedule D, in respect of their general practice in the service.

4. Apart from and in addition to the foregoing, the special commissioners found the following facts admitted or proved on the evidence adduced at the hearing of the appeal: (1) In the medical profession the normal way in which an individual became recognised as a "consultant" was by being appointed to the staff of a hospital as physician or surgeon (or a corresponding post). This was a recognition of his professional ability. The work of a consultant was the practice of his own special branch of medicine on cases sent to him by other doctors. Before the introduction of the National Health Service it was usual for consultants to have a private practice as such apart from their hospital appointments. Except in the case of hospitals run under the Public Health Act, 1936, and ex gratia payments from voluntary hospitals, it was not usual for consultants to receive payment for their hospital work. After the introduction of the National Health Service, consultants taking part in this service were paid in the manner hereinbefore referred to, but it remained the usual practice for part-time consultants to have a private practice as such, apart from their hospital appointments, though the volume of private work throughout the country declined. Apart from geographical limitations, consultants were free to take up part-time appointments with different regional hospital boards, payment being received from each in accordance with the

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amount decided by the Central Bureau, London, but subject to the maximum remuneration for part-time appointments laid down in the Terms and Conditions of Service of Hospital, Medical and Dental Staff (England and Wales).

(2) Both before and after the introduction of the National Health Service, the holder of an appointment on the staff of a hospital obtained definite advantages therefrom, in that it gave him professional prestige, and provided him with plenty of opportunity for developing and perfecting his skill. After the introduction of the National Health Service only those consultants who took part in that scheme were permitted to take a patient into a private bed in any of the hospitals under the Ministry of National Health and thus obtain for him the services of the nursing staff and the use of the apparatus in the hospital. The same facilities were available at only a few nursing homes.

(3) At all material times the respondent was a registered medical practitioner in the United Kingdom, specialising in radiology. He was a Bachelor of Medicine, a Bachelor of Surgery, a Master of Radiology, and held a diploma in Medical Radio Diagnosis.

(4) On March 1, 1950, he commenced a private practice as a consultant radiologist.

(5) On March 1, 1950, the respondent obtained a part-time appointment as a consultant radiologist under the Birmingham Regional Hospital Board to the hospital of St. Cross, Rugby, the Keresley Hospital and the Gulson Hospital. The terms of the appointment were set out in a letter which was dated November 9, 1950, and contained a schedule detailing the hospitals and hours of work required at each. At the end of the letter a form of acceptance was attached which the respondent signed. Also attached to the letter was a form of undertaking in connection with domiciliary consultations which the respondent signed. . . .

(6) The respondent interviewed his private patients either at his consulting rooms, or at any of the hospitals to which he was attached, or in nursing homes, or in their own private homes. At his consulting rooms at his house the respondent kept for professional purposes a desk, filing cabinets, portable X-ray apparatus, screens, a typewriter, telephone and a library of books of reference. He also had a dark room for developing films. The respondent also had a car which he used in his professional duties. When the respondent required the use of hospital apparatus and film for a private patient in hospital he paid a fee of two guineas.

(7) The respondent also had need of and employed secretarial assistance in his private practice and also in connection with his undertaking to carry out domiciliary visits. The services of a secretary were also useful in connection with his hospital work and for receiving telephone calls from the hospitals. . . .

(8) Upon taking up his appointment under the Birmingham Regional Hospital Board, the respondent contacted the consultant

radiologist at the hospital of St. Cross, Rugby, and arranged with him the best way of covering the radiological work at Rugby. It was agreed between them that the respondent should do two sessions at Gulson Hospital and seven sessions at St. Cross Hospital, but that the work at Keresley Hospital should be done by the other consultant radiologist in Rugby and by the consultant radiologist in Coventry. No permission was sought from or given by any of the administrative officials of the hospital for this arrangement.

(9) The respondent was solely responsible for the radiological work at St. Cross Hospital, Rugby, which he attended on four mornings a week. During this time he attended to National Health Service patients . . . and also to private patients, either in the paying bed section of the hospital, the private wing, or private out-patients. . . .

(10) At Gulson Hospital three consultant radiologists, including the respondent were responsible for the radiological work which they arranged between them to their mutual convenience so as to dovetail in their work at the hospital. . . . The respondent was entirely responsible for deciding what radiological work he should do and how he should do it.

(11) A domiciliary visit was usually inaugurated by a telephone message from a general practitioner to the respondent's house which was received by his secretary. Upon receipt of such message the respondent loaded his portable X-ray apparatus into his car and proceeded to the place of consultation. After taking the necessary pictures the respondent returned either to hospital or to his consulting rooms and proceeded at once to develop the film himself (usually in hospital). He usually informed the general practitioner concerned of the result the same day. The film used for domiciliary visits was provided by the Ministry of Health, and that used for private patients by the respondent himself. Domiciliary visits were usually undertaken between 5.30 and 8.30 p.m., i.e., after the afternoon session at a hospital, and at a time when general practitioners could very often be present. For each domiciliary visit carried out, up to a maximum of 200 in any year, the respondent received a fee of four guineas plus two guineas for the use of his apparatus; the latter fee being payable only once per patient. . . .

5. It was contended on behalf of the respondent: (i) that the activities of the respondent as a consultant radiologist constituted the carrying on of a profession and the entirety of the profits and gains arising from those activities was therefore assessable to income tax under Case II of Schedule D and not otherwise; (ii) that the part-time appointments held by the respondent were not offices or employments within the meaning of Schedule E; (iii) that if any such part-time appointment was an office or employment within the meaning of Schedule E the tenure thereof was an incident in the course of the carrying on by the respondent

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of his profession as a consultant radiologist, and any remuneration arising therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof for the purposes of assessment to income tax under Schedule D; and, accordingly, (iv) that the assessments under Schedule E should be reduced accordingly, and the assessments under Schedule D should be adjusted to correspond with the figures shown in the respondent's accounts; and in the alternative (v) that if the assessments under Schedule E were in principle well founded, the outgoings shown in the respondent's accounts were allowable deductions in computing the profits or gains of the respondent assessable under Schedule D, in so far as they were not allowable as expenses under Schedule E; and, in any event, (vi) that any profits or gains arising to the respondent in respect of domiciliary visits were proper to be regarded as profits or gains of his profession assessable under Schedule D and not as emoluments of offices or employments assessable under Schedule E.

6. It was contended on behalf of the appellants: (i) that the respondent's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included in the assessments in question made upon him under Schedule E; (ii) that the payments made to the respondent by the said board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by the respondent in respect of an office or employment of profit within the meaning of Schedule E; (iii) that the respondent exercised a profession or vocation in respect of which he was assessable under Case II, Schedule D, only in so far as he carried on a private practice as consultant radiologist outside the National Health Service; (iv) that in computing the profits of the respondent under Schedule E in respect of his said part-time appointment only such expenses as were allowable under the said Schedule and the rules applicable thereto were deductible, and in computing the profits or gains of the respondent under Case II, Schedule D, in respect of his said private practice only such expenses as were allowable under the schedule and case and the rules applicable thereto were deductible, and the outgoings shown in the respondent's accounts fell to be dealt with accordingly; (v) that the payments made to the respondent under the National Health Service Scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Schedule E and not as profits or gains assessable under Schedule D; and (vi) that the appeal should be dismissed and the assessments confirmed or adjusted in accordance with the appropriate figures.

7. The commissioners gave their decision in principle on July 31, 1956, in the following terms: . . .

(4) Upon consideration of the evidence adduced and arguments

addressed to us on behalf of the parties, we find that each of Dr. Ross' part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office, and the remuneration derived therefrom, together with the fees received in respect of domiciliary consultations carried out in connection therewith was the profit of an office within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952. It is immaterial for the purpose of determining this appeal to find whether or not such office is a public office within the meaning of the charging rule of Schedule E of the Income Tax Act, 1918, and section 156 of the Income Tax Act, 1952, and we express no opinion. Furthermore, finding as we do that the part-time appointments which Dr. Ross held as aforesaid constituted the holding of offices, it is unnecessary for the purpose of determining this appeal to find whether or not the hospital appointments also constituted an employment within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952, and again we express no opinion. We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general.

(5) We next have to decide the correct method of assessing the profits or gains which Dr. Ross derived from his hospital appointments. Having regard to the decision in *Fry* v. *Salisbury House Estate Ltd.*[3] and, in particular, to the judgment of Lord Atkin,[4] it would seem, prima facie, that remuneration received by Dr. Ross from his various hospital appointments, being, as we have found, derived from the holding of offices, must come under the dominance of Schedule E, to the exclusion of other Schedules, neither Dr. Ross nor the Crown having any option in the matter. We have, however, to consider what effect, if any, the decisions in the cases of *Davies* v. *Braithwaite*[5] and *Household* v. *Grimshaw*[6] have upon this view. In the first place, the *Salisbury House Estate* case[7] can, we think, be distinguished because it dealt only with the mutual exclusiveness of Schedules A and D, whereas the cases of *Braithwaite*[8] and *Household*[9] were concerned with professional earnings falling within Schedule D and Schedule E. In the second place, the *Braithwaite*[10] and *Household*[11] cases were decided after the decision in the *Salisbury House*

[3] [1930] A.C. 432, 457: 46 T.L.R. 336; 15 T.C. 266.
[4] Ibid.
[5] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.
[6] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.
[7] [1930] A.C. 432.
[8] [1931] 2 K.B. 628.
[9] [1953] 1 W.L.R. 710.
[10] [1931] 2 K.B. 628.
[11] [1953] 1 W.L.R. 710.

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Estates case [12] had been given and we are, therefore, entitled to assume that they are reconcilable with the latter. We think that the decisions in the cases of *Braithwaite* [13] and *Household* [14] are authority for the principle that an individual may have an engagement or hold a post in the same line as his profession at large, but that the contract governing such engagement or post may nevertheless be nothing but an incident in the conduct of his professional career. In such a case we think we would be bound by the authorities to hold that the profits or gains arising therefrom fell to be assessed as part of his professional earnings under Schedule D. Applying this principle to our findings in the present case, we hold that the remuneration received by Dr. Ross from his various part-time hospital appointments falls to be assessed under Case II of Schedule D as part of the profits or gains of his profession, and so also do the fees received by him in respect of domiciliary consultations.

(6) The appeal therefore succeeds against the Schedule E assessments in so far as they relate to Dr. Ross' personal remuneration, and it is unnecessary for us to consider further what, if any, expenses incurred by Dr. Ross would fall to be set against such assessments. We adjourn the appeal against the remaining assessments for consideration and agreement of the figures by the parties on the basis of this our decision in principle.

The Crown appealed; the point of law stated for the opinion of the High Court being whether on the facts found by the commissioners there was any evidence upon which they could properly arrive at their decision, and whether on the facts so found their determination of the appeal was correct in law.

R. O. Wilberforce Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the Crown.

F. Heyworth Talbot Q.C. and *J. L. Creese* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Tennant* v. *Smith* [15]; *Butler* v. *Mortgage Co. of Egypt Ltd.* [16]; *Fuge* v. *McLelland* [17]; *Simmons* v. *Heath Laundry Co.* [18]; *Performing Right Society Ltd.* v. *Mitchell and Booker (Palais de Danse) Ltd.* [19]; *Gould* v. *Minister of National Insurance* [20]; *Collins* v. *Hertfordshire County Council* [21]; *Cassidy* v. *Minister of Health* [22]; *Dale* v. *Inland*

[12] [1930] A.C. 432.
[13] [1931] 2 K.B. 628.
[14] [1953] 1 W.L.R. 710.
[15] [1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158.
[16] (1928) 13 T.C. 803.
[17] (1956) 36 T.C. 571.
[18] [1910] 1 K.B. 543; 26 T.L.R. 326.
[19] [1924] 1 K.B. 762; 40 T.L.R. 308.
[20] [1951] 1 K.B. 731; [1951] 1 T.L.R. 341; [1951] 1 All E.R. 368.
[21] [1947] 1 K.B. 598; 63 T.L.R. 317; [1947] 1 All E.R. 633.
[22] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

Revenue Commissioners [23]; *Roe* v. *Minister of Health* [24]; *In re National Insurance Act, 1911.* [25]

Cur. adv. vult.

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July 21. UPJOHN J. read the following judgment: I have before me five appeals from the Special Commissioners for Income Tax, and they raise questions of general importance to medical specialists; that is, whether the expenses incurred by them in rendering services to patients under the National Health Service Act, 1946 (which I shall call "the Act"), ought to be deducted under Schedule D or Schedule E of the Income Tax Acts.

As is well known, owing to the difference in wording of the relevant rules for the assessment of tax, outgoings may be deductible as expenses for the purposes of Schedule D which would not be so deductible for the purposes of Schedule E.

[His Lordship stated the names of the respondents and the appointments held by them, and continued:] The main question I have to determine is whether, when the consultants have accepted such appointments, the profits or gains arising from the appointments are profits or gains arising from an "office" or "employment" within Schedule E. The facts, the relevant statutory provisions, forms of contract and general terms of service are so fully set out in the first and main case, that I shall content myself with the barest outline of facts before turning to the law.

As set out in the long title, the National Health Service Act, 1946, is "An Act to provide for the establishment of a comprehensive health service for England and Wales, and for purposes connected therewith." [His Lordship read section 3 (1) of the Act, to which reference is made in para. 3 (5) of the main case, and continued:] The appointed day was July 5, 1948. I am concerned with section 3 (1) (*c*), the services of specialists.

The Minister, in fact, carries out his duties in the main by delegation to regional hospital boards who, in turn, may delegate certain of them to hospital management committees, but not those relating to the appointment and dismissal of specialists. In the case of teaching hospitals there is a separate board of governors for each such hospital to govern and control its activities. I shall use the word "board" to designate a regional hospital board or a board of governors of a teaching hospital indifferently.

Before the Act of 1946 came into operation the specialist, or consultant, as he was frequently called, was one who was appointed to the staff of a hospital as a physician or surgeon or

[23] [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671; 34 T.C. 468.

[24] [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131.

[25] [1912] 2 Ch. 563.

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some similar post. He practised in his own specialised field on cases normally sent to him by general practitioners. He would normally have private patients and his appointment to the staff of the hospital was almost invariably honorary and part-time.

When the Act came into operation all that was changed. A specialist may, if he so desires, continue to practise exclusively on private patients, but if he desires to participate in services to the public to be rendered under the Act, he must take an appointment with, and become a member of the staff of, a board. He becomes an officer of the board, but the use of that word in the relevant statutes and statutory instruments has not been relied on as throwing much light on the problem I have to decide. He may take a whole-time or part-time appointment. In either case he is remunerated for his services as may be agreed between the board and the specialist, subject to regulations made by the Minister of Health. The large majority of specialists take part-time appointments. In that event, the specialist agrees to work a certain number of sessions or notional half-days per week. All these matters are provided for in the contract into which the board and the consultant must enter. Such contract by reference to a document, referred to in paragraph 3 (23) of Dr. Ross's case stated as "the terms of service," provides for retirement of the specialist at the age of 65 (subject to extension), for an appeal to the Minister if the specialist considers his appointment is being unfairly terminated by the board, for annual leave, for reimbursement of travelling expenses, subsistence allowance, and for many other incidental matters. A specialist may take part-time appointments with more than one board, but his total maximum remuneration must not exceed nine sessions a week.

It naturally follows from the nature of the professional status of a specialist that his work is subject to no control or direction as to how he should carry out his work in the sense of prescribing particular treatment in relation to a particular patient. That appears to be so even in the case of those who are on the lowest rung of the specialist ladder. (See, for example, the case stated of Dr. Tarnesby.)

The general organisation of the work, that is, the particular hospital or hospitals within the jurisdiction of a board to be visited by each specialist and the particular hours per week to be spent at each, will probably be stated in the contract, but in practice these arrangements may be varied very informally between the consultants concerned without reference to the board. (See, for example, Dr. Ross's case stated, paragraph 4 (8).) Generally speaking, all these matters and actual days and hours of attendance are, as one would expect, normally left to arrangements to be made between the particular specialists and the hospital or hospitals concerned, to suit their mutual convenience.

I do not propose to read any of the contracts in these five cases as they are all annexed to the cases stated. Some of them

vary slightly in form from the others, but nothing turns on the precise terms of the contracts in question. That is all I propose to say on the main issue, but there are certain subsidiary points with which I shall deal later.

I turn then to the law. It is necessary to look at the history of the relevant legislation. By virtue of section 1 and Schedule E of the Income Tax Act, 1918, re-enacting similar legislation in the Income Tax Act, 1842, tax was chargeable under Schedule E in respect of "every public office or employment of profit." Rule 6 of Schedule E of the Income Tax Act, 1918, sets out a long list of public offices and employments of profit, ending with a comprehensive sub-paragraph (*k*), "all other public offices or employ-" ments of profit which are of a public nature."

It was clear that the office or employment to fall within Schedule E had to be public, and it was so held by the House of Lords in *Great Western Railway Co.* v. *Bater*,[1] a decision on the corresponding rule in the Income Tax Act, 1842. In that case it was decided that a clerk in the employment of the Great Western Railway was not the holder of a public office or employment within Schedule E. Employment which did not fall within Schedule E was taxed under paragraph 1 (*a*) (ii) of Schedule D of the Act of 1918 as a profit or gain arising from "any trade, profes-" sion, employment or vocation." The law was altered after the *Bater* case by section 18 of the Finance Act, 1922, which provided (omitting immaterial words) that "Such profits or gains arising or " accruing to any person from an office, employment or pension as " are, under the Income Tax Act, 1918, chargeable to income tax " under Schedule D . . . shall cease to be chargeable under that " schedule and shall be chargeable to tax under Schedule E, and " the rules applicable to that schedule shall apply accordingly " subject to the provisions of this Act." So in the result the law now is that all offices and employments for profit, whether public or private, fall within Schedule E. The relevant law is now re-enacted to the same effect by the Income Tax Act, 1952 (see proviso to paragraph 1 of section 122 and paragraphs 1 and 2 of section 156).

There is but little authority on the meaning of the word "office." It was considered in *Bater's* case[2] and again in *Macmillan* v. *Guest*.[3] In that case it was decided that a director of a private company incorporated in England holds a public office within the United Kingdom. Lord Atkin said[4]: "On the first " point there was no dispute. There is no statutory definition " of 'office.' Without adopting the sentence as a complete defini-" tion one may treat the following expression of Rowlatt J. in " *Great Western Railway Co.* v. *Bater*,[5] adopted by Lord Atkin-" son as a generally sufficient statement of the meaning of the

[1] [1922] A.C. 1; 38 T.L.R. 448; 8 T.C. 231.
[2] [1920] 3 K.B. 266, 274; [1922] A.C. 1.
[3] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.
[4] [1942] A.C. 561, 564.
[5] [1920] 3 K.B. 266, 274.

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"word: 'an office or employment which was a subsisting, per-
"'manent, substantive position which had an existence inde-
"'pendent of the person who filled it, which went on and was
"'filled in succession by successive holders.' There can be no
"doubt that the director of a company holds such an office as is
"described."

Lord Wright said [6]: "The word 'office' is of indefinite con-
"tent. Its various meanings cover four columns of the New
"English Dictionary, but I take as the most relevant for purposes
"of this case the following: 'A position or place to which certain
"'duties are attached, especially one of a more or less public
"'character.' This, I think, roughly corresponds with such
"approaches to a definition as have been attempted in the autho-
"rities, in particular *Great Western Railway Co.* v. *Bater*,[7]
"where the legal construction of these words, which had been in
"Schedule E since 1803 (43 Geo. 3, c. 122, s. 175), was dis-
"cussed. It was there held that the position of a clerk in a
"railway company was not an office or employment of profit of a
"public nature within Schedule E. Lord Wrenbury [8] was content
"so to hold without attempting to define what type of office or
"employment would satisfy the language of the schedule. Lord
"Sumner said [9] that to hold otherwise would be 'an abuse of
"'language.' To hold that the director of a company such as
"A. Wander Ltd. (though it is what is called a private company)
"does not have an office within the meaning of the schedule
"would equally, in my opinion, be an abuse of language. Every-
"one, I think, would say that as director he held an office in the
"company. The word 'employment,' in my opinion, has to be
"construed with and takes its colour from the word 'office.'
"If I may adopt the words of the Master of the Rolls, it is too
"late to say that the director of a company like this does not
"hold an office within Schedule E. I do not attempt what their
"Lordships did not attempt in *Bater's* case,[10] that is, an exact
"definition of these words. They are deliberately, I imagine, left
"vague. Though their true construction is a matter of law, they
"are to be applied in the facts of the particular case according
"to the ordinary use of language and the dictates of common
"sense with due regard to the requirement that there must be
"some degree of permanence and publicity in the office."

On the question of employment a large number of authorities were cited to me. Many tests have been laid down to determine whether the relation of master and servant exists, such as the degree of control exercised by the master, and so on. The relationship between a specialist and a board is so very special, however, that many of these cases, dealing either with entirely different types of engagements (to use a neutral word) or with

[6] [1942] A.C. 561, 566.
[7] [1922] A.C. 1.
[8] Ibid. 35.
[9] [1922] 2 A.C. 1, 25.
[10] [1922] 2 A.C. 1.

the pre-Act relationship between hospitals and specialists, form no safe guide.

The real question to be answered is this: Does a specialist who holds a part-time National Health appointment (a) occupy an office, or (b) undertake an employment, or (c) does he merely render services in the course of the exercise or practice of his profession?

In support of the last view it was urged that a specialist may have private patients; he may have one or more National Health Service part-time appointments; he may lecture to students or nurses; he may go as a locum tenens to some medical post; these are all ways in which the specialist practises his profession and they are only incidents of it. The case, it is said, is analogous to *Davies* v. *Braithwaite*.[11] It is there held that Miss Lilian Braithwaite, who accepted many engagements on the stage, in films and on the B.B.C., was only exercising her talents as an actress, and that each of these engagements could not be considered an employment, but merely an engagement in exercising a profession.

The true nature of the relationship between a board and a specialist was considered in the Court of Appeal in *Razzel* v. *Snowball*.[12] That case decided that the Minister of Health was responsible for the negligence of a specialist, for it was the duty of the Minister under section 3 (1) (*c*) of the National Health Act, 1946, to provide treatment by means of specialists and not merely to provide the specialist.

Denning L.J. said[13]: "Mr. Bernstein [for the plaintiff] "pressed us with some observations in the cases about consul- "tants. He said that the defendant was a part-time consultant, "and that a consultant was in a different position from the staff "of the hospital. I think that Mr. Cumming-Bruce [for the "defendant] gave the correct answer when he said that, whatever "may have been the position of a consultant in former times, "nowadays, since the National Health Service Act, 1946, the "term 'consultant' does not denote a particular relationship "between a doctor and a hospital. It is simply a title denoting "his place in the hierarchy of the hospital staff. He is a senior "member of the staff, but nevertheless is just as much a member "of the staff as the house surgeon. Whether he is called "specialist or consultant makes no difference. He, like all the "others, is just carrying out the duties of the Minister and is "entitled to the protection of section 21 of the Limitation Act."

A specialist or consultant in carrying out his duties under a part-time appointment with a board is therefore not merely rendering services as a private though professionally skilled and qualified individual to a private citizen, but he is the instrument

[11] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[12] [1954] 1 W.L.R. 1382; [1954] 3 All E.R. 429.

[13] [1954] 1 W.L.R. 1382, 1386.

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of the Minister to carry out part of the national scheme "to "provide for the establishment of a comprehensive health service "for England and Wales." I quote again the long title to the Act. It seems to me that he is thus carrying out necessarily a public function (see *Macmillan* v. *Guest* [14]), and, in my judgment, such a specialist is properly described as the holder of a public office. So far I agree with the conclusion of the special commissioners and, indeed, go further in holding that the office is public. The commissioners, however, then decided that, though the appointment constituted the holding of an office, nevertheless the taxpayer was assessable to tax under Schedule D. Mr. Heyworth Talbot for the taxpayer has candidly conceded that he can find no argument to support this conclusion of law. It is, indeed, clear that in reaching that conclusion the commissioners have misunderstood the effect of *Davies* v. *Braithwaite* [15] and my own later decision in *Household* v. *Grimshaw*.[16] Those decisions, while helpful in reaching a conclusion as to whether there is, on the one hand, an office or employment, or on the other an exercise of a profession, have no bearing on the tax position once it is found that the activity in question is an office or employment.

Apart from Mr. Heyworth Talbot's point, which I shall mention in a moment, it is not in dispute that if a person holds an office of employment he must be assessed to tax under Schedule E in respect of his earnings arising therefrom; there is no option about it.

Mr. Talbot's point, however, is this: There is a finding in each case (as amended) to this effect (I take Dr. Ross's case for convenience): "We also find that at all material times Dr. Ross "exercised the profession of consultant radiologist, his part-time "hospital appointments being a necessary part of the exercise of "that profession by him and merely incidental thereto, notwith-"standing that a great deal of his time was thereby taken up. "We do not seek to describe the profession of consultant "radiologist in general."

That phraseology is not very happy, but I think the parties are agreed that it means this: that Dr. Ross, to establish himself as a specialist, found it necessary as a practical matter to take a hospital appointment; it was a necessary incident of his profession. No doubt this would be for a number of reasons: first and most important, it was the best way of practising and improving his particular skill; secondly, it would provide a salary on which to live; thirdly, it would bring him into contact with general practitioners who would, in due course, no doubt send him their private patients; fourthly, it is only by taking an appointment that hospital services could be made available to the specialist's private patients; there may well be other reasons.

Founding himself upon this Mr. Talbot submits that all Dr.

[14] [1942] A.C. 561.
[15] [1931] 2 K.B. 628.
[16] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.

Ross's expenses, whether incurred in the course of exercising his office under the National Health Service Act or otherwise, are all part of carrying on the profession of a consultant radiologist. Therefore, any expenses incurred in the course of exercising the office which would not be allowable under Schedule E but would be allowable under Schedule D, may be brought into account as part of the general exercise of his profession of a consultant radiologist.

Mr. Talbot poses the question, is Dr. Ross carrying on one profession or two? The question is a narrow one and without the slightest importance except for the purpose of income tax. In a general sense, of course, Dr. Ross is carrying on the profession of a radiologist whether he is performing his National Health functions or attending to private patients. It is all part of his vocation as a medical adviser. In my judgment, however, the argument ought not to succeed. When carrying out his National Health duties, Dr. Ross is performing the duties of an office and he is taxed under Schedule E. When attending private patients he is exercising his profession and is taxed under Schedule D. Each schedule and the rules thereunder contains, in the words of Lord Atkin in *Fry* v. *Salisbury House Estate Ltd.*,[17] "definite "codes applying exclusively to their respective defined subject-"matters."

Once the conclusion is reached that the National Health appointment is the holding and exercise of an office (and that is the vital decision), the expenses attendant thereon must be deducted under the rules applicable to Schedule E and, in my judgment, under no other schedule. The fact that the exercise of that office may truly be described as an incident of the profession of radiologist cannot alter that position. Mr. Talbot relied on the case of *Hughes* v. *Bank of New Zealand.*[18] The Bank of New Zealand had certain tax-exempt securities, exempt as to some by virtue of section 46 of the Income Tax Act, 1918, and as to others by virtue of the rules under Schedule C, which were purchased out of floating capital. It was held that the expenses of making those investments were allowable as a deduction in computing tax liability. That was decided unanimously in all courts. Lord Wright M.R. pointed out that there was only one indivisible trade, and the expenses in question were properly allowable as deductions in computing income tax liability. The exempting provisions exempted certain interest from tax, but there was nothing in those provisions which precluded the company from claiming the expenses as allowable deductions.

That seems to me a very different case, and does not lay down any principle which assists me in this case. This point fails.

I turn then to the supplementary questions. First, as to domiciliary visits. In addition to the performance of the ordinary

[17] [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266.

[18] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472.

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duties the specialist may if, but only if, he so desires undertake domiciliary visits. That is, he undertakes at such times and within such area as he may prescribe in his contract to visit patients whom a general practitioner does not desire to be treated in hospital, at their homes. Such visits are arranged directly between the general practitioner and the specialist concerned. The specialist takes his own apparatus to the patient's house, e.g., X-ray apparatus, examines him, develops the film, usually in hospital, and then reports to the general practitioner concerned. For this service he receives a fee of four guineas for each domiciliary visit (with a maximum of 200 visits in each year) and two guineas for the use of his apparatus, but once only per patient.

That a specialist holding a National Health appointment might as part of his duties carry out domiciliary visits is clearly contemplated in section 3 (1) (*c*) of the Act. It seems to me clear that in making those visits the specialist is exercising part of his duties under the Act; that is to say, the visits are all part of the exercise of the public office which he holds under the Act. In my judgment, it is no point of distinction that the specialist need not contract to make domiciliary visits, nor that the visits are arranged directly between the specialist and the general practitioner, nor that the specialist uses his own apparatus for which, incidentally, he is paid by the State. Accordingly, the expenses attendant thereon must be deducted under the rules applicable to Schedule E.

Finally, I turn to the question of expenses attendant on the work of a locum tenens in respect of a National Health appointment. The phrase is so well understood in connection with the medical profession that I need not explain it. The case of Mr. Drew shows how informal are the arrangements made for this type of work. It was said that Dr. Tarnesby and Mr. Drew, in carrying out such work, were merely undertaking engagements in the same way that Miss Lilian Braithwaite did. I disagree. The phrase "locum tenens" is in fact a most apt and appropriate expression to describe the work. The specialist in doing such work is, in fact, holding the post of another. He is, for the time being, exercising the functions and holding the public office of another. How can his expenses of doing so properly be allowed on some different basis from that of its real holder of the office, in whose shoes he temporarily stands? In performing this work he is exercising a public office and his expenses must be deducted under the rules applicable to Schedule E.

Both Dr. Hirtenstein and Mr. Drew received fees and, no doubt, incurred expenses in lecturing, but it seemed to me that the facts relating to these activities were quite insufficiently explored before the special commissioners to enable me to decide whether such work was undertaken as part of the specialist's public office under the Act or as part of his general practice. Mr. Wilberforce did not press this point or ask me to send the cases

back for further findings. Therefore I say nothing about this aspect of the matter; it was not argued before me and it must be left to some future case to resolve this problem. The decision of the commissioners that expenses in connection with lecturing are deductible under Schedule D will therefore stand for the relevant years of assessment.

Both Dr. Tarnesby and Mr. Drew undertook domiciliary work not only in the area of the regional board with which they respectively had contracts but in other areas. Here again, the facts were insufficiently found, and Mr. Wilberforce asked me to deal only with the straight-forward case of Dr. Ross so far as the expenses of domiciliary visits are concerned. Therefore, again, I decide nothing about domiciliary visits to outside areas.

Accordingly, the decision of the commissioners that the expenses in connection with domiciliary visits to outside areas are deductible under Schedule D will stand for the relevant years of assessment.

Subject to that, I allow the appeal in each case. These five cases must be remitted to the special commissioners to assess each respondent under Schedule E in respect of his earnings arising from appointments under the Act.

Appeals allowed with costs.

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MITCHELL AND HADDOCK (INSPECTORS OF TAXES) *v.* HIRTENSTEIN.
MITCHELL AND MELLERSH (INSPECTORS OF TAXES) *v.* MARSHALL.
TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY.
TAYLOR-GOOBY AND JOB (INSPECTORS OF TAXES) *v.* DREW.

Solicitors: *Solicitor of Inland Revenue; Hempsons.*

[PROBATE, ETC., DIVISION.]

LORD CITRINE (OWNERS) *v.* HEBRIDEAN COAST (OWNERS). THE HEBRIDEAN COAST.

1959
June 3, 4, 19.

Lord Merriman P.

[1955 L. 487.]

Shipping—Collision—Damages for detention—Damaged vessel owned by public authority and not profit-earning—No other vessels chartered to replace damaged vessel—Measure of damages—Rate of interest on capital.

Ships' Names—The Hebridean Coast.

On December 23, 1951, a collision occurred between the *Lord Citrine*, a collier owned by the plaintiffs, the Central Electricity Generating Board, and the defendants' vessel, *Hebridean Coast*, causing damage to the *Lord Citrine*. The defendants admitted liability for the collision and consented to a reference to assess the measure of damages in respect of loss by detention for 11½ days, quantified by the plaintiffs at £2,032 on the basis of the cost

[Reported by B. D. J. WALSH, Esq., Barrister-at-Law.]

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incurred in chartering other vessels to replace the *Lord Citrine*. The registrar found that, of the sea-borne coal supplied to the plaintiffs during the year, 45–50 per cent. was carried in their own vessels, while the remainder was carried in chartered vessels, and the plaintiffs' own vessels could not have carried the whole of this sea-borne coal. During the detention period none of the plaintiffs' vessels were idle, and the *Lord Citrine* would not have been idle if she had not been under repair. The plaintiffs were using a number of chartered vessels at the time, but no specific vessel could be said to have taken the place of the *Lord Citrine* during the detention period. The registrar held that, as the plaintiffs had failed to show that they had chartered additional tonnage to replace the *Lord Citrine*, the only available measure of damages was a reasonable rate of interest on capital, but he awarded a rate of interest on the agreed value of £207,500 which would produce the sum of £2,032 claimed by the plaintiffs. This rate of interest amounted to over 30 per cent. for the period of detention. The defendants moved for a variation of the registrar's decision:—

Held, (1) that where a vessel was owned by a public authority and was not profit-earning, and where the owners had neither chartered alternative tonnage nor provided a substitute vessel of their own, damages should be computed at a reasonable rate of interest on the value of the vessel.

(2) That, as this basis of assessing damages was quite distinct from, and should not be confused with, the measure of damages based on the cost of chartering alternative tonnage, the registrar, having rightly rejected the latter basis of assessment, was wrong in principle in awarding the identical amount by way of interest on the capital value.

(3) That the rate of interest awarded by the registrar was inordinate, and in the present case, where a generous rate was justified, a rate of 7 per cent. was appropriate.

The Greta Holme [1897] A.C. 596; 13 T.L.R. 552 and *The Susquehanna* [1926] A.C. 655; 42 T.L.R. 639 applied.

The Ikala [1929] A.C. 196 distinguished.

MOTION in objection to the registrar's report.

The plaintiffs, the Central Electricity Generating Board, established under the Electricity Act, 1957, in place of the Central Electricity Authority created by the Electricity Act, 1947, were the owners of the *Lord Citrine*, a collier employed by them at the material time in carrying coal for the generation of electricity in the London area. On December 23, 1951, she sustained damage as the result of a collision with the defendants' vessel *Hebridean Coast*, and on March 31, 1952, the defendants admitted liability for this collision.

By an agreement dated July 19, 1955, the defendants' solicitors consented to a reference to assess that part of the plaintiffs' claim which had not been admitted or agreed, and by October 30, 1958, when the reference before the registrar took place, the only item which had not been agreed was that in respect of loss by detention, quantified by the plaintiffs at £2,032.

This head of claim was originally put forward on the basis that the *Lord Citrine* was a profit-earning vessel, but in a letter dated June 14, 1954, the chartering of equivalent shipping space was put forward by the plaintiffs for the first time as the basis for

the assessment of the damages. Although this letter was marked "without prejudice," his Lordship was invited to read the material part, which stated: "... we are unable to agree with "your view that the British Electricity Authority is not a "trading body, and that the *Lord Citrine* is not to be regarded "as a profit-earning ship. However, even if you are right as to "this, it is quite clear in our view that interest on capital value "is not the proper basis for the allowance for loss of use but "that our clients must then be entitled to recover the cost of "chartering other shipping space to carry the coal which the "*Lord Citrine* would have carried if she had not had to be stopped "for repairs. ... Since it was, as stated above, essential that "all the coal allocated should be carried, as this was in fact done, "and as the Authority's own ships could not have done it in "any case, the lay-up of the *Lord Citrine* necessarily involved "extra chartering for which they have had to pay. Although the "exact replacement ships cannot be identified in the circum-"stances, it seems to me that the amount of our clients' loss on "a chartering basis can doubtless be arrived at roughly by calcu-"lating what quantity of coal she would have carried during the "detention period from the average cargoes on the six voyages "(of which you have particulars) and from the times occupied "by those voyages (of which you also have particulars) and "ascertaining the cost of hiring other ships to carry that "quantity. ..."

The registrar found the following facts, which his Lordship held were justified by the evidence:

For the year in question the National Coal Board provided only 87 per cent. of the quota allocated to the plaintiffs. Of the coal provided, 25 per cent. was sea-borne, and of that fraction 45–50 per cent. was carried in the plaintiffs' own vessels, while the remaining 50–55 per cent. was carried in chartered tonnage.

The plaintiffs' own ships could not have carried the whole of the sea-borne coal actually received. Ten large vessels were regularly employed by the plaintiffs on long-term charters, while other vessels were employed as required on short-term or on "spot" charters. None of the plaintiffs' own vessels was idle during the detention period, and if the *Lord Citrine* had not been under repair she would not have been idle. At no time during the winter of 1951–52 were the plaintiffs not chartering vessels additional to the long-term charter vessels; but no specific vessel could be said to have taken the place of the *Lord Citrine* during the detention period in order to carry the coal which she would have carried if she had not been under repair. It was cheaper for the plaintiffs to carry coal in their own vessels rather than in chartered vessels, and there was no question of the plaintiffs chartering their own vessels or sub-chartering the chartered vessels to anyone else. While it was customary to build up stocks of coal at each station during the summer and to run down stocks in the winter, the situation in the winter of 1951–52 was

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normal, and there was no under-stocking or over-stocking at all.

The period during which the *Lord Citrine* was detained was agreed as being 11½ days. The fact that the precise dates of detention were not specified was held both by the registrar and by his Lordship to be immaterial.

In his report made on December 5, 1958, the registrar held that the plaintiffs had failed to show that they had chartered tonnage to replace the *Lord Citrine*, and that interest on capital was therefore the only available measure of damages, but he awarded a rate of interest on the agreed value of £207,500 which would produce the sum of £2,032 claimed by the plaintiffs on the basis of the charter of alternative tonnage. This rate amounted to over 30 per cent.

The defendants on this motion asked that the registrar's decision be varied on the grounds that: (a) the registrar was wrong in law in that after disallowing the plaintiffs' claim, based on charter rates less savings, he awarded them such a rate of interest as to produce the same result; (b) he failed to distinguish between a profit-earning vessel and a non-profit-earning vessel; (c) in fixing the rate of interest he improperly had regard to evidence concerning profit-earning vessels, and (d) he misdirected himself in awarding a rate of interest of over 30 per cent., which was grossly excessive and contrary to the practice of the court.

Waldo Porges Q.C. and *R. F. Stone* for the plaintiffs.
K. S. Carpmael Q.C. and *Peter Bucknill* for the defendants.

The following case was referred to in argument, in addition to those cited in the judgment: *Admiralty Commissioners* v. *Chekiang* (*Owners*).*

Cur. adv. vult.

June 19. LORD MERRIMAN P. read the following judgment, in which he stated the facts and continued: It is well settled that the fact that a ship is owned by a public authority, or is not "profit earning," does not disentitle the owner from claiming damages; and that such damages are not merely nominal: *The Greta Holme*.[1] If it is necessary to charter alternative tonnage to replace the damaged vessel, the amount chargeable for the period may be recovered. Alternatively, if the owners are able to provide a substitute out of their own resources, as in the case of the spare lightship (see *The Mediana*[2]), an amount may be recovered for the notional hire of the substitute as special damage. Failing any other measure, damages may be computed at a reasonable rate of interest on the value of the vessel, after taking depreciation into account, for the period during which the owner is deprived of her services.

* [1926] A.C. 637; 42 T.L.R. 634.
[1] [1897] A.C. 596; 13 T.L.R. 552.
[2] [1900] A.C. 113; 16 T.L.R. 194; 44 S.J. 259.

The registrar held that if the plaintiffs have to show that they chartered other tonnage to replace the *Lord Citrine* he did not think that they had succeeded in doing so; though it seemed to him quite likely that they did in fact do so. On the contrary, he held that he was driven to the conclusion that interest on capital was the only available measure of damages, however artificial and unsatisfactory it might be. But he was prepared to adopt the rate of interest on the agreed value of £207,500 which would produce the figure claimed on the basis of the charter of alternative tonnage, namely, £2,032. On this basis the rate of interest works out at over 30 per cent.

I agree with the finding that the plaintiffs did not succeed in showing that they had chartered tonnage to replace the *Lord Citrine*, but I disagree with the suggestion that it is quite likely that they did so; and I do not approve of the allowance of the identical sum of £2,032 by way of interest on her capital value.

The plaintiffs' case is based mainly on one passage in Lord Warrington's speech in *The Ikala*,[3] in which it was the loss incurred by a profit-earning ship that was in question. Having expressed the clear opinion that the evidence was not sufficient to establish that the appellants found it necessary to provide extra tonnage equivalent to 13 days' use of their injured vessel and that in consequence of such necessity they did in fact provide it, Lord Warrington proceeded as follows[4]: "But this does not dispose of the question. Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the *Strathfillan*, the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention."

But he held, agreeing with the Court of Appeal, that the evidence was not sufficient to justify the inference in question.

It is true, as the registrar points out, that the view of the facts which had prevailed up to the time when the case was heard in the House of Lords, and on which Lord Warrington held that the inference could not be drawn, turned out to be erroneous. Accordingly, *The Ikala*[5] affords little or no guidance as to the kind of evidence which would support such an inference.

In substance it was sought to apply this passage in Lord Warrington's speech by the argument that having regard to the percentages of coal carried in the plaintiffs' own colliers, and in chartered vessels respectively, it followed that whatever quantity of coal was actually received by the plaintiffs during the year, the necessary inference was that of the total amount the proportion carried by chartered vessels, as against the proportion carried by the plaintiffs' own colliers, was increased by the *Lord Citrine* being detained for the 11½ days.

[3] [1929] A.C. 196.
[4] Ibid. 211.
[5] [1929] A.C. 196.

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In my opinion, however, it is vital to recall the observations of Lord Dunedin and Lord Sumner in *The Susquehanna.*[6]

In his opinion in that case Lord Dunedin emphasises[7] the difference between special damage which must be averred and proved and general damage, the quantification of which is a jury question. Lord Sumner having commented that the whole suggestion, of chartering at the time of the detention was pure speculation pointed out[8] that as the Admiralty, the owners of the damaged vessel, had got through their work without her, they could not get damages based on the use of a stand-by when, in fact, they did very well without one; and he added[8]: "In no "case can this be matter of presumption." With this he contrasted[9] cases in which the principle of *The Greta Holme*[10] might be applied with such rates of interest and depreciation as the evidence might justify.

Moreover, in his opinion in *The Greta Holme*,[10] Lord Herschell drew a marked distinction between the cost of hiring an alternative dredger and the loss of the interest on the money spent on the purchase of the damaged vessel. This distinction clearly emerges in the following passage[11]: "If the appellants had hired "a dredger instead of purchasing one, and had during the months "they were deprived of its use been bound to pay for its hire, "it cannot be doubted that the sums so paid could have been "recovered. How can they the less be entitled to damages "because, instead of hiring a dredger, they invested their money "in its purchase? The money so invested was out of their "pockets, and they were deprived of the use of the dredger, to "obtain which they had sacrificed the interest on the money "spent on its purchase. A sum equivalent to this, at least, they "must surely be entitled to."

In this passage Lord Herschell was clearly laying down that the loss of interest on the capital value was a measure of damages essentially different from that which would have been recoverable had the plaintiffs been able to prove special damage in hiring another dredger.

In my opinion, having regard to the evidence it is not legitimate to infer that the coal which might otherwise have been carried by the *Lord Citrine* during the 11½ days was carried by chartered tonnage; or, if so, that it was necessary to do so. Certainly there is no evidence that there was any special chartering for the purpose; or that such "spot" charters as were made for special deliveries had any connection with the detention of the *Lord Citrine*.

To my mind, the fair inference from the evidence as a whole is that such coal as was carried in chartered vessels during the 11½ days was carried in this way in the normal course, and that

[6] [1926] A.C. 655; 42 T.L.R. 639.
[7] [1926] A.C. 655, 661, 662.
[8] Ibid. 663.
[9] Ibid. 664.
[10] [1897] A.C. 596.
[11] Ibid. 605.

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there was no necessity, as a matter of business, to make any special arrangements to replace the *Lord Citrine* for that period.

It seems to me that, having rightly rejected that particular head of special damage, it was wrong in principle for the registrar to award the identical amount by way of interest on the capital value. The two measures of damage are quite distinct, and should not be confused.

Admittedly the question of the rate of interest to be allowed on capital is a matter for discretion, but the rate at which the present award works out seems to me to be inordinate.

It was agreed that 5 per cent. is usually allowed, but there is at least one reported instance of the allowance of 7 per cent. *The Marpessa*.[12] I think that this is a case in which a generous rate is justified. Accordingly, I allow the appeal, and vary the registrar's award by substituting for the sum of £2,032 interest at the rate of 7 per cent. on the agreed depreciated value of £207,500 for 11½ days.

Appeal allowed. Plaintiffs to have costs of reference up to payment into court by defendants of a sum equal to 10 per cent. of the agreed value for 11½ days. Defendants to have costs of reference after payment in and costs of appeal.

Solicitors: *Sinclair, Roche & Temperley for Botterell, Roche & Temperley, Newcastle; Middleton, Lewis & Co. for Middleton & Co., Sunderland.*

[12] [1906] P. 14, 18; affd. [1907] A.C. 241.

[QUEEN'S BENCH DIVISION.]

ATTORNEY-GENERAL AND ANOTHER *v.* ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER.

1959
July 13, 14, 15, 24.

Salmon J.

Land Drainage—Maintenance—Liability for repair and maintenance of drains—Whether responsibility of rural district council or county council—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 30 (1).
Local Government—Nuisance—Non-feasance—Drain—Flooding of land through non-repair of drains—Whether local authority liable—Whether personal right of action maintainable by landowner.
Statutory Duty—Civil right, whether created—Local authority—Duty to maintain drain—Enclosure Acts.

Land farmed by the plaintiff had from time to time been seriously flooded partly as a result of the non-repair of two drains

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[Reported by E. CARYL-THOMAS, Barrister-at-Law.]

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which ran adjacent to and through the land. By an award under the Enclosure Act, 1800, the drains were maintainable by the surveyor of the highways of the parish; subsequently these duties were transferred to the local highway board and by the Local Government Act, 1894, they were transferred to the rural district council. The question was whether the responsibility for maintaining and repairing the drains now lay on the county council as highway authority by virtue of section 30 (1) of the Local Government Act, 1929.[1] The plaintiff and the Attorney-General on relation of the plaintiff claimed (1) a declaration that one or other of the councils was bound in law to maintain the drains and keep them in repair, and (2) damages against one or other of them:—

Held, (1) that the drains were part of the land drainage scheme, and the function of maintaining and repairing them was not a function with respect to highways within the meaning of the proviso to section 30 (1) of the Act of 1929; accordingly, by that section the duty to maintain and repair the drains was not transferred to the county council but was reserved to the rural district council.

(2) That the immunity of highway authorities in respect of non-repair of highways did not extend to the rural district council in the present case to exempt them from liability for non-feasance in respect of the maintenance and repair of the drains.

(3) That the Enclosure Act, 1800, was passed and the award made for the benefit of the persons in favour of whom the enclosures were made; therefore a person whose land was immediately adjacent to the drains and through whose land the drains passed had a personal right to sue in a case of breach of duty to maintain and repair the drains; accordingly, the plaintiff was entitled to the declaration and to damages.

Dicta of Atkin L.J. in *Phillips* v. *Britannia Hygienic Laundry Co.* [1923] 2 K.B. 832, 841, and A. L. Smith L.J. in *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402, 407; 14 T.L.R. 493, C.A., applied.

ACTION.

The following facts are taken from the judgment. The plaintiff, Thomas Brownlee Paisley, was a farmer who farmed land in the parish of Holywell-cum-Needingworth in the county of Huntingdon. Two drains known as Parsons Drove and Heath Drain ran adjacent to and passed through the plaintiff's land. These drains were originally natural watercourses. They were small tributaries of the Great Ouse and the natural drains for

[1] Local Government Act, 1929, s. 30 (1): "As from the appointed "day, every county council shall be "the highway authority as respects "such part of the county as is for "the time being comprised in any "rural district and as respects the "highways therein, and as such shall "have all such functions under the "Highway Acts, 1835 to 1885, as "were exercisable by rural district "councils who by virtue of the Local "Government Act, 1894, became "successors of highway boards, and "rural district councils shall cease "to be highway authorities: Pro-"vided that nothing in this section "shall affect the functions of rural "district councils under the Local "Government Act, 1894, as respects "rights of way and encroachments "on roadside wastes, or any func-"tions not being functions with "respect to highways exercisable at "the appointed day by rural district "councils as successors to surveyors "of highways or highway boards."

the land on each side of them. They left the Great Ouse outside the parish of Holywell, joined together inside the parish, and flowed onward to the Ouse. The land on each side of the drains sloped towards them and downwards towards the River Ouse. The drains at their source were only two or three feet wide and quite shallow, but gradually broadened and deepened as they reached Holywell.

No work had been done on these drains since 1947. At the date of the issue of the writ the drains had for years been seriously choked, overgrown and silted and were generally in a very bad condition. The plaintiff's land had from time to time been seriously flooded partly as a result of the non-repair of the drains. This flooding had interfered with his farming activities and caused him damage.

It was common ground that the duty to keep the drains in proper repair lay on one or other of the defendants. The plaintiff brought this action claiming (1) a declaration that the first defendants, St. Ives Rural District Council, alternatively the second defendants, Huntingdon County Council, were bound in law to maintain the drains and keep them in repair; and (2) damages against one or other of the defendants. There was joined to this claim a claim by Her Majesty's Attorney-General, on the relation of the plaintiff, for a declaration in the same terms as that claimed by the plaintiff personally.

Harold Williams Q.C. and *A. L. Figgis* for the plaintiffs.

C. E. Scholefield Q.C. and *G. J. Ponsonby* for the first defendants.

J. P. Widgery Q.C. and *A. P. Fletcher* for the second defendants.

The following cases were cited in argument in addition to the cases referred to in the judgment: *Attorney-General* v. *Tamworth Rural District Council* [2]; *Reg.* v. *Heath* [3]; *Irving* v. *Carlisle Rural District Council* [4]; *Shoreditch Corporation* v. *Bull.* [5]

Cur. adv. vult.

July 24. SALMON J. read the following judgment in which he stated the facts and continued: The first question to be decided is upon which of the defendants lies the obligation to maintain and keep the drains in repair. By the Enclosure Act, 1800, relating to the parish of Holywell the commissioners therein designated were empowered, amongst other things, to scour out and widen the ancient brooks, ditches and watercourses in the parish of Holywell and to set out such new ditches, drains and watercourses

[2] (1901) 85 L.T. 190.

[3] (1866) L.R. 1 Q.B. 218; 7 B. & S. 285; 13 L.T. 669.

[4] (1907) 71 J.P. 212; 5 L.G.R. 776, D.C.

[5] (1904) 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254.

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Salmon J.

of such breadth and depth and in such direction as the commissioners thought proper. The commissioners were further empowered and the duty imposed upon them to order and award by whom and in what manner the said brooks, ditches, drains and watercourses should thereafter be repaired, cleansed, scoured and maintained.

By an award in the year 1803 under the Enclosure Act, 1800, the commissioners ordered that Parsons Drove and Heath Drain, amongst other drains in the parish of Holywell, should thereafter for ever be maintained and kept in repair for the respective breadth and depth specified in the award by and at the expense of the surveyor of the highways for the time being of the parish out of a rate to be from time to time levied by him on the occupiers of lands and grounds within the parish.

These duties were subsequently transferred by the Highway Act, 1862, s. 11, to the highway board for the district in which the drains lay. By section 25 of the Local Government Act, 1894, the duties of the highway board were transferred to the first defendants, and the highway board was abolished. The section reads as follows: " . . . there shall be transferred to the district " council of every rural district all the powers, duties, and liabili- " ties of the rural sanitary authority in the district, and of any " highway authority in the district, and highway boards shall " cease to exist, and rural district councils shall be the successors " of the rural sanitary authority and highway authority, and shall " also have as respects highways all the powers, duties, and " liabilities of an urban sanitary authority under sections 144 to " 148 of the Public Health Act, 1875, and those sections shall " apply in the case of a rural district and of the council thereof in " like manner as in the case of an urban district and an urban " authority . . ."

It is not disputed that between the year 1894 and the date when the Local Government Act, 1929, came into operation the duty to maintain and repair the drains lay upon the first defendants. A great deal in this case turns upon the true construction of section 30 (1) of the Local Government Act, 1929. [His Lordship read section 30 (1) and continued:] The first defendants contend that upon the true construction of this subsection their duty to maintain and repair the drains was transferred to the second defendants.

Mr. Widgery, for the second defendants, contends, first, that the main part of the subsection does not transfer the duties to which I have referred, inasmuch as these duties are not functions under the Highway Acts, 1835 to 1885. Alternatively, Mr. Widgery contends that if the main part of the subsection looked at by itself would be apt to transfer these duties, they are expressly reserved to the first defendants by the proviso.

In my judgment, the main part of section 30 (1) does transfer those duties to the second defendants. The Highway Act, 1862, is one of the Acts included in the words " the Highway Acts, 1835

"to 1885." Section 11 of the Highway Act, 1862, amongst other things, provides that "All such . . . duties, liabilities . . . as "are vested in or attached to . . . any surveyor . . . of any parish "forming part of the district, shall vest in and attach to the "highway board." One of the duties vested in and attached to the parish surveyor, and therefore one of his functions, was the duty or function of maintaining and repairing the drains in question. This duty or function was therefore transferred to the highway board by the Highway Act, 1862, and was exercisable by the first defendants as successors of the highway board under the Local Government Act, 1894. Accordingly, but for the proviso, section 30 would, in my judgment, clearly transfer the duties of maintaining and repairing the drains to the second defendants.

Mr. Widgery's second contention, namely, that the proviso reserves the duty to maintain and repair the drains to the first defendants, raises a point of some difficulty as well as of general importance. I understand that this point has been very much of a live issue between county councils and rural district councils since the year 1929, but so far has never been litigated.

Mr. Williams, for the plaintiff, supports the part of Mr. Widgery's argument relating to the construction of the proviso, although he dissociates himself from Mr. Widgery's first contention, with which I have already dealt.

Mr. Scholefield, for the first defendants, contends that the whole proviso is of no effect and is inserted in the section only ex abundanti cautela. He says that its sole purpose is to make it plain that only functions with respect to highways under the Highway Acts, 1835 to 1885, exercisable by rural district councils as successors to the highway boards passed to the county councils, and that all the rural district councils' other functions, for example, under the Public Health Acts, are left with the rural district councils.

If this be the true construction of the proviso, then the first part of the proviso is otiose.

Mr. Scholefield replies that on any view of the subsection the first part of the proviso is otiose. He says that the last part of the proviso refers merely to functions imposed under various Public Health and Local Government Acts—such functions, for example, as watering and scavenging the highways. I am unable to give such a narrow construction to the language of the proviso. It seems to me to contemplate that there were functions (for example, land drainage functions) exercisable by rural district councils as successors to the highway boards which were not functions with respect to highways, and to enact that such functions should not pass to the county councils.

In my view, it is possible to see how the first part of the proviso may have been inserted having regard to the last words in the main part of the subsection, "and rural district councils "shall cease to be highway authorities." Without the first part

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of the proviso it would perhaps have been possible to regard the duty imposed under section 26 of the Local Government Act, 1894, to prevent the obstruction of highways as part of the duties of a highway authority, and, accordingly, left in the air, since the rural district councils ceased to be the highway authorities, and the duty was manifestly not transferred to county councils.

The second part of the proviso is, however, in the most general terms and cannot, in my judgment, properly be given the narrow construction for which Mr. Scholefield contends.

Mr. Scholefield's second contention is that the duty to maintain and repair the drains is a function with respect to highways and is, therefore, not reserved to rural district councils under the proviso. This contention depends upon the true construction of the somewhat loose words "any functions not being functions "with respect to highways." By the awards, of which I understand there were about 4,000, made under various Enclosure Acts, the parish surveyors had certain functions cast upon them, some admittedly with respect to highways, and some relating to drains and ditches draining a great deal of the land in rural districts. Accordingly, the functions of the surveyors under these awards related mainly to highways, but partly also to land drainage. It is possible that one of the reasons why these latter functions were imposed upon the surveyors was that the highways at certain points might be affected by land drainage. There are, of course, road drains and gulleys whose main, if not whose only, function is to drain the highway. The repair of such drains and gulleys is, in my judgment, clearly a function with respect to highways. There are other drains and ditches whose function is solely to drain agricultural land, and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage.

In my judgment, the drains in question in this case are undoubtedly part of the land drainage scheme, and their non-maintenance and disrepair can affect only incidentally a small section of the highway within the parish of Holywell. I agree with the contention of Mr. Widgery that the true inference to be drawn in this case is that originally the duty to maintain and repair these drains was cast upon the surveyor, not because of their effect upon the highways but because, as they approached the parish of Holywell, they increased in breadth and depth, so that they became an important part of the land drainage in the parish and, as such, of general importance to the inhabitants. There were only four parish officers: the clerk, the constable, the overseer and the surveyor. The surveyor would appear to be

the officer whose duties were most in line with the maintenance and repair of drains. I do not say that the fact that the non-repair of these drains might have had some effect upon certain sections of the highway was not a minor reason for selecting him rather than any of the other officers of the parish. I have not lost sight of the fact that in adjacent parishes, where the two drains in question did not run alongside or across highways, the duty to maintain and repair them was cast upon the riparian owners. I think that in those places the drains were so narrow and small that they could not be looked upon as of any importance to the inhabitants of the parish generally but as of limited importance, and that only to the riparian owners.

It follows that, in my judgment, the function of maintaining and repairing these drains in the parish of Holywell was not a function with respect to highways within the meaning of the proviso of section 30 (1), and, accordingly, was not transferred to the second defendants, but was reserved to the first defendants.

The next point that falls for decision is whether or not the defendants are liable to be sued for their failure to maintain and repair the drains. The defendants contend that the failure to maintain and repair the drains is non-feasance and that, accordingly, the plaintiff has no right of action in respect thereof. Highway authorities are clearly not liable in damages for any negligent non-repair of a highway, since the surveyor of highways was never personally liable for damages arising from mere omission to repair. No action at common law is or was maintainable against the parish for non-repair of the highways. The only remedy against the parish is by way of indictment. The Highway Act, 1835, merely enabled the parish to conduct its work through the surveyor. The duty to repair still remained and remains in the inhabitants at large. Accordingly, no action for non-repair of the highway is maintainable against the surveyor or against his successors, the present highway authorities: *Young* v. *Davis*.[1] This rule has long been established in our law, and no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity. Nevertheless, there can be no doubt that in law they do enjoy the immunity, and I must apply the law; but I am not obliged to extend it.

In the present case I am being asked to extend it to the maintenance and repair of the drains in question. If these drains were designed to drain the highway, I should, as at present advised, feel myself bound, however reluctantly, to apply the rule. The situation is, however, very different. The only connection, and to my mind a very tenuous one, between the rule and the facts of the present case is that formerly the duty to maintain and repair the drains lay upon the highway authority. The immunity the highway authorities enjoy for the non-repair of

[1] (1863) 9 L.T. 145.

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highways is not out of any special tenderness which the law feels for highway authorities as such, but merely because the duty of repairing the highway fell upon them or was transferred to them as representatives of the inhabitants at large, and no action lay against the inhabitants at large. They could be proceeded against only by way of indictment: *Swain* v. *Southern Railway Co.*, *per* Finlay L.J.[2] In the present case the duty of repairing the drains was not originally upon the inhabitants at large, but was cast upon the surveyor by the award made under the Enclosure Act, 1800. Neither the inhabitants at large nor the surveyor were liable, nor are their successors liable, to be indicted in respect of their failure to maintain and repair the drains. I can see no reason for extending the immunity from liability for non-feasance to the defendants. *Sanitary Commissioners of Gibraltar* v. *Orfila*,[3] which is strongly relied upon by the defendants, seems to me to turn almost exclusively upon the construction of a local ordinance.

The only other question which remains for decision is whether the breach of duty to maintain and repair the drains gives the plaintiff a personal right to sue, or whether an action can be brought only by Her Majesty's Attorney-General on the relation of the plaintiff. The point for decision really turns upon whether it was the intention of the legislature to make the duty imposed one " which was owed to the party aggrieved as well as to the " State, or was a public duty only. That depends on the con- " struction of the Act and the circumstances in which it was " made and to which it relates ": *Phillips* v. *Britannia Hygienic Laundry Co.*, *per* Atkin L.J.[4] In other words, the court must " consider for whose benefit the Act was passed, whether it was " passed in the interests of the public at large or in those of a " particular class of persons ": *Groves* v. *Lord Wimborne*, *per* A. L. Smith L.J.[5]

In deciding this question one must look at the Act generally and consider, amongst other things, whether any penalty is provided for breach of the statutory duty. If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally, a right of civil action accrues to the person who is damnified by the breach. " For, if it were not " so, the statute would be but a pious aspiration ": *Cutler* v. *Wandsworth Stadium Ltd.*, *per* Lord Simonds.[6]

In the present case the Enclosure Act, 1800, and the award thereunder imposed no penalty or other sanction for non-compliance with the duty to maintain and repair the drains, and I have come to the clear conclusion that the Act was passed and the award made for the benefit of the persons in favour of whom the enclosures were made, that is to say, for the persons whose land is immediately adjacent to the drains, and through whose land

[2] [1939] 2 K.B. 560, 574.
[3] (1890) 15 App.Cas. 400.
[4] [1923] 2 K.B. 832, 841.
[5] [1898] 2 Q.B. 402, 407; 14 T.L.R. 493.
[6] [1949] A.C. 398, 407; 65 T.L.R. 170; [1949] 1 All E.R. 544.

the drains pass. I am fortified in this conclusion by the last recital to the Act.

It follows, in my judgment, that the plaintiff is entitled against the first defendants to a declaration as prayed and to damages. The damages will be assessed by an official referee. In reaching his decision he will no doubt take into account, amongst other things, the extent to which the flooding of the plaintiff's land is attributable to the failure to repair the drains and maintain them in the breadth and depth specified in the award, and to the action (if any) which the plaintiff might reasonably have taken to mitigate his damage.

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Judgment for the plaintiff against the first defendants.

Solicitors: *Fisher, Dowson & Wasbrough for Francis & Co., Cambridge; John J. McIntyre for Town Clerk, St. Ives; Sharpe, Pritchard & Co. for A. Case Aylward, Huntingdon.*

[VACATION COURT.]

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[1959 H. No. 2107.]

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Criminal Law—Court of Criminal Appeal—Substitution of sentence—Effect—Sentence quashed and shorter sentence substituted therefor—Whether disabilities attaching to quashed sentence continue to attach to substituted sentence—Meaning of "quash"—Former sentence not void ab initio—Lost remission—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (3)—*Prison Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 25 (1)—*Prison Rules,* 1949 (*S.I.* 1949, *No.* 1073)—*Prison Rules,* 1952 (*S.I.* 1952, *No.* 1405), *r.* 3.

Criminal Law—Sentence—Remission—Effect of reduction of sentence on appeal.

The Criminal Appeal Act, 1907,[1] by section 4 (3), provides: "On an appeal against sentence the Court of Criminal Appeal "shall, if they think that a different sentence should have been "passed, quash the sentence passed at the trial, and pass such "other sentence warranted in law by the verdict . . . in substitution "therefor as they think ought to have been passed. . . ."

By the Prison Act, 1952, section 25 (1),[2] it is provided that rules

[1] Criminal Appeal Act, 1907, s. 4 (3): "On an appeal against sentence "the Court of Criminal Appeal shall, "if they think that a different sen-"tence should have been passed, "quash the sentence passed at the "trial, and pass such other sentence "warranted in law by the verdict "(whether more or less severe) in "substitution therefor as they think "ought to have been passed, and in "any other case shall dismiss the "appeal."

[2] Prison Act, 1952, s. 25 (1): "Rules made under section forty-"seven of this Act may make provi-"sion whereby, in such circumstances "as may be prescribed by the rules,

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made under the Act may make provision whereby "a person serving "a sentence of imprisonment . . . may be granted remission of such "part of that sentence as may be prescribed by" the rules on the ground of his industry and good conduct; and the Prison Rules, 1949, as amended by rule 3 of the Prison Rules, 1952,[3] provide that "arrangements shall be made by which a prisoner serving a "sentence of imprisonment . . . may by good conduct and industry "become eligible for discharge when a portion of his sentence not "exceeding one-third of the whole sentence has yet to run: . . ."

The plaintiff was sentenced on January 11, 1955, to 10 years' imprisonment. During the first years of his imprisonment he suffered losses of remission of sentence amounting to 848 days for acts contrary to good conduct and industry in prison. In 1957 he was granted leave to appeal out of time against his sentence; and on October 14, 1957, the Court of Criminal Appeal quashed the 10-year sentence and passed in substitution therefor a sentence of seven years' imprisonment.

The plaintiff was thereafter continuously of good conduct and industry, and, accordingly, when approaching the date (September 10, 1959), when one-third of his seven-year sentence had yet to run, he inquired as to his eligibility for release on that date with remission of the remainder of his seven-year sentence in accordance with the rules. The prison commissioners replied that they held him under a 10-year sentence varied on appeal to seven years; that the 848 days' loss of remission in respect of the quashed sentence continued to subsist in respect of the substituted seven-year sentence; and that, accordingly, he was not eligible nor due for release until January 6, 1962. They intimated that the appropriate authority would consider any application on his behalf for the mitigation or remission of the losses of remission.

On a claim by the plaintiff for declarations (1) that he was eligible for release on September 10, 1959, and (2) that he had not lost or forfeited any remission of the sentence he was then serving, the prison commissioners took no objection to the court expressing an opinion on the preliminary point as to the effect of quashing a sentence under the Criminal Appeal Act, 1907:—

Held, that the word "quash" in section 4 (3) of the Act of 1907 did not mean to make null and void ab initio, but only for the future, from the moment when the Court of Criminal Appeal decided to quash the former sentence and substitute therefor a different sentence; accordingly, it was immaterial, for the purposes of consideration by the prison commissioners of his eligibility for discharge under the rules, whether the plaintiff was serving the 10-year or the seven-year sentence when losses of remission were

"a person serving a sentence of "imprisonment for such a term as "may be so prescribed may be "granted remission of such part of "that sentence as may be so pre-"scribed on the ground of his indus-"try and good conduct, and on the "discharge of a person from prison in "pursuance of any such remission as "aforesaid his sentence shall expire."

[3] Prison Rules, 1952 (S.I. 1952, No. 1405), r. 3: "For rule 37 of the "principal rules" (S.I. 1949, No. 1073) "there shall be substituted the "following rule:—37. Arrangements "shall be made by which a prisoner "serving a sentence of imprisonment, "whether by one sentence or by con-"secutive sentences, for a period "exceeding one month, including a "person committed to prison in de-"fault of payment of a sum adjudged "to be paid by a conviction, may by "good conduct and industry become "eligible for discharge when a portion "of his sentence not exceeding one-"third of the whole sentence has yet "to run: Provided that nothing in "the said arrangements shall autho-"rise the reduction of any period of "imprisonment to a period less than "thirty-one days."

imposed on him; and the question whether or not he was eligible for discharge before the expiration of the seven-year sentence remained a matter within the unfettered discretion of the prison commissioners.

ACTION.

The plaintiff, Ronald Arthur Hancock, was sentenced on January 11, 1955, at the County of Lancaster Quarter Sessions to a term of 10 years' imprisonment for housebreaking. He was then aged 23; his previous record was not good; but he felt considerable resentment at the length of sentence imposed on him, and between April 1, 1955, and July 12, 1957, while a prisoner and serving the 10-year sentence of imprisonment he not only escaped from prison but also committed other acts of misconduct for which, after investigation in accordance with the Prison Rules, 1949 (S.I. 1949, No. 1073), he was awarded losses of remission for good conduct and industry amounting to a total of 848 days.

The plaintiff, who had not appealed against his sentence in time, applied in 1957 for leave to appeal out of time, and the Court of Criminal Appeal, having granted him the longest extension of time for leave to appeal on record, heard his appeal and, on October 14, 1957, quashed the sentence of 10 years and substituted therefor a sentence of seven years' imprisonment, pursuant to its powers under the Criminal Appeal Act, 1907, s. 4 (3).

After that partial success, the plaintiff continued a prisoner in H.M. Prison, Dartmoor, and was of good conduct and industry continuously from October, 1957.

When he had served almost two-thirds of the seven-year sentence he made inquiries of the defendants, the prison commissioners, orally in August, 1958, and through his solicitors in 1959, as to his eligibility for discharge on September 10, 1959 (that being the date on which he would have served two-thirds of his seven-year sentence), in accordance with rule 37 of the Prison Rules, 1949, as amended by rule 3 of the Prison Rules, 1952 (S.I. 1952, No. 1405). The prison commissioners, orally in August, 1958, and by letter dated June 12, 1959, informed him that they held him under a sentence of 10 years' imprisonment, varied on appeal to seven years' imprisonment, and that the awards of loss of remission in respect of the 10-year sentence continued to subsist in respect of the seven-year sentence, notwithstanding that the 10-year sentence had been quashed. He was informed at the same time that the appropriate authority was prepared to consider any application on his behalf for the mitigation or remission of the disciplinary awards of loss of remission of 848 days.

The plaintiff elected to seek a remedy through the court, and on September 4, 1959, issued a specially indorsed writ, claiming declarations (1) that he was eligible for release from prison on

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September 10, 1959, and (2) that he had not lost or forfeited any remission of the sentence he was now serving.

By his statement of claim he recited the sentence of January 11, 1955, and the quashing of that sentence by the Court of Criminal Appeal on October 14, 1957, and claimed that he had not lost or forfeited any remission of the substituted sentence and was eligible for release in accordance with rule 37 of the Prison Rules, 1949, as amended by rule 3 of the Prison Rules, 1952, on September 10, 1959, but that by letter dated June 12, 1959, the prison commissioners had expressed their intent not to release him on that date, and had declared that he was not eligible or due for release until January 6, 1962, on the grounds that he had lost remission of the sentence which was quashed by the Court of Criminal Appeal.

In his accompanying memorandum the plaintiff stated that he would contend that all disabilities, including any awards of loss of remission attaching to the 10-year sentence were extinguished by the order of the Court of Criminal Appeal quashing that sentence, and that the commissioners had misconceived the effect of that order in purporting to hold him under a sentence of 10 years' imprisonment varied on appeal to seven years, and in contending that the awards of loss of remission in respect of the 10-year sentence continued to subsist in respect of the seven-year sentence. He stated further that he would contend that he had a legal right to have the effect of the order of the Court of Criminal Appeal determined in its application to his present detention; and that, having suffered no award of loss of remission of his seven-year sentence, he had satisfied the conditions laid down by the Prison Rules and was eligible for release.

The prison commissioners' memorandum in reply stated that the substituted sentence of the Court of Criminal Appeal was effective as from the date when the original 10-year sentence was pronounced, namely, January 11, 1955; that on the hearing and determination of his appeal no reference had been made in the Court of Criminal Appeal to any loss of remission already incurred by him or to any conduct on his part which had resulted in or which might occasion a loss of remission; that notwithstanding the use by them of the compendious and convenient phrase "varied on appeal," they had at all material times understood and appreciated that the effect of the order of the Court of Criminal Appeal made on October 14, 1957, was to quash the sentence of 10 years' imprisonment and to substitute therefor a sentence of seven years' imprisonment; that between April 1, 1955, and July 12, 1957, after investigation in accordance with the Prison Rules, 1949, the plaintiff, then being a prisoner serving a sentence of imprisonment, was duly awarded losses of remission amounting to a total of 848 days; and that none of the said awards had been remitted or mitigated under rule 48 of the Rules at

the date of the issue of the plaintiff's writ. The prison commissioners added that the plaintiff had been informed that the appropriate authority was prepared to consider any application on his behalf for the mitigation or remission of the aforementioned disciplinary awards.

On an application by the plaintiff to Winn J. in the Vacation Court on September 8, 1959, for the trial of this matter during the long vacation and for the date of the trial to be fixed, the judge ordered that the action be tried in vacation on September 18, 1959.

Neil McKinnon Q.C. and *George Shindler* for the plaintiff.
Sebag Shaw for the prison commissioners.

The only case cited during the submissions is referred to in the judgment.

WINN J. I am very much obliged to counsel for their help towards the solution of this preliminary, but in reality the sole substantial, issue which arises in this action.

The plaintiff, Ronald Arthur Hancock, seeks as against the prison commissioners a declaration which he hopes would have the result indirectly of securing his immediate release, whereas, as things are at present, he looks as though he may have to remain in prison until January, 1962, unless the prison commissioners are able to see their way to take a more favourable view of his position than they have done hitherto.

He is a man who was sentenced in January, 1955, for housebreaking to a term of 10 years' imprisonment. He was a man then of only 23, but his earlier record was not a good one and, in fact, he had just escaped from prison where he was serving a six-year sentence. I take those last detailed facts from a note which I have seen from the file of the proceedings in the Court of Criminal Appeal. He was sentenced on January 11, 1955, to 10 years' imprisonment. He did not appeal against that sentence until the autumn of 1957, when, rather remarkably (and I am told on very good authority that this case represents the very longest extension of time for appeal that has ever been granted), he was granted an extension of time for appealing, and his appeal came on before the Court of Criminal Appeal on October 14, 1957. On that day the Court of Criminal Appeal expressed the opinion that the 10-year sentence was too long, and they made an order, the precise terms of which it is important to note. They were these: "Upon the appeal of the above-named appellant against sentence, "the court doth determine the same and doth quash the sen- "tence passed at the trial, and doth pass a sentence of seven "years' imprisonment and make an order under section 22 of the "Criminal Justice Act, 1948, and doth pass that sentence in "substitution for the sentence of 10 years."

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Mr. Neil McKinnon has submitted to me cogently (and one recognises that it is an argument which calls for careful consideration and has considerable weight) that the word "quash" in that order means that the 10-year sentence was thereby rendered null and void, and wholly set aside as though it had never been. There would be persuasive force in that argument, and I would feel very well disposed to accept it, had I not found in the very wording of section 4 (3) of the Act the provision that, wherever the Court of Criminal Appeal does find itself of the opinion that a sentence passed has been too severe, it "shall . . . "quash" that sentence and "pass such other sentence . . . as "they" (the court) "think ought to have been passed in sub-"stitution therefor." When one finds those words in the section and considers the context in which they are used, and the subject-matter to which those words must be applied, one is inevitably driven to the conclusion that the word "quash" is not there used in the sense in which the Shorter Oxford English Dictionary tells me that it often is used, namely, "to annul," "make null "or void," but is used in the less drastic meaning that the former sentence is by the order of the court rendered null and void at the moment when the Court of Criminal Appeal decides to substitute for it a different sentence, so as to make that earlier sentence null and void and of no effect for the future from that point of time onwards, but not so as to render it null and void ab initio, namely, as from the date when it was passed.

I feel that that must be the right way of construing the section, for otherwise, at least as a matter of theory, the successful appellant against the length of sentence would be a person who had been unlawfully imprisoned as from the date of his conviction and removal to gaol until the time when the Court of Criminal Appeal so pronounced; and all measures of restraint exercised on him (not merely by retaining him in gaol but in other ways) in that interim period would be, at least in theory, tortious wrongs committed against him, were it not that the true intent of such an order and the true meanings of the words in subsection (3) of section 4 of the Criminal Appeal Act, 1907, which enables such an order to be made, is that the Court of Criminal Appeal quashes for the future the original sentence, and substitutes for the future the new sentence which the Court of Criminal Appeal considers the proper sentence, albeit that that sentence itself takes its extent from the original date of the first sentence; that is to say, it is a term of so many years calculated from a starting date which is the same date as the starting date of the sentence which has been, in the sense which I have indicated, quashed.

That being so, it appears to me that this man was imprisoned until the time when the Court of Criminal Appeal found in his favour, to the extent of reducing his sentence, by force of, and by virtue of, and under the 10-year sentence, and that on his partial

success in the Court of Criminal Appeal he thereafter became a prisoner detained and detainable legally by virtue of and under the strength of and under the new seven-year sentence, being a sentence of imprisonment the duration of which was to be calculated by adding seven years to the starting date of the 10-year sentence, January 11, 1955.

Looked at in that way, the problem posed to me today (which is one well worthy of the consideration of the court, and one which I still think it was right to consider, even in vacation, because the man would naturally labour under a continuing sense of grievance if he could not get his complaint considered for weeks or months after the date—September 10, now already past—when, according to his view of the matter, he would have been released) seems no longer really to be one of great complexity or difficulty. One has to remember, as the *Maguire* case [1] illustrates, that a sentence of imprisonment is a sentence for the period stated by the court in sentencing the convicted person. It is completely fallacious to regard the sentence as one which is to last only for two-thirds of that period. The man or woman so sentenced is sentenced to a period of 10 years, seven years, six years, or whatever it may be; it is only by virtue and by the indulgence of an administrative provision [Prison Rules, 1952 (S.I. 1952, No. 1405)] that in practice prisoners who behave themselves, and for whose encouragement to behave themselves well this provision has been made, may and normally will find themselves discharged from prison by the governor some two-thirds of the way through the period of time named in the sentence. If there is, in fact, a discharge by the governor based on the remission which has been de facto granted to a prisoner, then the sentence expires by the express force of section 25 (1) of the Prison Act, 1952, and thereupon the prisoner is in the position of having completely served a sentence of a period longer than the time during which he has been actually in gaol.

One finds in rule 3 of the Prison Rules of 1952, which is an amendment of rule 37 of the Prison Rules, 1949, that arrangements are to be made—and the court knows, though there is no evidence of it, that arrangements have in fact been made—by which a prisoner who is serving a sentence of imprisonment may, by good conduct and industry, become eligible for discharge when a portion of his sentence not exceeding one-third of the whole sentence has yet to run.

This man has reached a date at which it can be said that not more than one-third of the seven-year sentence passed by the Court of Criminal Appeal, calculated from January 11, 1955, has yet to run. That is the mere arithmetical calculation which produces September 10, 1959, the date mentioned to me, as that on which it could be said that there was no longer more than one-third of the seven-year sentence yet to run. That being so, he has become eligible for discharge (that is, has become eligible

[1] (1956) 40 Cr.App.R. 92.

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for the prison commissioners to consider whether they would approve of his being discharged, only if he has been of good conduct and industry). The common ground facts here are that this man, during the time that he has been in prison, has not in fact throughout the whole period been of good conduct and industry. On the other hand, he has for a very considerable time now past, namely, since October, 1957, been of good conduct and industry.

It seems to me, therefore, that the answer to the problem put before me is two-fold, and that it remains with the prison commissioners to decide for themselves what they will do with, for, and by this man, because he is, in my opinion, and I so declare, by good conduct and industry since October, 1957, eligible for consideration by the commissioners as a person who would be discharged because of that good conduct and industry, having now reached a date when not more than one-third of his sentence has yet to run. On the other hand, when and if they consider him, with a view to deciding whether he should be discharged or not—and the court has no power whatsoever to direct them to consider the question at all, for it is within their administrative and uncontrolled discretion whether they will consider him or not—they will inevitably have in mind that he has not throughout the whole period of his detention in gaol been of good conduct or industrious, and therefore did not, prior to October, 1957, acquire by good conduct and industry any eligibility for discharge.

As so often happens when problems are analysed and closely considered, the supposed legal problem is seen not to exist at all and, because it does not exist, it is impossible, in a logical and practical way, for the court or any other adviser to solve it. The practical aspects of the matter are very important. On the one hand, it is manifest that the control of prisons and prisoners by the prison commissioners and the visiting justices should not be interfered with by the courts unless, in any particular case, there has been some departure from law and good administration amounting to an offence in law; I would not think of interfering in any way whatsoever with the entirely unfettered power and discretion of the prison commissioners in this matter. On the other hand, the prison commissioners have consented to my expressing an opinion about this dispute or difference of view between the plaintiff and themselves. It seems to me that they (the prison commissioners) are right in saying that it is quite immaterial whether he was serving the 10-year sentence or serving the seven-year sentence at the time when he attempted to escape, and was guilty of other acts of misconduct which resulted in the imposition on him of sentences of losses of remission. That is quite immaterial in law, and quite immaterial in fact, in all respects except this, that I feel an uneasy doubt whether it may not sometimes happen that some visiting committees—not necessarily this one—when dealing with a man who has been sentenced to 10 years and is

still in the first stage, may not be possibly a little more ready to impose a severe loss of remission, having regard to the fact that it is not going to affect the man for several years to come, than they would be to impose that same loss of remission on a man who has reached a stage where it is soon going to be a matter of practical consequence to him that the loss of remission has been imposed. What is more, I venture to say (without, I trust, trespassing into the territory and sphere which is solely that of the prison commissioners) that it seems to me very probable that this man did feel considerable resentment about the sentence that was passed on him in January, 1955—a resentment which those who are best of all qualified to judge the propriety of sentences have found to be substantially justified; and I think the prison commissioners might well have it in mind (if they do see fit, as I hope they will, to consider this man's case now, with a view to deciding whether they can see their way to give him a discharge now or at some date earlier than 1962) that such resentment is likely to stimulate the kind of conduct of which he was guilty in prison; the best evidence of the plausibility of that view is the way in which he has behaved himself once he got a sentence which he, as a man, recognised was not an unjust sentence.

In the light of those observations, and recognising that I have really done nothing more than deliver a discourse which has little to do with the discharge of my proper functions as a judge, I would say that there should be no order of any kind made in this action. If either counsel were to ask me to make an order at all, I would only make it in this form, that I would declare (if so asked) that it is immaterial for the purposes of rule 37 [as amended] that the first sentence was quashed and the second sentence substituted, but that nevertheless, by reason of good conduct since October, 1957, the plaintiff has become eligible for consideration for discharge; but whether he is to be discharged remains entirely in the discretion of the prison commissioners. That seems to me to be a somewhat discursive and not very helpful declaration, and I doubt whether it is worth while making it; but that is all that I would be disposed to do.

No declaration made.
Judgment for the defendants.
No order as to costs.

Solicitors: *S. Sydney Silverman; Treasury Solicitor.*

M. M. H.

[PROBATE, ETC., DIVISION.]

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July 20,
21, 31.

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WHYSALL *v.* WHYSALL.

Husband and Wife—Divorce—Insanity—"Incurably of unsound mind"—Test of—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*).

A husband, who was a coal miner, was certified insane and entered a mental hospital in 1952 where he had remained. In February, 1958, the wife filed a petition for dissolution of marriage under section 1 (1) (*d*) of the Matrimonial Causes Act, 1950,[1] on the ground that the husband was incurably of unsound mind and also on the ground of cruelty. The husband, by the Official Solicitor as his guardian ad litem, filed an answer in October, 1958, denying both charges. The question whether the husband was incurably of unsound mind was ordered to be tried as a preliminary issue.

According to the medical evidence given at the hearing of the issue the husband was of unsound mind and the prognosis was that although he might shortly be released from hospital, there was no hope of more than a partial recovery enabling him to live a life as the subject of sympathetic supervision and care. In order to maintain even that degree of recovery he would have to take regular, prophylactic, self-administered doses of drugs:—

Held, that on the true interpretation of section 1 (1) (*d*) of the Act of 1950, the intention of Parliament embodied in the words "incurably of unsound mind" was to enable one spouse to obtain a dissolution of the marriage when the mental incapacity of the other was, despite five years' care and treatment, such as to make it impossible for the parties to live a normal married life together, and when there was no prospect of their being able to do so in the future.

That no distinction was to be drawn between the phrase "unsound mind" and the word "insanity," and that the test of the state of mind required was to be found in section 90 (1) of the Lunacy Act, 1890,[2] namely, "incapable of managing himself and "his affairs" provided that the word "affairs" was taken to include the problems of society and of married life, and that the test of the ability required was that of a reasonable man.

Smith v. *Smith* [1940] P. 179; 56 T.L.R. 760; [1940] 2 All E.R. 595 followed.

That, as to the test to be applied to the word "incurably," the fact that a spouse, who had been released after at least five years' care and treatment, had to take prophylactic measures did not, in itself, render that spouse "incurably of unsound mind"; the test was whether that spouse could hope to be restored to a state in which he was capable of managing himself and his affairs.

[1] Matrimonial Causes Act, 1950, s. 1 (1): "... a petition for divorce "may be presented to the court "either by the husband or the wife "on the ground that the respondent— "... (*d*) is incurably of unsound "mind and has been continuously "under care and treatment for a "period of at least five years immediately preceding the presentation of "the petition; ..."

[2] Lunacy Act, 1890, s. 90 (1): "The Judge in Lunacy may upon "application by order direct an inquisition whether a person is of "unsound mind and incapable of "managing himself and his affairs."

Randall v. *Randall* [1939] P. 131; 55 T.L.R. 224; [1938] 4 All E.R. 696 applied.

Accordingly, in the present case, it was clear on the medical evidence as a whole, that there was no hope that the husband could be restored to such a condition; the wife had, therefore, proved that the husband was incurably of unsound mind and was entitled to a decree nisi.

ISSUE.

The parties were married in December, 1939. On May 5, 1952, the husband, who was a coal miner, entered Pastures Hospital, Mickleover, Derbyshire, having been certified insane, and remained there in that condition. By her petition of February, 1958, the wife sought a dissolution of the marriage on the ground that the husband was incurably of unsound mind, and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of her petition and, secondly, on the ground of the husband's cruelty. After the filing of her petition the wife entered the same hospital but was at all material times able to give instructions to her solicitors and counsel. In October, 1958, the husband, by the Official Solicitor as his guardian ad litem, filed an answer denying that he was incurably of unsound mind, and also denying the charge of cruelty. The District Registrar ordered that the question of whether the husband was incurably of unsound mind be tried as a preliminary issue.

According to the medical evidence given at the trial of the issue the husband was of unsound mind. The prognosis was that he might shortly be released from hospital, but that there was no hope of more than a partial recovery enabling him to live a life in which he was the subject of sympathetic supervision and care, that he would be apathetic and lacking in volition, that he would, perhaps, be able to work as a labourer but would be unfit to deal with the simple problem of how to dispose of his wages. In order to maintain even that condition he would have to take regular, prophylactic, self-administered doses of drugs.

R. J. A. Temple Q.C. and *T. R. Heald* for the wife.
Roger Ormrod Q.C. and *K. R. Bagnall* for the husband.

The following cases were cited in argument, in addition to those referred to in the judgment: *Swettenham* v. *Swettenham* [3]; *Marquis Camden* v. *Inland Revenue Commissioners.* [4]

Cur. adv. vult.

July 31. PHILLIMORE J. referred to the facts of the marriage and the proceedings and continued: My task has been greatly facilitated by the fact that the three medical experts called are

[3] [1938] P. 218; 54 T.L.R. 903; [1938] 3 All E.R. 183.

[4] [1914] 1 K.B. 641.

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virtually in agreement. Inevitably, there is some slight difference in emphasis in their evidence, but on the broad question of the husband's state of health and prospects of recovery, or cure, they are substantially agreed.

The facts, which I regard as indisputable in the light of the evidence, are as follows: The husband, who is a coal miner, entered the Pastures Hospital on May 5, 1952, a reception order having been made by a justice of the peace. The particulars attached to the order recorded, inter alia, that his existing attack was of a duration of a "few weeks," and that he had threatened to kill sundry people, including his wife.

He was, on entry into hospital, unquestionably a paranoid schizophrenic—and that is still his state. He has suffered from delusions, the most consistent during recent months being that one of the male nurses is hypnotising him. In addition, he suffers from hallucinations in the shape of voices, which—so he says—give him instructions. He has in the past connected these voices with his belief that his wife is unfaithful to him, but now seems to be very vague as to what they say.

He has had many varieties of treatment, including E.C.T. (electro-convulsive therapy) and, since October 9, 1954, doses of the new drug chlor-promazine (the trade name of which is largactil), which drug has proved of great value in the treatment of schizophrenia. Unfortunately, he has displayed an allergy to large doses of this drug, with the result that at the present time he is being treated with small doses of this and of two other drugs, each being administered three times daily.

In the past, treatment has from to time resulted in a great improvement in the husband's mental state, but in each case he has suffered a relapse. The most recent treatment—namely, the combination of three drugs, including largactil—is at the present time showing excellent results, so much so that on July 17, 1959, when Dr. Pentreath, the medical superintendent of Pastures Hospital, who gave evidence on behalf of the wife, visited him, he found him much improved. Thus, although he still insisted that he was being hypnotised and was hearing the voices, he said that he did not bother about them so much.

Dr. Pentreath concluded that although the husband had still very little insight into his condition—the doctor used the word "negligible"—that he was better than for a very long time, and that, if his improvement could be maintained to the extent that he became free of the symptoms I have referred to, it was even possible to visualise his discharge at Christmas, provided suitable conditions could be found for him to live outside the hospital.

It is material to remember that Dr. Curran, the senior psychiatrist at St. George's Hospital, London, who gave evidence on behalf of the wife, and Dr. Blair, the consultant psychiatrist at St. Bernard's Hospital, Southall, who gave evidence on behalf of the husband, saw the husband on January 31, 1959, and

March 11, 1959, respectively, before the present improvement began.

Having suffered from, and having received treatment for, this disease for over five years, the husband is to be regarded as a chronic case, and until a few years ago no form of recovery could have been hoped for. The drug largactil has, however, effected an astonishing change in cases of schizophrenia, with the result that, even in chronic cases, a remarkable degree of recovery has occurred and has been maintained.

This degree of recovery has varied from what the doctors describe as clinical recovery to the lesser improvement, which they term social recovery, or, still further down the scale, semi-social recovery, which they also designate as "much improved." As I understand the term "clinical recovery," it means that the patient can be discharged from hospital, there being no persisting clinical signs of the disease, and the patient being apparently capable of resuming the normal life which he or she enjoyed before the onset of the disease.

At the lower end of the scale, a semi-social recovery may permit the discharge of the patient—the symptoms of the disease such as delusions and hallucinations having been suppressed—but the degree of recovery being less, the patient is unfit to resume a normal life and may require at the least the care and help of a good friend or relative to enable him or her to live outside an institution.

There are, of course, many degrees of recovery between the full clinical recovery at the top of the scale and the semi-social recovery or the condition "much improved" at the foot of the scale. Social recovery is, as I understand the phrase, a sort of halfway mark.

Dr. Blair, who has conducted a special study covering 132 cases of women who have suffered from schizophrenia for over five years (and can thus be termed "chronic cases"), told me that, as a result of this new drug 8·3 per cent. had made a full clinical recovery, and 25·8 per cent. what he terms a social recovery, and added that, so far as he is able to ascertain, these cases had maintained improvement. In particular, he spoke of a woman who had spent over 15 years in hospital as a schizophrenic and who, having made a clinical recovery, had been able to return to her husband and her home: this woman has maintained her recovery for over two years. He said, however, that the degree of recovery in the case of men was less satisfactory than in that of women.

All the doctors agree that whatever degree of recovery, whether clinical or semi-social or any intervening degree, the chronic schizophrenic must continue to take doses of the drug largactil at fixed times to provide against relapse. Thus, no degree of recovery is at present envisaged in these cases which does not involve treatment, albeit in the shape of self-treatment, with largactil.

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In the present case, there is no dispute that the husband is, at the present time, of unsound mind, or that he has been in this state and undergoing treatment for it for over five years immediately preceding the presentation of his wife's petition; but before she can obtain the relief which she seeks under section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, she must discharge the onus of proving that the husband's unsoundness of mind is incurable.

The doctors are agreed that in the light of the history of this case there is no prospect in the present state of medical knowledge of a full clinical recovery; but all agree that it is impossible to rule out the possibility of some degree of social recovery which may make it possible to discharge this man from hospital, perhaps as early as Christmas of this year, if suitable conditions of living can be found for him.

On this evidence, counsel for the husband contends that the wife has failed to discharge the burden of proving that the husband's condition is incurable. He urges that, if the degree of recovery enables this man to be discharged and to live a reasonably normal life (which, he asserts, is possible on the evidence), he cannot be regarded as of unsound mind, and that he ought to be regarded as cured, even though he may still require to take drugs to maintain his recovery. He points out that the phrase "incurably of unsound mind" is a term of art—one of those phrases which commend themselves to lawyers rather than to anyone else—and asks me to say what degree of infirmity or unsoundness of mind justifies the conclusion that a man or woman is in that mental state which the law regards as a basis for dissolution of his or her marriage at the instance of the other spouse.

Counsel for the wife contends that even if he attains the degree of clinical recovery, since the husband would still require to take drugs to maintain it, he could never be regarded as cured, and that, on all the facts of this case, I must find that the husband's present condition is incurable within the meaning of the statute.

My task would, of course, be comparatively easy if the doctors were prepared to assess the prospects of a "cure" or to assess the patient's state in terms of "curability" or "incurability," but those are not the terms in which they are prepared to give their evidence. The medical terms "clinical," "social" and "semi-social" recovery are terms which the doctors understand, and which involve a practical criterion against which they can assess the mental state of a patient.

I am faced with the difficulty of reconciling the terms they use with the terms used by Parliament—namely, "incurably of 'unsound mind.'" Moreover, I must bear in mind that the modern tendency is to discharge patients from hospital far more freely than in the past. A patient is often discharged where arrangements can be made for his cure outside hospital, and where

further treatment is unlikely to improve his mental state, which, nevertheless, few people would describe as normal or cured.

Section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, on which this ground of relief now rests, re-enacts section 2 of the Matrimonial Causes Act, 1937, which first created this ground of divorce in the shape of an amendment to section 176 of the Supreme Court of Judicature (Consolidation) Act, 1925. Neither section has attempted to define the term "unsound mind" or the phrase "incurably of unsound mind," although section 1 (2) of the Act of 1950, in defining when a person of unsound mind shall be deemed to have been under care and treatment for five years, stipulates by subsections (*a*), (*b*) and (*c*) that it involves compulsory detention in a mental institution throughout the period of five years and, accordingly, involves certification. However, by subsection (*d*), the requirement can also be satisfied if the patient was originally detained compulsorily as a result of certification, provided the balance of the five years was passed in an institution as a voluntary patient. This, no doubt, was the factor which induced Sir Boyd Merriman P. to say in *Randall* v. *Randall*,[1] that unsoundness of mind must at least involve the status of voluntary patient.

The emphasis on detention and, consequently, on certification has been for all practical purposes removed by the provisions of section 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, by which a person is to be deemed to be under care and treatment for the purposes of section 1 (1) of the Act of 1950 "at any "time when he is receiving treatment for mental illness—(*a*) as a "resident in a hospital or other institution provided, approved, "licensed, registered or exempted from registration by any "Minister or other authority. . . ."

It is said that the provisions of this Act make it all the more important to determine what degree of mental infirmity amounts to the unsoundness of mind required to satisfy section 1 (1) (*d*) of the Act of 1950, and what is meant by the word "incurably."

My duty is to give the words used by Parliament their ordinary and natural meaning in the context in which they are used, bearing in mind the purpose of the enactment in which they appear, and any other indication of intention disclosed by the wording of the statute. It is permissible to seek assistance from dictionaries and from the user of these same words by Parliament in other statutes.

I have been referred by counsel to the Lunacy Act, 1890, which was a consolidating Act, whose scheme (as described by the authors of the article on Lunatics or Persons of Unsound Mind in Halsbury's Laws of England, 2nd ed., vol. 21 p. 274), is to divide persons of unsound mind into two classes: (1) persons of unsound mind so as to be incapable of managing themselves or

[1] [1939] P. 131, 139; 55 T.L.R. 224; [1938] 4 All E.R. 696.

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their affairs; and (2) persons of unsound mind so as to be incapable of managing their affairs though capable of managing themselves.

Thus, section 90 (1) provides: "The judge in lunacy may "upon application by order direct an inquisition whether a person "is of unsound mind and incapable of managing himself and his "affairs."

Section 116 (1), which describes the extent of the powers of management and administration by the judge in lunacy, applies them: (a) To lunatics so found by inquisition. (b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act. (c) To every person lawfully detained as a lunatic though not so found by inquisition. (d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs. (e) To every person with regard to whom it is proved to the satisfaction of the judge in lunacy . . . that such person is of unsound mind and incapable of managing his affairs. . . . (f) To every person with regard to whom the judge is satisfied . . . that such person is or has been a criminal lunatic and continues to be insane and in confinement. The succeeding provisions of the Act describe all the above persons as lunatics; the term is thus employed to cover both those found to be incapable of managing themselves and their affairs, and also those who, from mental infirmity or unsoundness of mind, are incapable of managing their affairs although presumably still capable of managing themselves.

Finally, section 341 defines "Lunatic" as "an idiot or person "of unsound mind." The phrase "person of unsound mind" also appears in Forms 1 and 8 in the First Schedule to the Act, where it is treated as synonymous with the term "lunatic." It follows that the phrase "person of unsound mind" as used by Parliament in this Act covers various grades of mental infirmity and, in particular, those whose mental unsoundness or infirmity renders them incapable of managing themselves and their affairs, as well as those merely rendered unable to manage their affairs.

I was referred also to section 20 (5) of the Mental Treatment Act, 1930, passed, it should be remembered, only seven years before the phrase "incurably of unsound mind" was first made a ground for dissolution by the Matrimonial Causes Act, 1937. This provides as follows: "The word 'lunatic' (except in the "following contexts, that is to say, in the phrase 'criminal "'lunatic,' and in relation to persons detained as lunatics outside "England) shall cease to be used in relation to any person of or "alleged to be of unsound mind and there shall be substituted "for that word whenever it occurs . . . the expression 'person of "'unsound mind' 'person' 'patient' 'patient of unsound "'mind' or 'of unsound mind' or such other expression as the

" context may require." Here Parliament is equating the term " lunatic " with the phrase " a person of unsound mind."

Some assistance is also to be derived from the Trustee Act, 1850, where by section 2: " The word ' lunatic ' is defined as " meaning ' any person who shall have been found to be a lunatic " ' upon a Commission of Inquiry in the nature of a Writ *De* " ' *lunatico inquirendo* ' "—that is to say, found by inquisition—and the expression " person of unsound mind " as meaning " any " person, not an infant, who, not having been found to be a " lunatic, shall be incapable from infirmity of mind to manage " his own affairs." These definitions were applied by Cotton L.J. in the case *In re Martin's Trusts*,[2] where he held that a trustee was of unsound mind when, from continuing infirmity of mind, he was incapable of managing his affairs. The Lunacy Regulation (Ireland) Act, 1871, by section 2, defines a lunatic as " any person " found by inquisition idiot, lunatic, or of unsound mind, and " incapable of managing himself or his affairs." It will be observed that the word " or " is here used in contrast to the word " and " used in section 90 of the Lunacy Act, 1890, a similar variation appearing in the definition of the words " persons of " weak mind " in the same statute. It is curious to observe that section 1 (1) (*b*) of the Divorce (Scotland) Act, 1938, in applying to Scotland the new grounds for divorce introduced in England by the Matrimonial Causes Act, 1937, used the phrase " is incur- " ably insane." As to this, I would refer to the view of Sir Boyd Merriman P. expressed in *Smith* v. *Smith* (*orse. Hand*),[3] in concluding,[4] after reference to the Oxford Dictionary, that no distinction is to be drawn between the phrase " unsoundness of " mind " on the one hand and the word " insanity " on the other.

In using the phrase " of unsound mind " in the Acts of 1937 and 1950, Parliament must, I think, have intended to describe a mental state which, assuming that it was incurable, would justify a dissolution of the marriage tie. Although in the comparable law to govern the dissolution of marriages in Scotland the term " insane " is used, it seems unlikely that it was really intended that the law should be different on either side of the border. In the context, and bearing in mind the definitions afforded by the Oxford Dictionary, it must, I think, have been intended to describe a state of mind variously called unsoundness of mind or insanity.

It is always dangerous to attempt to define a phrase such as the phrase " of unsound mind " used in section 1 (1) (*d*) of the Act of 1950. As Sir Boyd Merriman P. pointed out in *Randall* v. *Randall*,[5] there is a great risk that in attempting to define the words used by Parliament fresh difficulties will be created; the result may be to make confusion worse confounded. This view

[2] (1887) 34 Ch.D. 618, 622.
[3] [1940] P. 179; 56 T.L.R. 760; [1940] 2 All E.R. 595.
[4] [1940] P. 179, 181.
[5] [1939] P. 131, 137.

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was followed by Mr. Commissioner Latey Q.C. in *Lock* v. *Lock*.[6] In the present case, however, I am pressed by counsel for the Official Solicitor to attempt to do so. He tells me that the Official Solicitor is greatly concerned at the number of cases where a party has been divorced on the ground that he or she is "incurably of unsound mind," and has, thereafter, as a result of further treatment, left hospital fit to resume a normal married life. He points out that, whereas the proviso to the Act of 1950 did at least link the deterioration of the mental condition to past certification, this test has been removed by the Act of 1958. He has also emphasised, in referring to the previous statutes, the very wide range of user to which the phrase "person of unsound "mind" has been attributed by Parliament. Finally, he said that in the light of the medical evidence in this case it is not practicable to determine whether the husband is curable of his unsoundness without first deciding what is meant by "unsound "mind." Since the Official Solicitor, in the exercise of his public duty, is concerned in almost all of these cases, I have thought it my duty to attempt to state my opinion.

It is no doubt arguable that since the word "lunatic" and the phrase "person of unsound mind" have been used by Parliament to designate cases of so wide a range of mental infirmity, the court in considering section 1 (1) (*d*) ought to adopt an equally broad view. If this argument be right, the categories covered by section 116 (1) (*d*) and (*e*) of the Lunacy Act, 1890, are to be included. Is this right, or ought the court to restrict the relief of dissolution to cases where a spouse is incapable of managing himself and his affairs?

The cases covered by section 116 (1) (*d*) include those who, endowed perhaps with great wealth or cursed by the complexity of their financial problems, may, in their old age, be unable to manage their affairs and yet, since they are still able to understand the extent of their property and the claims to which they ought to give effect, are capable of making a valid will or giving a valid power of attorney. They may also be able, relieved of the burden of their affairs, to continue to live a normal life and, indeed, a normal married life. I cannot think that cases of this sort were contemplated by Parliament in enacting section 1 (1) (*d*) of the Act of 1950. Nor do I suppose that the section was intended to apply to the individual who suffers from the sort of minor degree of unsoundness of mind which may produce eccentricities or harmless delusions.

It seems to me that the intention of Parliament was to enable one spouse to obtain a dissolution of the marriage when the mental incapacity of the other, despite five years' treatment, was such as to make it impossible for them to live a normal married life together, and when there was no prospect of any improvement in mental health which would make it possible for them to do so

[6] [1958] 1 W.L.R. 1248; [1958] 3 All E.R. 472.

in the future. The state of mind envisaged was, accordingly, a degree of unsoundness or incapacity of mind properly called insanity. If a practical test of the degree is required, I think it is to be found in the phrase used in section 90 of the Lunacy Act—" incapable of managing himself and his affairs "—provided it is remembered that " affairs " include the problems of society and of married life, and that the test of ability to manage affairs is that to be required of the reasonable man. The elderly gentleman who is no longer capable of dealing with the problems of a " take-over bid " is not, in my judgment, to be condemned on that account as " of unsound mind."

What effect is to be given to the word " incurably " ? If a person may be discharged from hospital in a state in which he can resume married life, managing himself and his affairs, able to make a will and, perhaps, to enter into contracts or act as a trustee, does the fact that he will always have to take a regular dose of a drug to guard against any recurrence of the disease prevent it being said that he is cured? Mr. Temple's argument would have a patient with this prospect labelled " incurable " even if the hospital were to discharge him as recovered, since, as he says, the prophylactic doses would not be necessary if he was cured.

Likewise, what is the degree of cure involved in a semi-social recovery or discharge with the finding " much improved " ? I think assistance is to be derived from the decision of Sir Boyd Merriman P. in *Randall* v. *Randall*.[7] Unfortunately, the facts in that case are somewhat inadequately reported. Incidentally, the first sentence of the headnote is clearly misleading. It is, however, clear that it was a borderline case, since it was, at least, doubtful whether the respondent was certifiable at the time of the hearing. Sir Boyd Merriman P., having stated that certification was not necessarily the test, went on to refer[8] to the medical evidence. It was clear that the respondent husband would always suffer what were referred to figuratively as the " scars of the disease " and be subject to an irreducible minimum of unsoundness of mind so that, at best, he could hope to live in a small cottage with a small garden, in circumstances where he would remain technically in detention and subject to recall to hospital. Here, then, was a patient for whom a sheltered life subject to supervision was the utmost that could be hoped for. In this case, which Sir Boyd Merriman P. held incurable, the prospects were, I think, analogous to what the doctors described to me as a semi-social recovery.

In my judgment, the test to be applied to the word " incur- " ably " is to be applied with common sense and with regard to the popular understanding of the term. In a sense, no doubt, anyone who has suffered a severe disease, mental or physical, cannot be cured in that he cannot expect to enjoy a mind or body

[7] [1939] P. 131.

[8] Ibid. 139–140.

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as robust or healthy as before. Nevertheless, we regard such a person as cured when he has left hospital and resumed a normal life. The mere fact that he may have to take prophylactic measures to preserve his cure does not in ordinary language class him as an invalid. In the physical sphere injections in the case of a diabetic provide a parallel to the largactil which the schizophrenic must always take, even after he is discharged as "clinically recovered." There will always be borderline cases such as cases where there is a real prospect of relapse at an early date, but if these cases are to be properly assessed, and the interests of the mentally afflicted are to be protected, a practical test must be found, a test which enables a doctor to say with some confidence on which side of the line the particular patient falls.

If a man can hope to resume a normal married life and to manage himself and his affairs, no ordinary person would describe him as incurably of unsound mind or insane because he has to take a drug once a week or once a day. Equally, however, if in the light of medical knowledge at the time of the inquiry it is said that the patient's mental state is such that the best that can be hoped for is discharge to conditions where he will not be required to manage himself or his affairs, but will live an artificial existence protected from the normal incidents and problems of life he will properly be termed incurable. A parallel in the physical sphere is the patient who can go home but who will always be bedridden, whom we would term a permanent invalid. I would conclude, therefore, that in deciding whether a person is "incurably of "unsound mind," the test to be applied is whether by reason of his mental condition he is capable of managing himself and his affairs and, if not, whether he can hope to be restored to a state in which he will be able to do so. I would add to the above test the rider that the capacity to be required is that of a reasonable person.

I turn finally to consider the effect of the view I have formed on the facts of this case. As I have already stated, there is no dispute that the husband is at the present time of unsound mind. Is this state incurable, bearing in mind that all the doctors deny the possibility of a clinical recovery and hold out the hope of a semi-social recovery as the best that can be expected? Dr. Blair's assessment was that the husband might hope for a grade lower than social recovery, which he would term "much "improved" or "semi-social recovery." The state of apathy typical of the disease would be likely to persist, and possibly some hallucinations, but he should be able to earn his living and possibly manage some simple financial matters, though this would entirely depend on how he adapted himself. He would always have a scar in the personality so that his personality would never be quite the same as before. Dr. Curran was less optimistic. He took the view that the husband would never be free from latent disease; although

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the present symptoms might be suppressed, others would be likely to appear. He would always show lack of emotional responsibility, be lacking in activity, and carry on without volition and with a lack of interest. In short, his opinion is that the husband will always suffer from an irreducible minimum of unsoundness of mind, and that it is not likely that he will be able to earn his own living. Dr. Pentreath, who has known the patient over the years and is really in the best position to judge, thought that, even if the present improvement is continued so that the husband can be discharged, he will still remain a withdrawn personality, lacking in volition and spontaneity; suffering from some residual scarring of the mind, he would probably always need some degree of personal supervision by kind friends or relatives, particularly in matters of money.

This man is a chronic case. It it clear that there is no hope of more than a partial recovery, and that this can only enable him to live a life where he is the subject of sympathetic supervision and care. I do not think that it could be said that there is any real prospect of his return to a normal life or normal married life, where he would be able to manage himself and his affairs. He will be apathetic and lacking in volition and will, perhaps, be able to do the work of a labourer but unfit to deal with the simple problem of how to dispose of his wages. I do not think that Parliament intended to treat as cured a man whose optimum prospect of recovery is to be fit for this sort of half-life. I am satisfied, therefore, that I ought to hold that the wife has proved her case that the husband is incurably of unsound mind, and that she is entitled to a decree nisi.

Order accordingly.

Solicitors: *P. Alec Cook, The Law Society Divorce Department (Nottingham); The Official Solicitor.*

E. J.

[QUEEN'S BENCH DIVISION.]

REGINA *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SHUTER.

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July 7.

Lord Parker C.J., Slade and Davies JJ.

Fugitive offender—Offences within Act—Evidence—Order by dominion court—Offences "punishable . . . by imprisonment with hard labour "for a term of twelve months or more, or by any greater punish- "ment"—Order setting out punishments—Whether admissible as evidence of punishments stated in it—Whether statements as to punishments statements of fact or law—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *ss.* 9, 29.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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REGINA v. GOVERNOR OF BRIXTON PRISON. *Ex parte* SHUTER.

Evidence—Dominion law—Practice—Desirability of expert evidence—Evidence (Colonial Statutes) Act, 1907 (7 *Edw.* 7, *c.* 16), *s.* 1.

Fugitive Offender—Habeas corpus—Jurisdiction—Unlawful detention of applicant—Jurisdiction to remit matter to magistrate.

An applicant for a writ of habeas corpus had been committed to prison to await his return to Kenya by a warrant of the chief magistrate, acting under the provisions of Part I of the Fugitive Offenders Act, 1881.[1] No expert evidence of the law of Kenya was adduced before the chief magistrate, who acted, inter alia, upon an order signed by the senior resident magistrate in Nairobi, which referred to 11 counts of offences alleged to have been committed by the applicant in Kenya, upon which the applicant was to be arrested, and set out the maximum penalty for each offence. In respect of 9 of the 11 counts this penalty was stated to be imprisonment for a period exceeding 12 months.

The applicant contended first, that this order was not admissible under section 29 of the Act of 1881 as evidence of the penalties applicable to the offences with which he was charged, and secondly, that if it was, it did not furnish evidence that the offences were offences within section 9 of the Act:—

Held, (1) that, in cases under the Act, there should be a settled practice that an expert on the local law should give evidence, either in the form of a deposition accompanying the warrant of arrest from the dominion concerned, or orally before the magistrate in this country. The practice of receiving copies of local statutes, penal codes and ordinances in evidence under the provisions of the Evidence (Colonial Statutes) Act, 1907, was not satisfactory, since no one except an expert could be sure that the document was the latest version of the local law.

(2) That it was doubtful whether the order was evidence under section 29 of the Act of the matters stated in it, since it stated what were, so far as the senior resident magistrate was concerned, not matters of fact but propositions of law; moreover, even if the order were evidence of the matters stated in it, it was doubtful whether the evidence showed that the offences referred to were offences within section 9 of the Act, since on a natural reading of the section the words "or by any greater punishment" did not refer to ordinary imprisonment for a period exceeding 12 months, and the words "or more" referred to a sentence of more than 12 months' imprisonment accompanied by hard labour.

(3) That, even though the applicant was wrongly detained, there was inherent jurisdiction in the court to remit the matter to the chief magistrate to be dealt with in accordance with what should become the settled practice.

Dicta of Lord Alverstone C.J. and Darling J. in *Rex* v. *Governor of Brixton Prison, Ex parte Percival* [1907] 1 K.B. 696, 705, 708; 23 T.L.R. 238 applied.

[1] Fugitive Offenders Act, 1881, s. 9: "[Part I] of this Act shall "apply . . . to every offence . . . "which is for the time being punish- "able in the part of Her Majesty's "dominions in which it was com- "mitted, . . . by imprisonment with "hard labour for a term of twelve "months or more, or by any greater "punishment; and for the purposes of "this section, rigorous imprison- "ment, and any confinement in a "prison combined with labour, by "whatever name it is called, shall be "deemed to be imprisonment with "hard labour. . . ."

S. 29: ". . . Depositions (whether "taken in the absence of the fugitive "or otherwise) and copies thereof, "and official certificates of or judicial "documents stating facts, may, if "duly authenticated, be received in "evidence in proceedings under this "Act. . . ."

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APPLICATION for a writ of habeas corpus.

The applicant, Victor Charles Shuter, applied for a writ of habeas corpus ad subjiciendum addressed to the Governor of Brixton Prison, where the applicant was detained to await his return to Kenya by virtue of a warrant of committal made by Sir Laurence Dunne, the chief magistrate, at Bow Street on June 17, 1959, under the provisions of Part I of the Fugitive Offenders Act, 1881. The applicant had been brought before the chief magistrate under a warrant of arrest issued by the senior resident magistrate in Nairobi, Kenya, and endorsed in the United Kingdom. Attached to the warrant were the depositions taken in Nairobi, and an order for the issue of the warrant signed by the senior resident magistrate. No expert evidence of the law of Kenya was adduced before the chief magistrate, whose attention however was drawn to the order; this was headed "Inquiry under the Fugitive Offenders Act" and referred to eleven counts of offences which the applicant was alleged to have committed in Kenya at the end of 1958 and the beginning of 1959, upon which he was to be arrested, setting out the maximum penalty which could be imposed for each offence. In nine cases out of the eleven the maximum penalty was stated to be imprisonment for more than a year, but in none of them was there any reference to imprisonment with hard labour.

On behalf of the applicant it was contended that the order signed by the senior resident magistrate could not be admissible under section 29 of the Act in proceedings before the chief magistrate, since the statements of maximum penalties were not matters of fact but propositions of law. It was further contended that if the order were admissible, it contained no evidence that the offences set out in it were offences to which Part I of the Act applied, since the references to penalties mentioned only imprisonment, and offences punishable with imprisonment only, of however long a period, were not within the words of section 9 of the Act.

On behalf of the Government of Kenya it was contended that the order was admissible, but the second submission of the applicant was conceded. It was, however, contended that by virtue of the Criminal Justice Ordinance, 1957, which abolished imprisonment with hard labour in Kenya, it was provided that all persons serving prison sentences might be kept to labour. This ordinance was not before the chief magistrate, but would be admissible under the provisions of the Evidence (Colonial Statutes) Act, 1907, if the case were sent back to him. Read with the provisions of the Kenya Penal Code, which was before the chief magistrate, and the senior resident magistrate's order, this provided the necessary evidence that the offences fell within Part I of the Act of 1881.

On behalf of the Governor of Brixton Prison, both the applicant's submissions were conceded. It was further submitted

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that although the reception of Government printer's copies of statutes, penal codes and ordinances was authorised by the Act of 1907, the safer course was to call expert evidence of the local law, since it was dangerous to assume that any such statutes, codes and ordinances had not been amended or repealed since they were first enacted.

The applicant also applied for relief under section 10 of the Act of 1881; the case is not reported upon this point.

Neil Butter for the applicant.

John Mathew for the Government of Kenya and H.M. Secretary of State for Home Affairs.

J. H. Buzzard for the Governor of Brixton Prison.

The following case, which was not referred to in the judgments, was cited in argument upon the points reported: *Rex* v. *Secretary of State for India in Council, Ex parte Ezekiel.*[2]

LORD PARKER C.J. In these proceedings Mr. Butter moves for a writ of habeas corpus on behalf of one Victor Charles Shuter, now detained in Brixton Prison pursuant to an order of committal made by Sir Laurence Dunne, the chief magistrate, under the Fugitive Offenders Act, 1881. There is in the alternative an application for relief under section 10 of that Act.

The applicant is accused of having committed a number of offences in Kenya at the end of 1958 and the beginning of 1959. There are some eleven charges, consisting of forgery, uttering false documents, theft, obtaining cash and goods by false pretences and obtaining credit. There is a warrant from Kenya duly authenticated for his apprehension and return to Kenya, and there is no doubt that the depositions from Kenya, which were of course admissible as evidence before the chief magistrate, raised a strong or probable presumption that the applicant had committed the offences mentioned in the warrant, so as to justify the chief magistrate in committing him to prison to await his return under section 5 of the Act of 1881. What is said, however, is that there was no evidence before the chief magistrate that the offences with which he was charged were offences to which the Act applied.

[His Lordship read section 9 of the Act, and continued:] The only evidence before the chief magistrate of the law of Kenya—which I may refer to as the local law—in regard to the punishment for these offences, if it be evidence at all, is to be found in a document attached with the depositions to the warrant, which was an order by the senior resident magistrate in Nairobi that a warrant of arrest be issued. It reads in this way: "Inquiry under the Fugitive Offenders Act, 1881. The "Queen *v.* Victor Charles Shuter. I order that a warrant of

[2] [1941] 2 K.B. 169; [1941] 2 All E.R. 546.

" arrest be issued for the apprehension of Victor Charles Shuter " formerly an officer of the Kenya Prisons Service on the eleven " counts in the charge sheet hereto attached marked 'A.'" There then follows a reference to the eleven counts, beginning: " Count 1: Forgery, being a felony rendering the offender liable " to imprisonment for three years." Thereafter it goes through all the eleven counts, setting out the period of imprisonment for which the offender is liable. In passing it is to be observed that in nine cases out of the eleven the liability to imprisonment was to imprisonment for more than a year; and secondly, it is to be observed that in no case is there any reference to imprisonment with hard labour.

However, I have very grave doubts whether that document is any evidence of the punishment to which the offender would be liable in Kenya. Whether it is any such evidence depends on the construction of section 29 of the Act. The relevant part of that section is in these words: " Depositions (whether taken " in the absence of the fugitive or otherwise) and copies thereof, " and official certificates of or judicial documents stating facts, " may, if duly authenticated, be received in evidence in pro- " ceedings under this Act." No doubt the order is a judicial document, but so far at any rate as the author, the senior resident magistrate at Nairobi, is concerned, what is set out there in regard to the liability to punishment can hardly be said to be setting out facts; he was setting out the law, and accordingly, I have very grave doubts whether that document was admissible under section 29 before the chief magistrate as evidence of the law of Kenya in regard to punishment.

Quite apart from that there is nothing in the order to indicate that the respective periods of imprisonment there referred to are periods of imprisonment with hard labour or periods of imprisonment of such a character as to come within the words of section 9: " for the purposes of this section, rigorous im- " prisonment, and any confinement in a prison combined with " labour, by whatever name it is called, shall be deemed to be " imprisonment with hard labour." It is true that on one reading of that section it could be said that as in nine out of the eleven offences the punishment set out in the document is more than twelve months, those offences are covered by the words in the section, " or by any greater punishment." I confess that I feel great difficulty in any such construction. It seems to me that the more natural way to read the section is that the words " or " more " are referring to a sentence of imprisonment of more than twelve months accompanied by hard labour.

There is no doubt that this is a technical objection. It is most unlikely, looked at as a matter of common sense, that the senior resident magistrate in Nairobi would set his hand to such a document as this order, headed, as it is, " Inquiry under the " Fugitive Offenders Act," without verifying that the offences were offences within that Act. It would be, as a matter of

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common sense, still more extraordinary if in fact these offences of forgery, false pretences and the like were not offences to which the Fugitive Offenders Act applied at all; but be that as it may, the matter must be looked at strictly.

In *Rex* v. *Governor of Brixton Prison, Ex parte Percival*,[1] a case not unlike the present one, Lord Alverstone C.J. said[2]: "In my opinion every person who comes and asks for an order "for the delivery up of a fugitive offender must be prepared with "evidence that that condition of the statute has been fulfilled. "That is a very important matter, and having regard to the fact "that we are dealing with the criminal law, we must apply the "general principles of the criminal law, and the prosecutor must "make out his case. We are also dealing with a branch of the "criminal law which affects the liberty of the subject, and that "condition should under ordinary circumstances be clearly ful-"filled." That view was expressed directly in regard to the calling of evidence as to the local law. I incline to the view, as I have said, that there was no evidence at all before the chief magistrate as to the law in regard to punishment, and in any event no evidence that the offences came within section 9 in regard to hard labour. But whether I am right or wrong, I feel very strongly that in these cases there should be a settled practice, and that in every case an expert on the local law should give evidence, either in the form of a deposition which comes over with the warrant or orally before the chief magistrate in this country. So far as the present case is concerned, I think that the proper course is to remit the matter to the chief magistrate in order that it may be dealt with in accordance with what I hope will become the settled practice.

Mr. Butter, to whom the court is greatly indebted for his argument, has contended that there is no jurisdiction in this court to remit the matter. He points out what is undoubtedly true, that on the view I have expressed the chief magistrate had no jurisdiction to commit the applicant, and that the applicant is at this moment wrongly detained. That I fully appreciate, but it seems to me that in a proper case—and I think this is a proper case—the court must have inherent jurisdiction to take that course. In *Percival's* case[3] Lord Alverstone C.J. and Darling J. both took the view that there was jurisdiction to send the case back. Lord Alverstone begins his judgment by saying[4]: "Having regard to the serious nature of the offence if "proved, I have been much pressed with doubt as to whether "we ought not to send the case back in order that the evidence "which is suggested as being wanted should be supplied." Darling J. said[5]: "What I have a doubt about in this case is "whether we are justified in deciding it without doing that "which I am quite clear we could do, viz., either send it back

[1] [1907] 1 K.B. 696; 23 T.L.R. 238.
[2] [1907] 1 K.B. 696, 706.
[3] [1907] 1 K.B. 696.
[4] Ibid. 705.
[5] Ibid. 708.

" to the magistrate and point out to him the defect in the pro-
" ceedings as they at present come before us, and allow him to
" have the prosecution reopened and evidence given, or else
" require for our own information an affidavit showing what
" the law of Victoria applicable to this case is." Both Lord Alverstone C.J. and Darling J. clearly took the view that it was possible to remit the case, or alternatively to receive further evidence in this court. It is true that in that case they did not do so, but that was for particular reasons, one of which was that the alleged offence had occurred some five or six years before, and another that the prisoner had endeavoured to make reparation and was carrying on an honest life. Thus, in all the circumstances of that case they did not exercise what they undoubtedly considered to be their inherent power to remit.

At one time I was inclined to the view that the matter might be most conveniently dealt with by invoking the Evidence (Colonial Statutes) Act, 1907, which provides by section 1 that copies of Acts, ordinances and statutes passed by the legislature of any British possession purporting to be printed by the Government printer " shall be received in evidence by all courts of justice in
" the United Kingdom without any proof being given that the
" copies were so printed." Following the power given by that section, it seemed that it might be a convenient course if this court received, and Mr. Mathew on the part of the Kenya Government tendered, the printer's copies of the relevant code and ordinances dealing with punishment for these offences. But as Mr. Buzzard quite rightly points out, no one except an expert can be sure that the statute or other document of which the printer's copy is tendered is the latest version of the local law. For all one knows it may have been recently amended and, as I am so anxious that there should be a settled practice in the matter, and a safe practice, it seems to me that in this and all cases there should be, as I have said, evidence from an expert in the local law. Accordingly, I would remit the matter to the chief magistrate for him to receive evidence as to that local law.

[His Lordship proceeded to consider and dismiss the application for relief under section 10 of the Fugitive Offenders Act, 1881.]

SLADE J. I agree. I desire to add only this, that upon the construction of section 9 of the Act of 1881 for which Mr. Mathew contends, there was no evidence of any kind whatsoever before the chief magistrate to bring the offences within section 9, even assuming that the order signed by the senior resident magistrate at Nairobi was admissible in evidence. Indeed, Mr. Mathew's argument, as I understand it, is this: The counts contain no reference to hard labour, which is a condition precedent to bringing the offences within section 9 and you will not get much assistance from the Kenya Penal Code, but if you were further

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informed that there was a Criminal Justice Ordinance No. 26 of 1957 and looked at that, you would see that although hard labour has been abolished in Kenya imprisonment there could take the form of rigorous imprisonment or some other form of imprisonment which falls within the words in section 9 "and any "confinement in a prison combined with labour, by whatever name "it is called, shall be deemed to be imprisonment with hard "labour." That Ordinance was not before the chief magistrate; moreover, the mere production of an Act of Parliament or a penal code does not necessarily mean that all of it is still extant or remains unaltered; indeed we know that the Kenya Penal Code which was before the chief magistrate had been altered by this Criminal Justice Ordinance No. 26 of 1957. That is sufficient to send this case back to the chief magistrate.

With regard to the construction of section 9, the point does not now arise, but I find it difficult to believe that imprisonment for life is not a greater punishment than fifteen months' hard labour.

DAVIES J. I entirely agree with the judgments of my Lords.

LORD PARKER C.J. The applicant can apply for bail, the terms of bail to be fixed by the chief magistrate.

Application dismissed.
No order as to costs.

Solicitors: *Official Solicitor; Charles Russell & Co.; Director of Public Prosecutions.*

[QUEEN'S BENCH DIVISION.]

1959
July 2, 30.

Salmon J.

BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE *v.* EAGLE STAR INSURANCE CO. LTD.

[1958 B. No. 1768.]

Road Traffic—Third party insurance—Hospital expenses—Policy covering voluntary passengers in addition to persons compulsorily insured—Passenger injured—Payment made by insurers to passenger—Whether made under or in consequence of policy issued under Part II of Road Traffic Act, 1930*—Hospital treatment received by passenger before date of payment to him and without knowledge of insurers—Whether hospital entitled to recover from insurers expenses incurred—"Any person"—Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 36 (1) (*b*) (2), *as substituted by Road and Rail Traffic Act,* 1933, (23 & 24 *Geo.* 5, *c.* 53), *s.* 33.

A voluntary passenger in a motor-car was injured in a road accident and received treatment as an in-patient in a hospital

administered by the plaintiffs under the National Health Service Acts. At the time of the accident the owner-driver of the car held a policy of insurance issued by the defendants insuring him against all liability as required by section 36 (1) (*b*) of the Road Traffic Act, 1930,[1] and also against liability to voluntary passengers in his car. The defendants made a payment to the passenger under the policy in respect of his injuries. At the time of such payment they were unaware that he had received hospital treatment but the fact that he had came to their knowledge before the issue of the writ in this action in which the plaintiffs, a hospital management committee, sought to recover from the defendants the expenses incurred by the hospital by virtue of section 36 (2) of the Act of 1930, as substituted by section 33 of the Road and Rail Traffic Act, 1933.[2] The defendants denied liability:—

Held, (1) that the policy issued by the defendants was a policy issued under Part II of the Road Traffic Act, 1930, notwithstanding that it included cover in respect of an additional liability to that required by section 36 (1), and, accordingly, the payment made by them to the passenger was a payment made under or in consequence of a policy issued under the Act.

(2) That the provisions of section 36 (2) of the Act of 1930 (as substituted by section 33 of the Act of 1933) relating to payment made by an authorised insurer to "any person," could not be confined to persons compulsorily insured but included voluntary passengers and the expenses of their treatment in hospital.

Royal Victoria Hospital v. *London Guarantee and Accident Corporation* [1937] N.I. 64 applied.

But (3) that in order for any liability to fall on insurers in respect of hospital treatment, the insurers must have had knowledge of such treatment before making payment to the third party, and as the defendants had no knowledge of the treatment by the hospital before they made the payment to the passenger they were under no

[1] Road Traffic Act, 1930, s. 36 (1): "In order to comply with the "requirements of this Part of this "Act [Part II], a policy of insurance "must be a policy which—(*a*) is "issued by a person who is an autho- "rised insurer within the meaning of "this Part of this Act; and (*b*) in- "sures such person, persons or classes "of persons as may be specified in "the policy in respect of any liability "which may be incurred by him or "them in respect of the death of or "bodily injury to any person caused "by or arising out of the use of the "vehicle on a road: Provided that "such a policy shall not be required "to cover . . . (ii) except in the case "of a vehicle in which passengers are "carried for hire or reward or by "reason of or in pursuance of a con- "tract of employment, liability in "respect of the death of or bodily "injury to persons being carried in "or upon or entering or getting on "to or alighting from the vehicle at "the time of the occurrence of the "event out of which the claims "arise. . . ."

[2] Road and Rail Traffic Act, 1933, s. 33: "Section 36 of the Road "Traffic Act, 1930 (which relates to "requirements in respect of policies "of insurance) shall be amended by "substituting for subsection (2) there- "of the following subsection:—'(2) "'Where any payment is made "'(whether or not with an admission "'of liability) by—(*a*) an authorised "'insurer under or in consequence of "'a policy issued under this Part of "'this Act; . . . in respect of the death "'of or bodily injury to any person "'arising out of the use of a motor- "'vehicle on a road or in a place to "'which the public have a right of "'access, and the person who has so "'died or been bodily injured has to "'the knowledge of the authorised "'insurer . . . received treatment at "'a hospital . . . in respect of "'the injury so arising, there shall "'also be paid by the authorised in- "'surer . . . to such hospital the "'expenses reasonably incurred by "'the hospital in affording such "'treatment, . . .'"

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statutory obligation to pay the plaintiffs the expenses incurred in such treatment.

ACTION.

The following statement of facts is taken substantially from the judgment: On January 28, 1955, one George Groom, while travelling as a passenger in a motor-car owned and driven by one Boost, sustained certain bodily injuries. He was taken to the Barnet General Hospital, which was administered by the plaintiffs, the Barnet Group Hospital Management Committee, under the National Health Service Acts, where he received treatment as an in-patient until he was discharged on February 2, 1955. The hospital reasonably incurred expenses of £12 12s. 6d. At the time of the accident the owner and driver of the car was insured with the defendants, Eagle Star Insurance Co. Ltd., in respect of the use of his motor-car against all such liability as required to be covered by section 36 (1) (*b*) of the Road Traffic Act, 1930, and also against liability to voluntary passengers travelling in his motor-car. The defendants made a payment to Groom under the policy in respect of his injuries. At the time they made the payment they did not know that Groom had been treated in hospital, although they knew of that fact before the issue of the writ in this action in which the plaintiffs claimed that they were entitled to recover from the defendants the expenses they had reasonably incurred in treating Groom. They relied on section 36 (2) of the Road Traffic Act, 1930, as substituted by section 33 of the Road and Rail Traffic Act, 1933, and applied by Schedule 10 of the National Health Service Act, 1946.

In their statement of claim the plaintiffs contended that the policy issued by the defendants to the owner and driver of the car was a policy issued under Part II of the Road Traffic Act, 1930, within the meaning and effect of section 36 (2) thereof (as substituted by section 33 of the Act of 1933), and that the defendants, with knowledge that Groom had received treatment at a hospital, made a payment to him under or in consequence of that policy; that the defendants were indebted to the plaintiffs in the amount of expenses they had reasonably incurred but, despite demand, had refused to pay the amount demanded. They accordingly claimed the sum of £12 12s. 6d.

The defendants admitted the payment made to Groom but denied knowledge that he had received hospital treatment at the date that payment was made, but admitted such knowledge before the issue of the writ. They expressly denied that the payment made to Groom was a payment made by them under or in consequence of a policy issued under Part II of the Road Traffic Act, 1930, or that Groom was " any person " within the meaning of those words in section 36 (2) of that Act as substituted by section 33 of the Act of 1933. They contended that they had no right or duty in law to pay to the plaintiffs the sum demanded by them.

By their reply the plaintiffs contended that if the defendants acquired knowledge of the hospital treatment received by Groom after and not before making payment to him nevertheless, by reason of their knowledge at the date of the issue of the writ in this action, they were indebted to the plaintiffs in the sum claimed.

J. R. Cumming-Bruce for the plaintiffs.

Gerald Gardiner Q.C. and *Michael Lee* for the defendants.

The only case cited in argument is referred to in the judgment.

Cur. adv. vult.

July 30. SALMON J. stated the facts, and continued: The case turns largely upon the construction of section 33 of the Road and Rail Traffic Act, 1933. [His Lordship read the section.] The first question for decision is whether the payment by the defendants (who admittedly are authorised insurers within the meaning of the Act) is a payment in consequence of a policy issued under the Act. There can be no doubt that the payment was made under the policy of insurance dated March 3, 1955. Was this a policy issued under Part II of the Road Traffic Act, 1930?

Section 35 (1) of that Act reads as follows: "Subject to the "provisions of this Part of this Act, it shall not be lawful for any "person to use, or to cause or permit any other person to use, a "motor vehicle on a road unless there is in force in relation to "the user of the vehicle by that person or that other person, as "the case may be, such a policy of insurance . . . in respect of "third-party risks as complies with the requirements of this Part "of this Act."

Section 36 (1) of the same Act reads as follows: "In order "to comply with the requirements of this Part of this Act, a "policy of insurance must be a policy which—(*a*) is issued by a "person who is an authorised insurer within the meaning of this "Part of this Act; and (*b*) insures such person, persons or classes "of persons as may be specified in the policy in respect of any "liability which may be incurred by him or them in respect of "the death of or bodily injury to any person caused by or arising "out of the use of the vehicle on a road: Provided that such a "policy shall not be required to cover . . . (ii) except in the "case of a vehicle in which passengers are carried for hire or "reward or by reason of or in pursuance of a contract of employ-"ment, liability in respect of the death of or bodily injury to "persons being carried in or upon or entering or getting on to or "alighting from the vehicle at the time of the occurrence of the "event out of which the claims arise." Section 36 (5) provides: "A policy shall be of no effect for the purposes of this Part of this

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" Act unless and until there is delivered by the insurer to the " person by whom the policy is effected a certificate (in this " Part of this Act referred to as a ' certificate of insurance ') in " the prescribed form and containing such particulars of any " conditions subject to which the policy is issued and of any other " matters as may be prescribed. . . ."

It seems to me beyond argument that the policy in question is a policy issued under Part II of the Road Traffic Act, 1930. It is true that it includes cover in respect of liability in respect of death or bodily injury of passengers which it is not required to include by section 36 (1) which I have just read. I can, however, see no reason why a policy which gives the cover required by the Act and complies with all the requirements of the Act fails to qualify as a policy issued under the Act merely because it includes cover beyond that made compulsory by the Act. The language of the proviso strongly supports this view. The words: " Pro- " vided that such a policy shall not be required to cover," seem to envisage that such a policy may cover liability in respect of voluntary passengers, although it need not do so. It is also to be observed that the certificate of insurance, which is in the prescribed form, states that the policy is issued in accordance with the provisions of the Act. Accordingly, in my view, the payment to Groom was made by an authorised insurer under a policy issued under Part II of the Road Traffic Act, 1930.

The next question that arises is as to whether or not Groom was " any person " within the meaning of section 36 (2). Prima facie, Groom clearly is " any person." Mr. Gardiner, on behalf of the defendants, argues, however, that " any person " means any person of the class required to be covered by the Act. Why should the court give such a limited construction to the meaning of the words " any person " ? In my view, such a construction involves writing words into the statute that are not there. If the legislature had intended the payment mentioned in section 36 (2) to be confined to persons of the class required to be covered by the Act, it could have expressed that intention in plain language. Indeed, where the legislature does intend to confine the operation of the Act to such liability as is required to be covered by the Act, it expresses that intention clearly. See, for example, sections 10 and 11 of the Road Traffic Act, 1934. In my judgment, the words " where any payment is made by an " authorised insurer under a policy issued under any Part of this " Act to any person " are as wide as they can be, and I can see no reason for cutting down their meaning.

I think Mr. Cumming-Bruce is right when he suggests that the object of Parliament in passing the Road Traffic Acts was to protect not only persons injured in motor-car accidents but also the hospitals who treat such persons for their injuries. I can see no reason why the provisions of section 36 (2) should be confined to persons compulsorily insured and exclude voluntary passengers.

The hospital treatment is no less valuable to the voluntary passengers than it is to any other third parties. Moreover, the insurers obviously benefit as much from the treatment of a voluntary passenger as they do from the treatment of any other third party. But for such treatment injuries would have graver consequences and, accordingly, damages payable by the insurers would be higher. I hold that the words " any person " in section 36 (2) include voluntary passengers.

Although, curiously enough, there is no authority on this point in England, I am supported in the view I have formed by the majority judgments of the Court of Appeal in Ireland in *Royal Victoria Hospital* v. *London Guarantee and Accident Corporation.*[1]

I have thought it right, out of respect for the careful arguments I have heard, and because this case may well go further, to express my conclusions on the points with which I have already dealt. These conclusions cannot, however, affect the result of this case having regard to the view I have formed on the other point with which I will now deal.

The plaintiffs' difficulty in this case arises out of the words in section 36 (2): " Where any payment is made . . . (*a*) by an " authorised insurer under or in consequence of a policy issued " under this Part of this Act . . . in respect of . . . bodily injury " to any person arising out of the use of a motor-vehicle on a " road . . . and the person who has so . . . been bodily injured has " to the knowledge of the authorised insurer . . . received treat- " ment at a hospital . . . in respect of the injury so arising, " there shall also be paid by the authorised insurer . . . the " expenses reasonably incurred by the hospital in affording such " treatment. . . ." The strict grammatical interpretation of the words of the statute which I have read is that in order for any liability to fall upon the insurers in respect of hospital treatment, the insurers must have knowledge of the treatment before paying the third party. This is conceded by Mr. Cumming-Bruce, who argues, however, that there is an obvious grammatical mistake on the part of the draftsman. He invites me, in effect, to rewrite the section—an invitation which, however attractive Mr. Cumming-Bruce makes it sound, I find myself compelled to decline. It is easy to see why Parliament should have required that the insurers' knowledge of the hospital treatment should precede payment to third parties for that payment to render them liable for those expenses. Many thousands of claims by third parties are settled each year by insurance companies. In assessing the value of the claim it is important for the insurers to appreciate their possible total liability. For example, it might be thought that the most a claim was worth in order to avoid litigation was £x. If the hospital expenses are £y, the insurers, with knowledge of the hospital treatment, would settle the claim on the basis of paying the third party £x minus £y and paying

[1] [1937] N.I. 64.

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the hospital £y. It would be a hardship if, after paying the whole sum of £x to the third party in ignorance of his having received hospital treatment, the insurers should have to pay out a further £y in respect of such treatment. There seems to me to be no reason for the legislature to insert in section 36 the provision as to knowledge of the hospital treatment unless the knowledge is to precede the payment to the third parties. Mr. Cumming-Bruce suggests that the knowledge need precede only the issue of the writ, and that the object of the legislature was to prevent a writ being issued by the hospital against the insurer before the insurer had received notice of the hospital treatment. Ingenious as this argument may be, it does not carry conviction to my mind. It seems to me inconceivable that any hospital which had a statutory right to recover its expenses against an authorised insurer would go to the trouble and expense of issuing a writ without first asking the insurer to discharge his statutory obligation. I cannot think that Parliament inserted words in a statute merely to guard against an eventuality which no reasonable man would consider in the least likely to arise.

Accordingly, since it is admitted that the defendants in this case did not know of the hospital treatment until after they made their payment to Groom, they are under no statutory obligation to pay the expenses of that treatment to the plaintiffs. There will, accordingly, be judgment for the defendants.

Judgment for defendants with costs.

Solicitors: *Merton Jones, Lewsey & Jefferies; Simmons & Simmons.*

E. M. W.

[CHANCERY DIVISION.]

1959
May 11;
July 27.

Wynn-Parry J.

In re WALKDEN SHEET METAL CO. LTD.

[No. 00105 of 1959.]

Company—Winding up—Execution—Voluntary liquidation—Payment to bailiff to avoid sale—Payment more than 14 *days before receipt of notice of winding up—Payment over to sheriff within* 14 *days—Money claimed by liquidator—Whether "benefit of execution"—Whether money received in "part satisfaction of the execution" —Whether payment to bailiff payment to sheriff—Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 325 (1), 326 (1) (2).

On April 2, 1958, a creditor issued a writ of fi. fa. against a company. On April 21, 1958, the company paid £500 to the bailiff in respect of the company's indebtedness of £1,532 and undertook to pay off the balance by further instalments. No instalments were

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in fact paid, and on May 8, 1958, notices were received by creditors and shareholders for the purpose of a voluntary winding up of the company. On May 16, 1958, the company went into voluntary liquidation. On May 20, 1958, the liquidator wrote to the under-sheriffs notifying them that the company was in liquidation and requesting them to hand over the balance of the £500 (a small debt having been paid by the bailiff). On May 27, 1958, the bailiff transmitted the balance to the under-sheriff. It was not disputed that the payment was made to avoid a sale. On a claim by the liquidator that he was entitled under sections 325 (1) or 326 (1) or (2) of the Companies Act, 1948,[1] to the balance remaining in the hands of the sheriff:—

Held, (1) that the money paid to the bailiff did not come within the charge created by the execution, since it was paid to prevent the charge operating, and it was not therefore within the phrase "the benefit of the execution" in section 325 (1).

(2) That the reference to money "received in part satisfaction "of the execution" in section 326 (1) was to money paid in the carrying out of the execution, and not to money paid (as here) to avoid sale which was paid not in carrying out the execution but to prevent or halt it.

[1] Companies Act, 1948, s. 325: "(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up: Provided that—(*a*) where any creditor has had notice of meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding up; (*b*) a person who purchases in good faith under a sale by the sheriff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and (*c*) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

S. 326: "(1) Subject to the provisions of subsection (3) of this section, where any goods of a company are taken in execution, and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a provisional liquidator has been appointed or that a winding-up order has been made or that a resolution for a voluntary winding up has been passed, the sheriff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge. (2) Subject to the provisions of subsection (3) of this section, where under an execution in respect of a judgment for a sum exceeding twenty pounds the goods of a company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for 14 days, and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or resolution is passed, as the case may be, for the winding up of the company, the sheriff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor."

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(3) That the matter was governed by section 326 (2), which dealt expressly with money paid to avoid sale, and the payment to the bailiff on behalf of the creditor was payment received on behalf of the sheriff within the meaning of that subsection; that the period of 14 days during which the sheriff was bound to retain the money began to run on April 21, when the money was received by the bailiff, and not on May 27, when it was received by the sheriff, it had therefore expired before the winding-up notices were received; and that, therefore, the liquidator's claim under subsection (2) of section 326 also failed.

Adjourned summons.

The liquidator in the creditors' voluntary winding up of Walkden Sheet Metal Co. Ltd. asked for a declaration that he, as liquidator of the company, was "entitled to the net sum of "£448 16s. being the balance of the sum of £500 recovered from "the said Walkden Sheet Metal Co. Ltd. on or about April 21, "1958, at the suit of . . . Douglas Elliott & Co. Ltd. and now "held by the Sheriff for the County of Lancaster."

The following statement of facts is taken substantially from the judgment: On April 2, 1958, Douglas Elliott & Co. Ltd. (hereafter referred to as "the creditor") issued a writ of fi. fa. against the company. In the middle of April an arrangement was come to with the aid of one Bowling, who was the bailiff or man in possession [and described himself as "officer to the Sheriff of Lancashire"], under which on April 21, 1958, £500 was paid by the company to him (in respect of the company's total indebtedness of £1,532), and the company undertook to pay off the balance by instalments of £70 per week, none of which in fact it was able to pay. Under cover of a letter dated May 7, 1958, the necessary notices convening meetings of creditors and shareholders for the purpose of placing the company in a creditors' winding up were sent out, being received on May 8, 1958. On May 16, 1958, the company went into voluntary liquidation and the present liquidator was appointed.

By letter dated May 20, 1958, the liquidator wrote to the under-sheriffs notifying them that the company was in liquidation and enclosing a copy of the relevant resolution. He also requested them to hand over the balance in their hands of the £500 paid by the company to Bowling. On May 27, 1958, Bowling transmitted £463 9s. 4d. to the under-sheriffs, being the balance of the £500 less a debt which he had paid and his costs. The under-sheriffs now held a net sum of £448 16s. 10d. in their hands and it was the destination of this sum which was in dispute.

John Brookes for the liquidator.

Owen Stable for the creditor.

The following cases were cited in argument, in addition to

those referred to in the judgment: *Bluston & Bramley Ltd.* v. *Leigh* [2]; *In re Pearson, Ex parte West Cannoch Colliery Co.*[3]

Cur. adv. vult.

July 27. The following judgment of WYNN-PARRY J. was read by Vaisey J., in which he stated the facts as set out above, and continued: Mr. Brookes, for the liquidator, contends that the liquidator is entitled as against the creditor to the balance in the hands of the under-sheriffs under section 325 (1) or section 326 (1) or section 326 (2) of the Companies Act, 1948. It is agreed that the £500 paid by the company to Bowling is properly to be regarded as "money paid to avoid sale." This is a phrase which appears in section 326 (2) and, at any rate at first sight, it would be surprising if such moneys, which are dealt with expressly in section 326 (2), were found to be dealt with also in section 325 (1) and section 326 (1).

[His Lordship read section 325 (1) (*a*), (*b*) and (*c*) of the Companies Act, 1948, so far as material, and continued:] This case, so far as a consideration of section 325 (1) is required, appears to me to raise a new point. It is established that the phrase "the benefit of the execution" does not refer to "the "fruits of the execution" but to the charge which is conferred on the creditor as a result of the issue of execution: *In re Andrew, Ex parte Official Receiver (Trustee)*,[1] approving and applying *In re T. H. Godwin, Ex parte The Trustee* v. *Morris*,[2] and *In re Samuels, Ex parte The Trustee* v. *J. H. S. Tee, Trading as Tee Bros. & Co.*[3] It is further clear that any money received by the sheriff or his officer and actually paid over to the creditor is outside the charge. The question, which, up to now, does not appear to have arisen for judicial decision, is what is the position of money paid to the sheriff or his officers in order to avoid sale, where that money still remains in the hands of the sheriff or his officer at the commencement of the winding up? In my judgment, the correct view is that money so paid does not come within the charge created by the issue of execution: it is outside it: it is paid to prevent the charge operating, at any rate pro tanto, on the property of the debtor: and therefore it is not included within the phrase "the benefit of the execution" in section 325 (1). I therefore conclude that section 325 (1) has no application to the present case.

I now turn to section 326 (1). [His Lordship read section 326 (1) of the Act.] That subsection appears to me to be dealing entirely with execution properly so-called. The vital words are "before the sale thereof or the completion of the execution." This phrase is followed by the words "by the receipt or recovery "of the full amount of the levy," but later reference is made to

[2] [1950] 2 K.B. 548; 66 T.L.R. (Pt. 2) 103; [1950] 2 All E.R. 29.
[3] (1886) 3 Morr. 187.

[1] [1937] Ch. 122; 53 T.L.R. 90.
[2] [1935] Ch. 213; 51 T.L.R. 118.
[3] [1935] Ch. 341; 51 T.L.R. 169.

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"any money seized or received in part satisfaction of the "execution." In my view, money paid in order to avoid sale is not money paid in or towards satisfaction of the execution, but money paid to prevent or halt the execution, and therefore, when the section refers to money received, it is not talking of money received to avoid sale but of money received in the carrying out of the execution. Execution is a process designed to carry into effect the charge to which I have referred in discussing section 325 (1). No case was cited which deals directly with this point, but, on the true construction of the wording of section 326 (1), I take the view that moneys paid in order to avoid sale do not fall within its purview.

There remains section 326 (2), which deals expressly with money paid to avoid sale, and which, in my view, is the statutory provision which governs this case. [His Lordship read section 326 (2) of the Act.]

As it is agreed that the £500 is to be regarded as money paid to avoid sale, the sole question which arises under this subsection is as to when the period of 14 days began. For the liquidator it was contended that the period began on May 27, 1958, when Bowling transmitted the balance of money in his hands to the under-sheriffs. If that contention be correct, then the statutory period of 14 days had not elapsed by the time the notices of meetings for voluntary liquidation were received on May 8, 1958. On the other hand, it is contended on behalf of the creditor that the period of 14 days started on April 21, 1958, when the £500 was paid by the company to Bowling: in which case the period of 14 days had expired before May 8, 1958.

The argument on behalf of the liquidator is based on the contention that the statutory period does not begin to run until the money is in the hands of the sheriff or the under-sheriff, and that it cannot be said to have been in his hands within the provisions of the subsection until May 27, 1958, because prior thereto it was in the hands of Bowling, who is not a person falling within the definition of "sheriff" in section 326 (4): see *Ex parte Warren, In re Holland*[4] and *Bellyse* v. *M'Ginn*.[5] I agree with this argument to the extent that Bowling is not within the definition. But, to my mind, that does not conclude the matter. It was contended for the creditor that immediately after the receipt of the money by Bowling on April 21, 1958, he could, after making all proper deductions, have properly paid the balance to the creditor. For the reasons which follow, I am unable to accept this contention. In my view, the proper way in which to approach this question is to consider the position of Bowling and his relationship to the sheriff. Bowling is described on his note-paper, and, in my view correctly described, as "Officer to the "Sheriff of Lancashire." Therefore, although he does not fall within the definition "sheriff" in section 326 (4), he is one who is

[4] (1885) 15 Q.B.D. 48. [5] [1891] 2 Q.B. 227.

employed by and is responsible to the sheriff: and his powers and rights cannot be greater than those of the sheriff. It follows, in my view, that even though he makes, as he did in this case, an arrangement to receive money on behalf of the creditor, as that money was paid by the company in order to avoid sale, he must be regarded as receiving money for the purposes of section 326 (1) on behalf, in the first instance, of the sheriff. If that is right, then just as the sheriff would be bound, so he, on behalf of the sheriff, would be bound to retain the money for the statutory period of 14 days. But, on that reasoning, it must follow that the statutory period of 14 days started on April 21, 1958. On that basis the period had expired before receipt by the under-sheriffs of the notices of the meetings on May 8, 1958.

I think that support for this view is to be found in the language of the subsection. The material words are " Where . . . " money is paid in order to avoid sale . . . the sheriff shall retain " the balance for fourteen days." The force of that language is that the 14 days runs from payment. There is no room for the interposition of a hiatus during which the money is held by someone other than the sheriff (as defined in section 326 (4)). Thus it seems to me that the only sensible construction to place on the subsection is to say that once the debtor pays to an officer of the sheriff a sum of money in order to avoid sale, time begins to run in favour of the creditor. Any other interpretation must result in unfairness to the creditor. The policy of the legislature is that, after payment, only a limited period is to elapse before the creditor is to have the benefit of the payment. It cannot be right that where, through events quite beyond the control of the creditor, the money is not paid by the officer of the sheriff to the sheriff for some time—with the result that the sheriff does not actually handle the money until a date within 14 days of receiving the notices of meetings for liquidation—the period should be treated as starting from the date of actual receipt by the sheriff and the creditor thus be deprived of the right to receive the money.

For these reasons, in my view, this summons must be dismissed with the usual order as to costs: namely, that the liquidator will pay the taxed costs of the creditor, and be entitled to retain those costs and his own costs of the summons out of the assets of the company in the course of the liquidation.

Summons dismissed; costs of both parties to be paid by the liquidator out of the assets of the company.

Solicitors: *Menassè & Tobin for Whittingham, Glass & Morrison, Manchester; Ward, Bowie & Co. for Booth & Co., Leeds.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

1959
May 11, 12, 13;
June 5.

Ashworth J.

ALBERT D. GAON & CO. *v.* SOCIÉTÉ INTERPROFESSIONELLE DES OLÉAGINEUX FLUIDES ALIMENTAIRES.

Sale of Goods—C.i.f.—Route—Customary route blocked—Availability of alternative route—Frustration.

Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Whether performance "a thing radically different "from that which was undertaken by the contract"—Whether parties "must have made" contract on basis of continued availability of canal.

By a written contract dated October 12, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Nice during October/November, 1956. By a second written contract dated October 31, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Marseilles during November, 1956. Shipment in both cases was to be from Port Sudan. On November 2, 1956, the Suez Canal was closed to navigation, and remained closed until April 9, 1957. The alternative route round the Cape of Good Hope was more than four times as long, and freightage by this route nearly five times as costly. No goods were shipped under either contract by the sellers, who claimed that they were prevented from doing so by the events in the Middle East.

In an appeal from arbitration proceedings between sellers and buyers, it was found that at the date of the first contract both parties, if they had given their minds to the question, would have contemplated that shipment would be made in a vessel proceeding via the Suez Canal, and that this route was then the usual and normal one; there was no finding as to the parties' state of mind at the date of the second contract. There were also the following mixed findings of law and fact: "(*a*) If after the closing of the "Suez Canal the sellers had shipped the goods via the Cape of "Good Hope the buyers could not have rejected the documents. "(*b*) While it would have been more expensive to ship via the Cape "of Good Hope than via the Suez Canal this did not make perform-"ance of the first and second contracts commercially impossible." On appeal:—

Held, (1) that a c.i.f. contract was not frustrated ipso facto if the usual or customary route was rendered impossible.

(2) That, having regard to the findings quoted above, the difference in expense, distance and character of the voyage round the Cape of Good Hope was not such as to render performance by that route a thing radically different from that which was undertaken by the contract, nor was there involved such a change in the significance of the obligation as would call the principle of frustration into play, and that, in consequence, neither contract was frustrated.

Observations of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 729; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145 applied.

Decision of McNair J. in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.* [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 not followed.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

(3) That neither of the contracts was made on the basis that if the Suez Canal was no longer available, the sales would be off, since it could not be said that the parties "must have made" their bargain on this basis unless there was a fundamental commercial difference between performance by the two alternative routes.

Observations of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 727 applied.

(4) That, in the case of the second contract, although there was no finding on the matter, the parties could hardly have contemplated when it was made that the Suez Canal would be available, and this furnished an additional reason for holding that it was not frustrated.

SPECIAL CASE stated by the Committee of Appeal of the Incorporated Oil Seed Association.

By a contract in writing dated October 12, 1956 (hereinafter referred to as "the first contract"), between the appellants, Albert D. Gaon & Co., of Sudan, as sellers, and the respondents, the Société Interprofessionelle des Oléagineux Fluides Alimentaires, as buyers, through agents, the sellers agreed to sell and the buyers to buy about 1,500 tons of Sudan groundnuts in shell 1955/56 crop at £49 10s. per ton c.i.f. Nice, shipment October/November, 1956. By another contract in writing dated October 31, 1956 (hereinafter referred to as "the second contract"), the sellers agreed to sell and the buyers to buy about 1,000 tons of Sudan groundnuts in shell 1955/56 crop at £54 5s. per ton c.i.f. Marseilles, shipment November, 1956.

Form No. 38 of the Incorporated Oil Seed Association Forms of Contract (hereinafter called "I.O.S.A. Contract No. 38") was incorporated in both contracts. Clause 1 of I.O.S.A. Contract No. 38 provides for "Shipment from a West African port . . . by "steamer or steamers (tankers excluded) direct or indirect with or "without transhipment." It was found as a fact in the case stated that both parties intended that the words "Sudanese port" should be substituted for "West African port." Clause 8 of I.O.S.A. Contract No. 38 provides: "In case of prohibition of "import or export, blockade or war, epidemic or strike, and in all "cases of force majeure preventing the shipment within the time "fixed, or the delivery, the period allowed for shipment or delivery "shall be extended by not exceeding two months. After that, if "the case of force majeure be still operating, the contract shall "be cancelled."

No goods were shipped under either of the contracts, the sellers claiming that they were prevented from doing so by events which had occurred in the Middle East (details of which are set out in the judgment). Disputes thereupon arose under both contracts between the sellers and the buyers, which were referred to arbitration in accordance with the rules of the Incorporated Oil Seed Association (hereinafter referred to as "the association"). Arbitrators appointed by both parties having failed to agree, they appointed an umpire who, by two awards dated October 23, 1957, awarded that the sellers were in default under both contracts, and

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should pay to the buyers as damages for the said default the difference between the contract price in each case and a price of £62 5s. per ton, together with interest at 5 per cent. from the date of the awards. The umpire also directed that the fees of the association and the arbitrators should be paid by the sellers. The sellers, being dissatisfied with the awards, appealed to the committee of appeal of the association in accordance with the association's rules. The committee of appeal, who made their award in the form of a special case, held that the sellers were in default under both contracts, confirmed the umpire's award, and further directed that the sellers should pay the costs of the appeal.

By their award, the committee of appeal found that the customary port for shipment of Sudan groundnuts is Port Sudan, and that the distance from Port Sudan to Marseilles and Nice via the Suez Canal is approximately 2,300 miles, and via the Cape of Good Hope is 10,500 miles. They further found that the basic freight ruling at the date of the contracts, for shipment of groundnuts from Port Sudan to the contract destinations, was about £6; but that following the closing of the canal to navigation a surcharge of from £21 9s. to £23 per ton was imposed during the period between November 9, 1956, and May 7, 1957. The other relevant findings of the committee of appeal are fully set out in the judgment of Ashworth J.

It was contended by the sellers that the contracts were frustrated by reason of the chaotic shipping situation which they alleged prevailed as a result of the closure of the Suez Canal, and also that by reason of this situation shipment was prevented by force majeure within the meaning of clause 8 of I.O.S.A. Contract No. 38. His Lordship held that the facts found in the case stated, together with the documents annexed thereto, established the contrary of these two contentions, and the judgment is not reported upon these points.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers.
Sir David Cairns Q.C. and *F. E. J. Allemès* for the buyers.

The following cases, which are not referred to in the judgment, were cited in argument: *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Commissioners of H.M. Works and Public Buildings* [1]; *S.S. Matheos (Owners)* v. *Louis Dreyfus & Co.* [2]; *In re L. Sutro & Co. and Heilbut, Symons & Co.* [3]; *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [4]; *Universal Cargo Carriers Corporation* v. *Citati (No. 2)* [5]; *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush*

[1] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.
[2] [1925] A.C. 654; 41 T.L.R. 393.
[3] [1917] 2 K.B. 348; 33 T.L.R. 359.
[4] [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.
[5] [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; [1958] 2 All E.R. 563.

Materials) *Ltd.*[6]; *Société Co-opérative Suisse des Céréales et Matières Fourragères* v. *La Plata Cereal Co. S.A.*[7]

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Cur. adv. vult.

June 5. ASHWORTH J. read the following judgment. This matter comes before me in the form of a case stated by the Committee of Appeal of the Incorporated Oil Seed Association, and it raises once more the difficult problem as to the effect upon c.i.f. contracts of the closure of the Suez Canal. This problem has already been considered by McNair J. in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[1] and by Diplock J. in *Tsakiroglou & Co. Ltd.* v. *Noblee Thorl G.m.b.H.*[2] In regard to these two cases, the latter was decided principally upon a special finding in the case stated. Inasmuch as there is no finding in the same terms in the present case, the decision of Diplock J. cannot be regarded as conclusive of the present dispute. So far as McNair J.'s decision is concerned, the appellants contend that in respect of the first of the two contracts which I have to consider there is no material distinction between the facts in the case before McNair J. and the facts in the case before me, but they concede that in respect of the second contract the situation may be different.

[His Lordship stated the facts, and continued:] Although the relevant dates are mentioned in both the decisions already cited, it may be convenient to repeat some of them here. On October 29, 1956, armed forces of Israel invaded Egypt; on November 2, 1956, the Suez Canal was closed to navigation by reason of the physical blocking of the canal, and remained closed to navigation until April 9, 1957. In addition, it is found as a fact that on October 31, 1956 (when the second contract was entered into), the sellers and the buyers knew of the Israeli invasion of Egypt which had begun two days previously. Further, although there is no finding as to the parties' knowledge thereof, it is found that shipping facilities from Port Sudan via the Suez Canal had come to a complete standstill on October 31, 1956. This finding appears in paragraph 9 of the case stated, and is difficult to reconcile with what appears to be a finding in paragraph 22 that traffic through the canal was in fact at a standstill from October 28. Since there is no finding that either the sellers or the buyers knew that traffic through the canal was at a standstill either on October 28 or 31, 1956, it does not appear to me to be essential to inquire which of the two dates is correct. No question arises as to inability on the part of the sellers to supply the goods. As from September 27, 1956,

[6] [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497.

[7] (1947) 80 Ll.L.Rep. 530.

[1] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[2] [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

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sufficient groundnuts in shell were held to the sellers' order in store at Port Sudan to enable them to fulfil both the first and the second contracts.

[His Lordship considered the findings in the case stated concerning the availability of shipping, and continued:] In regard to route, it is found as a fact that at the date of the first contract the usual and normal route for the shipment of groundnuts from Port Sudan to western Mediterranean ports was via the Suez Canal, which was then open to traffic. It is further found that at that date both parties, if they had given their minds to the question, would have contemplated that shipment would be made in a vessel proceeding via the Suez Canal. On or very shortly before the date of the second contract, the route via the Suez Canal became for all practical purposes impossible, but there is no finding that either the sellers or the buyers were aware of this, still less that they knew whether the traffic standstill was likely to be of short or long duration. Nor is there any finding as to the contemplation of the parties in regard to route when the second contract was made. There is, however, a finding that "the alternative route during the closure of the canal was "via the Cape of Good Hope which was then the shortest "practicable route from Port Sudan to European ports."

There are also mixed findings of law and fact, of which the first two are in the following terms: "26. (*a*) If after the closing "of the Suez Canal the sellers had shipped the goods via the "Cape of Good Hope the buyers could not have rejected the "documents. (*b*) While it would have been more expensive to "ship via the Cape of Good Hope than via the Suez Canal this "did not make performance of the first and second contracts "commercially impossible."

At this stage it is convenient to mention two points which were taken, but not argued, on behalf of the sellers. The first was that, in respect of both the first and the second contracts, there was an implied term that shipment should be made by the route customary at the date of the contract. A similar contention was rejected both by McNair J. and by Diplock J. The second was that the sellers were entitled to rely upon the exceptions clause 8, on the basis that the shipment therein referred to meant shipment via the Suez Canal and that such shipment was prevented. Diplock J. rejected a similar contention based on a similar clause. Both the points are open to the sellers in the Court of Appeal, but in the circumstances I do not propose to do more than express my respectful agreement with the decisions already given upon them.

I can also conveniently dispose of a point taken on behalf of the buyers, which was considered and rejected by McNair J. It was contended that a c.i.f. contract is not frustrated by events which prevent the shipping of goods, and reliance was placed

on the decision in *Ashmore & Son* v. *C. S. Cox & Co.*[3] In my judgment that decision does not support the wide contention for which it was relied on, and if all the material facts are contained in the report, I share McNair J.'s doubt whether the decision is consistent with modern authorities, notwithstanding its approval by Pickford L.J. in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*[4]

The real issue in the present case is whether the two contracts or either of them were frustrated. The sellers contend that frustration occurred either by reason of the closure of the Suez Canal on November 2, 1956, or alternatively, if such closure was not of itself sufficient to frustrate the contracts, because the shipping situation resulting from the closure was so chaotic that it became impossible for the sellers to carry out their obligations under either contract.

The argument for the sellers starts from the premise that under a contract in the terms of the first and second contracts the sellers' obligations include an obligation to procure a contract of affreightment under which the goods will be conveyed by the usual or customary route to the destination named in the contract. There is ample authority to support this premise, and it was not challenged on behalf of the buyers. As a corollary it should be added that, for the purposes of the hearing before me, the sellers acknowledged that the time of performance is the time at which the usual or customary route must be ascertained.

Secondly, the sellers rely on the fact, found in the case stated, that at the date of the first contract the usual or customary route from Port Sudan to the Mediterranean was via the Suez Canal, and, although there is no specific finding either way in the case stated, they contend that at the date of the second contract (two days before the closure of the canal) the route via the canal was still the usual and customary route.

Thirdly, the sellers rely on the absence in the case stated of any finding that another route, in particular the route via the Cape of Good Hope, became at any relevant time a usual or customary route for vessels sailing from Port Sudan to the Mediterranean. The most that is stated is that "the alternative "route during the closure of the canal was via the Cape of Good "Hope which was then the shortest practicable route from Port "Sudan to European ports." Accordingly, the sellers submit that, in these circumstances, the usual and customary route via the canal having been rendered impossible and there being no other usual or customary route, the contracts were each of them frustrated.

At one stage of the argument the sellers appeared to be contending that this type of contract is frustrated ipso facto if the usual or customary route is rendered impossible. The terms of

[3] [1899] 1 Q.B. 436; 15 T.L.R. 55. [4] [1918] 2 K.B. 467; 34 T.L.R. 508.

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this contention are, in my judgment, much too wide to be acceptable. There may no doubt be cases in which the impossibility of the usual or customary route would have the effect of frustrating such a contract; for example, a c.i.f. contract in respect of goods to be shipped from a Black Sea port to the Mediterranean might well be regarded as frustrated if the Dardanelles were rendered impassable, but in that case the usual or customary route would be the only possible route. But if an alternative route exists, the closure of the usual or customary route does not necessarily frustrate the contract. In this connection it is, I think, correct to say that the requirement that the goods must be shipped by a usual or customary route is a requirement implied by law for the benefit of a buyer and not a seller. So far as a seller is concerned, his obligation is to arrange shipment from A to B, and were it not for the requirement as to a usual or customary route, he could select his own route. The fact that he can no longer select what has hitherto been the usual or customary route does not, without more, release him from the primary obligation to arrange shipment from A to B.

As an alternative to the last-mentioned contention, it was submitted that frustration occurs if the usual or customary route is rendered impossible, unless, within the time limited for performance of the contract, an alternative route has become the usual or customary route. In my judgment, this submission does not give effect to the well-established principle that, if frustration occurs, it occurs once and for all. If the closure of the Suez Canal had the effect of frustrating either or both of the contracts in the present case, the contract or contracts were automatically dissolved and were not preserved in a state of suspended animation, the outcome of which depended on an alternative route becoming usual or customary before the end of November, 1956.

In my judgment, in considering whether a contract of this type has been frustrated by the disappearance of the usual or customary route, one has to decide (inter alia) whether an alternative route existed, and, if so, whether performance by that route would "render it a thing radically different from that which "was undertaken by the contract," to quote the words of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham Urban District Council.*[5] The sellers contend that shipment via the Cape of Good Hope, which was an alternative mode of performing the contracts, would fall within the scope of the words quoted, and the points of difference were said to be (a) expense, (b) distance, (c) the character of the voyage, and (d) a totally different contract of affreightment.

So far as expense is concerned, it seems to me that the finding in paragraph 26 (b), quoted above, precludes me from

[5] [1956] A.C. 696, 729; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145.

holding that the increase in expense was sufficient to frustrate the contract. In regard to distance and the character of the voyage, there may well be cases in which buyers could reject documents on the ground, for example, that the goods in question had been shipped by a route which would render them liable to damage or deterioration or unreasonable delay; and if that route were the only alternative to a usual or customary route which had been rendered impossible, sellers might well claim that the contract had been frustrated. But in the present case it is found in paragraph 26 (a) that if, after the closing of the Suez Canal, the sellers had shipped the goods via the Cape of Good Hope the buyers could not have rejected the documents. I regard this finding as one of mixed law and fact, and I draw the inference from it that documents covering shipment via the Cape of Good Hope would, in the circumstances, have been in compliance with the contract. In other words, neither distance nor the character of the voyage would have been such as to entitle the buyers to reject the documents. In regard to the fourth suggested difference, namely, that the sellers would have had to arrange a totally different contract of affreightment, I am of opinion that, so far as it goes, the difference so stated is made out; but I am also of opinion that it does not do more than summarise the other suggested differences. If they are not sufficient to " render it a thing radically different from that which " was undertaken by the contract," this fourth suggested difference will not do so.

In Lord Radcliffe's speech, from which I have already quoted, there is a further passage in the following terms[6]: " The court " must act upon a general impression of what its rule requires. " It is for that reason that special importance is necessarily " attached to the occurrence of any unexpected event that, as " it were, changes the face of things. But, even so, it is not " hardship or inconvenience or material loss itself which calls the " principle of frustration into play. There must be as well such " a change in the significance of the obligation that the thing " undertaken would, if performed, be a different thing from that " contracted for." In the present case an unexpected event occurred, namely, the closure of the Suez Canal, and no doubt it may be said to have involved both inconvenience and material loss. But I am not satisfied that there was also involved such a change in the significance of the obligation as would call the principle of frustration into play. Both before and after the closure of the canal the thing undertaken was the arranging of the shipment of the goods from Port Sudan to the Mediterranean. After the closure the thing undertaken remained the same, but the manner of performance changed.

It is clear that the nature and extent of the thing undertaken is a vital factor in considering whether a contract has been

[6] [1956] A.C. 696, 729.

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frustrated, and when a difference in the length and character of a voyage is said to give rise to frustration, the answer may in some cases depend upon whether the contract involved an obligation to perform the voyage itself, or, on the other hand, an obligation to arrange for its performance. I was informed by counsel that issues which had arisen between charterers and shipowners as a result of the closure of the Suez Canal had all been settled, so that there has been no authoritative decision whether a charterparty was frustrated in these circumstances. Whatever may be the right view in respect of that type of contract, I am of opinion that, in the present case, although the performance of the sellers' obligation after the closure of the Suez Canal would have involved them in greater expense, they would not have been performing something radically different from that which they had undertaken to do. In reaching this conclusion I am regretfully conscious that I am differing from that reached by McNair J., and although the facts found in the present case are not precisely the same as those before him, I doubt whether on this point the differences are such as to afford any firm basis for distinguishing his case from this.

I have also considered the problem, so to speak, from the other end, namely, whether the contracts or either of them were made on the basis that if the Suez Canal was no longer available when the sellers elected to perform, they would be off. The first contract was made on October 12, 1956, and the second was made on October 31. So far as the first contract is concerned, it is found in paragraph 20 of the case stated that "both parties, "if they had given their minds to the question, would have "contemplated that shipment would be made in a vessel pro-"ceeding via the Suez Canal." No doubt they would have done so, but the question is whether they "must have made" their bargain on the basis that what was then the usual or customary route would continue to remain available. To quote again from Lord Radcliffe's speech [7]: "In my opinion, full weight ought to "be given to the requirement that the parties 'must have made' "their bargain on the particular footing. Frustration is not to "be lightly invoked as the dissolvent of a contract." The buyers contend that the alleged basis can only exist if there is a fundamental commercial difference between performance by the contemplated route and performance by the alternative route. In my view this contention is right, and inasmuch as I have already, in effect, held that no such fundamental commercial difference has been established on the facts of this case, it follows that the alleged basis, namely, the continued availability of the Suez Canal, was not the basis on which the parties "must have made" their bargain.

So far as the second contract is concerned, the same reasoning applies, but, in any event, the circumstances in which it was

[7] [1956] A.C. 696, 727.

made afford an additional reason for holding that it was not made on the basis suggested. The parties knew that Israeli forces had invaded Egypt on October 29. Moreover, there is no finding in the case stated that on October 31 the parties or either of them contemplated that the Suez Canal would be available, and I confess that, having regard to the situation then prevailing in the Middle East, a finding to that effect would have surprised me. In regard to the second contract, the sellers were described by their counsel as optimists, and such they may well have been, but such a state of mind falls far short of what is required.

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[His Lordship proceeded to consider and dismiss the sellers' contentions that the contracts were frustrated by reason of the chaotic shipping situation which was alleged to have prevailed as a result of the closure of the Suez Canal, and that shipment was prevented by force majeure within the meaning of clause 8 of I.O.S.A. Contract No. 38.]

The question put was whether on the facts found and on the true construction of each of the contracts the sellers were under any liability to the buyers. My answer in respect of each contract is "Yes," and accordingly the appeal fails.

Award upheld.
Costs.

Solicitors: *Richards, Butler & Co.; Rowe & Maw.*

[PRIVY COUNCIL.]

PONOKA-CALMAR OILS LTD. AND ANOTHER . APPELLANTS;

AND

EARL F. WAKEFIELD CO. AND OTHERS . RESPONDENTS.

J. C.*

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Oct. 7.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Alberta—Mines and minerals—Mechanics' lien—"Owner"—Oil well—Drilling contractor's claim to lien—Whether work done for an "owner" as defined—Sale of severed oil—Fund in hands of receiver appointed by court—Rights of lienholder against fund—Mechanics' Lien Act, R.S. of Alberta, 1942, *c.* 236 (*as amended to* 1951, *R.S.* 1955, *c.* 197), *ss.* 2 (*a*) (*c*) (*g*), 6, 36, 37, 43.

By section 43 of the Mechanics' Lien Act, 1942, of Alberta, "owner" as defined in section 2 (*g*) is extended to include "every "person having any estate, interest or right in the oil or gas in "place or in the oil or gas when severed notwithstanding that such "person has not requested the contract work to be done, is only "indirectly benefited thereby and has had no dealing or contractual "relationship with the contractor or person claiming the lien."

* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER, LORD DENNING.

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The third respondent, who was the registered owner of an estate in fee simple in 80 acres of land in Alberta, on May 31, 1948, granted to lessees a lease of all petroleum and natural gas to be found under the land. On September 10, 1949, the first respondents, contractors, on the instructions of one H. and one M. began to drill an oil well on the land on the authority of a permit issued by the Petroleum and Natural Gas Conservation Board of Alberta to the second respondents, a company in which H. and M. were the only shareholders. Nine days later, on September 19, an agreement was made between the first and second respondents whereby the former, for a stipulated remuneration, undertook to drill a well for the production of oil and gas on the land. On September 21, the lessees from the third respondent assigned to the appellants their title to and interest in the oil and gas rights.

On September 24 an agreement (the pooling agreement) was made between the appellants (described as "the owners"), the second respondents (described as the "operator"), a trust company (therein called the "trustee"), and H. and M., whereby the appellants assigned to the trust company all their rights in the land and in the production of natural gas and hydrocarbons therefrom, and it was thereby provided that all the gross proceeds of wells drilled in the land under the agreement were to be divided by the trust company in certain defined proportions between the appellants, H. and M. and the second respondents. The agreement recited that H. and M. had assisted in arranging for the drilling.

The first respondents had received no payment for work done under the agreement of September 19, and on October 22, under a permit from the conservation board, they plugged and abandoned the well. In January, 1950, the well was deepened and subsequently completed by other contractors and had produced a considerable quantity of oil.

The first respondents filed mechanics' liens under the Mechanics' Lien Act against the land, and by action claimed a declaration that the liens were good, valid and subsisting liens, judgment against the second respondents for $65,745.62, and the appointment of a receiver pursuant to section 36 of the Act. An order in the action was made on the application of the appellants, and assented to by the first respondents, appointing the trust company receiver to operate the well and to receive all moneys from the sale of oil or other productions pending settlement of the action, and to pay them into a special trust account to the credit of the action to await further order:—

Held, first (without deciding whether the drilling done by the first respondents from September 10 was done with the privity and consent of the lessees from the third respondents), that the drilling work carried out before the date of the contract of September 19 having been expressly contemplated in the pooling agreement of September 24, the appellants vis-à-vis the second respondents had ratified and bound themselves to the latters' recognition and inclusion of the work done previously. The appellants were therefore "owners" within the meaning of sections 2 (*g*) and 6 as extended by section 43, on whose behalf the first respondents had done the work in respect of which the liens were claimed, and the liens were accordingly validly filed.

Secondly, that the first respondents had the same rights against the special fund in the hands of the receiver arising from the sale of oil as they would have had against the land itself, including the oil and gas whether severed or not. Further, the moneys paid into the special fund by the receiver were moneys "realised by proceedings under this Act" within the meaning of

section 37 of the Act, and must be applied and distributed in the prescribed order to the persons named in that section. The lien-holders mentioned in the section were those persons who had at the time of a sale a lien on the property sold and brought their action to enforce it.

Judgment of the Supreme Court of Canada [1958] S.C.R. 361 affirmed.

APPEAL (No. 7 of 1959), by special leave, from a judgment of the Supreme Court of Canada (Kerwin C.J., Rand, Locke, Fauteux and Abbott JJ.) (April 22, 1958) allowing in part an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (Ford C.J.A., Macdonald, McBride, Porter and Johnson JJ.A.) (June 25, 1957) which had allowed an appeal from a judgment of the Trial Division of the Supreme Court of Alberta (McLaurin C.J.) (March 14, 1956) whereby it was declared that the present first respondents had a good, valid, binding and subsisting lien under the Mechanics' Lien Act against all mines and minerals within, upon or under certain lands in the province of Alberta, and the first respondents were held entitled to recover $30,000 from funds held by a receiver appointed by the court.

The following facts are taken from the judgment of the Judicial Committee: At all material times the third respondent, Harry Szpilak, was the registered owner of an estate in fee simple in certain lands in Alberta, 80 acres in extent, subject to a reservation in favour of the Canadian Pacific Railway Co. of all coal. On May 31, 1948, he granted to five named individuals (including one Duitman and one Morrisroe) a lease of all petroleum, natural gas, natural gasoline and related hydrocarbons to be found within, upon, or under the said land. By the lease the lessees were obliged to commence a well for petroleum and natural gas within two years from the date of the lease and thereafter continuously to carry on the work until either petroleum oil or gas should be struck in a quantity of at least 30 barrels per day, or the lessees should be reasonably convinced that no such production would be reached. The lessees were entitled to assign the lease.

On September 10, 1949, the first respondents, Earl F. Wakefield Co., on the instructions of one Harding and one McMullen, began to drill an oil well on the said lands. It had by September 23 reached a depth of 2,570 feet. The drilling was commenced on the authority of a permit issued before drilling to the second respondents, Oil City Petroleums (Leduc) Ltd., which was in fact not incorporated until September 19, the only shareholders being Harding and McMullen, of whom the former was treasurer, and the latter secretary of the company.

On September 19, 1949, an agreement was made between the first respondents (described as "contractor") and the second respondents (described as "owner") whereby the first respondents undertook to drill a well for the production of oil and gas on the said lands. Drilling was to commence on or before September 15 and the first respondents were to be remunerated by the

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payment of $50,000 for the work therein mentioned and of certain other sums. It was further provided that the first respondents were to receive $10,000 when the well was spudded and other periodic payments, and that the second respondents should deposit with the Prudential Trust Co. a sum of $40,000 upon which the first respondents could draw as the work progressed.

On September 21 the lessees from the third respondent assigned to the first appellants, Ponoka-Calmar Oils Ltd., all their right, title and interest in and to the oil and gas rights in the said lands, and the latter assumed all the obligations of the lessees to the third respondent under the lease.

On September 23 the first respondents, having by then drilled the well to the depth of 2,570 feet, told the second respondents that they would drill no further until they were paid for the work which they had done in accordance with the agreement of September 19.

On the next day an agreement was made between the two appellants (described as " the owners ") of the first part, the second respondents (described as " the operators ") of the second part, the Prudential Trust Co. Ltd. of the third part, and Harding and McMullen of the fourth part. Thereby the appellants assigned to the trust company all their rights in the said lands and other lands, and in the production of natural gas and hydrocarbons therefrom, and it was thereby provided that all the gross proceeds of wells drilled in the said and other lands under the said agreement were to be divided by the trust company, subject as therein mentioned, in certain defined proportions between the first and second appellants and Harding and McMullen and the second respondents. The agreement, which recited (inter alia) that the appellants desired to have the second respondents drill or have drilled wells for petroleum or natural gas on the said lands, and that Harding and McMullen had assisted in arranging for the drilling of the said wells, provided (inter alia) that on or before September 20, 1949, the second respondents would commence to drill or cause to be commenced to be drilled one well on the said lands, and would thereafter continuously and diligently carry on or cause to be carried on the work of drilling and casing such well, together with penalties in default of their doing so.

On September 26 the first respondents received from the second respondents a cheque for $3,000 which was dishonoured. They had received no other payment for work done and services rendered under the agreement of September 19.

On October 14 the first appellants served notice on the second respondents of their default under the agreement of September 24 and that, if such default was not remedied within 30 days, the said agreement should thereupon cease and determine.

On October 22 the first respondents, having applied for and received a permit from the Petroleum and Gas Conservation Board of the Province of Alberta, plugged and abandoned the said well.

Between September 23 and October 14 the first respondents did not drill the well though they were ready, willing and able to do so and would have done so had they received the payment under the agreement of September 19.

During the month of January, 1950, the well drilled by the first respondents was deepened and was subsequently completed and had produced a considerable quantity of oil. The work and services done and rendered by the first respondents were competent and skilful and for the benefit of the appellants and other respondents. The agreed value of the work done by the first respondents and the material supplied by them (not including compensation for the period from September 23 to October 16) was $30,000. The agreed value of day work was $14,075, and of material purchased by the first respondents for account of the second respondents was $1,670.62. There was no agreement between the first respondents and the appellants or any of the other respondents that the first respondents should not be entitled to a mechanics' lien under the provisions of the Act. On October 12 the first respondents filed a mechanics' lien under the Act against the said lands for the sum of $28,849.33 and on October 18 a further similar lien for the sum of $36,896.29.

On December 5, 1949, the first respondents filed their statement of claim under the Act, all the other parties to this appeal being defendants, and thereby claimed a declaration that the said liens were good, valid and subsisting liens, judgment against the second respondents for $65,745.62 and the appointment of a receiver pursuant to section 36 of the Act.

On June 22, 1950, an order in the action was made by Shepherd J. It was made upon the application of the first appellants in the presence of the first respondents and with their assent. It recited that it appeared that a receiver should be appointed to preserve the property in the oil well therein described forming the subject-matter of that action, and to collect the receipts from the said well, and to otherwise manage and operate the said well until the settlement of the action, and it was thereby ordered that the Prudential Trust Co. should be appointed receiver to collect, get in and receive all moneys presently receivable or which might become receivable from the sale of oil or other productions from the said well, and the receiver was thereby authorised to pay out from any moneys which might be received from such sale the costs of production and of operating the well. Other directions were thereby given including a direction that the receiver (who was there called "the said trustee") should pay out from his receipts to the respondent Szpilak the gross royalty of 12½ per cent. reserved to him under the lease, and it was ordered that, except for the payment of the said operating expenses and royalty, the receiver should pay all other moneys received thereunder into a special trust account to the credit of the action subject to further order. The said receiver duly entered upon its duties and collected the moneys receivable from the sale

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of oil and other products and, subject to the payments that it was directed to make thereout, paid the said moneys into a special fund to await further order. It was the destination of that fund which was the subject of the present dispute.

1959. July 7, 8, 9. *W. G. Morrow Q.C.* (Canadian Bar), *J. G. Le Quesne* and *W. A. Stevenson* (Canadian Bar) for the appellants.

J. V. H. Milvain Q.C. (Canadian Bar), *R. A. MacKimmie Q.C.* (Canadian Bar), *W. Percy Grieve, J. H. Laycraft* (Canadian Bar), and *David Smout* (English and Canadian Bars) for the first respondents.

The following cases were cited in argument: *Pittsburgh Steel Products Co.* v. *Huntington Masonic Temple Association* [1]; *In re Dickinson, Ex parte Charrington & Co.* [2]; *In re Potts, Ex parte Taylor* [3]; *Portman* v. *Mill* [4]; *Law* v. *Mumford* [5]; *Power* v. *Jackson Mines Ltd.* [6]; *Fitzgerald and Powell* v. *Apperley and Apperley* [7]; *Hager* v. *United Sheet Metal Ltd.* [8]

October 7. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. This appeal from a judgment of the Supreme Court of Canada raises questions of some difficulty upon the true construction of the Mechanics' Lien Act and, in particular, upon its application, where the lien alleged to arise under it attaches not only to certain land, including the oil and gas therein, but also to the oil and gas when severed, and where it is sought to enforce it against a fund representing the proceeds of sale of such oil and gas which have been realised by a receiver appointed by the court under the Act. Upon these questions there has been a difference of judicial opinion in the courts of Canada.

The facts can be shortly stated. They were agreed at the trial of the action, out of which this appeal arises, before the court of first instance in Alberta. What inferences can be drawn from such facts will be considered later.

[His Lordship stated the facts set out above, and continued:] It is the destination of the special fund in the hands of the receiver appointed by the court which is the subject of the present dispute, and before further examining that question it is necessary to refer in some detail to some provisions of the Mechanics' Lien Act.

For the purpose of determining the first question that appears to arise, viz., whether the first respondents validly filed a lien or liens against the said lands, only a few sections of the Act need be considered. Briefly, the question is whether the work done by the first respondents in respect of which the lien is claimed

[1] (1917) 94 S.E.Reptr. 127.
[2] (1888) 22 Q.B.D. 187.
[3] [1893] 1 Q.B. 648; 9 T.L.R. 308.
[4] (1839) 9 L.J.Ch. 161.
[5] (1909) 14 B.C. 233.
[6] (1907) 13 B.C. 202.
[7] [1926] 2 W.W.R. 689; 3 D.L.R. 734.
[8] [1954] S.C.R.(Can.) 384.

was done on behalf of any "owner, contractor or subcon- "tractor" or of "any person having any estate, interest or right "in the oil or gas in place or in the oil or gas when severed" within the meaning of the Act, or with the privity or consent of any such owner. Section 2 defines a "contractor" as a person contracting with or employed by an owner or his agent to do work or perform services upon or in respect of, or to place or furnish materials to be used for, any improvement. "Improvement" includes a gas, oil or other well. "Owner" is defined as extending to "every person . . . having any estate or interest in "land, at whose request, express or implied, and (i) upon whose "credit; or (ii) upon whose behalf; or (iii) with whose privity and "consent; or (iv) for whose direct benefit,—any contract work "is done and all persons claiming under him . . . whose rights are "acquired after the commencement of the work." This definition is extended by section 43 to include "every person having any "estate, interest or right in the oil or gas in place or in the oil or "gas when severed notwithstanding that such person has not "requested the contract work to be done, is only indirectly "benefited thereby and has had no dealing or contractual relation- "ship with the contractor or person claiming the lien," with the proviso that where the oil or gas is held in fee simple the holder of an interest in the first royalty in the oil or gas up to 20 per cent. thereof shall not by reason of that section be deemed to be an owner. Section 6 provides that unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making of any improvement for any owner shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used. Section 7 provides that the lien shall arise at the date of the commencement of the work or at the date of the first delivery of material. Section 19 provides for the method of registration. Section 44 provides that the lien provided under section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed, and section 45 that all interests in the oil or gas under any lease, mortgage or agreement for sale relating to the oil or gas in excess of the first royalty up to 20 per cent. shall be subject to the lien in all respects. Other sections of the Act will be referred to in connection with the other questions that arise.

Upon this first question there has been a difference of judicial opinion. The Chief Justice of the Trial Division of the Supreme Court of Alberta held that the first respondents had a valid lien for $30,000, and ordered that that sum should be paid out of the funds held by the receiver. He did not give a reasoned judgment. In the Appellate Division of the Supreme Court it was held by Ford C.J.A. and Macdonald and Porter JJ.A., that from beginning

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to end of the drilling the first respondents had not done any work for the owner as defined by the Act, while McBride and Johnson JJ.A. were content to assume the contrary, but for other reasons disallowed the first respondents' claim. Upon appeal to the Supreme Court of Canada the judges of that court were unanimous in determining that the first appellants were to be regarded as owners within the meaning of the Act.

In reaching this conclusion Locke J. (with whom the Chief Justice and Fauteux J. concurred) and to some extent Rand J. (with whom also the Chief Justice and Abbott J. concurred) relied on facts to some of which attention has been called, in particular that the drilling agreement of September 19 required the drilling to commence on September 10, that the agreement of September 24 specified the date for commencement as four days earlier, that Harding and McMullen were intimately connected with the appellants, and other circumstances to which reference is made in their judgment. These facts led Locke J. to infer that "Harding and "McMullen had been authorised, either by the individual lessees "from Harry Szpilak [the third respondent] or on behalf of the "Ponoka-Calmar Company [the first appellant], to request the "appellant [the first respondent] to do the work, and, further, "that the drilling done by the appellant from September 10 "onwards was done with the privity and consent of the said "lessees and of the said company." This conclusion was challenged by the present appellants on the ground that such an inference of facts was not to be found in the agreed statement of facts and could not properly be drawn. If it was a fact, the first respondents should, it was said, have required the appellants to agree to its inclusion in the statement: they had not done so and it was not to be assumed that agreement would have been reached.

Their Lordships are not satisfied that the inferences drawn by Locke J. could not fairly be drawn, but they do not think it necessary to determine this question. For in the judgment of Rand J. there is what appears to them an alternative and decisive way of dealing with the question. That judge, after citing section 43 of the Act, proceeded: "The drilling work prior to the "date of the contract [i.e., the 19th September] having been "expressly contemplated in the agreement of September 24th, "these two companies [i.e., the present appellants] vis-à-vis Oil "City [the second respondent] have ratified and bound themselves to the latter's recognition and inclusion of the work done "previously to the 15th. Section 43 in its exceptional terms was "undoubtedly passed to meet just such situations as are shown "here: i.e., conditions brought about by the urgency to exploit "the resource in which formal agreements could not keep pace "with action and only by relation back were the rights of the "parties intended to be determined." In his opinion, therefore, the appellants clearly were "owners" within section 2 and section 6 as extended by section 43. Their Lordships agree with

this statement, which no elaboration can improve. This question must therefore be decided in favour of the first respondents.

It remains to determine whether upon the assumption that valid liens were created in favour of the first respondents they were enforceable in the manner and to the extent directed by McLaurin C.J. The consideration of this question requires the statement of other sections of the Act.

Section 19 and the following sections prescribe the manner in which, and the time within which, liens must be registered. Section 24 provides for the expiry and discharge of a lien and must, in view of the opinion of McBride and Johnson JJ.A. in the Appellate Division of the Supreme Court of Alberta and of the contention before the Board, be stated in some detail. By subsection (1) it is enacted that every lien which is not registered shall absolutely cease to exist on the expiration of the time thereinbefore limited for the registration thereof. Subsection (2) provides for the cessation of a lien upon notice. Subsection (6) is more relevant. It provides that every registered lien, whether a certificate of lis pendens has been filed or not, shall absolutely cease to exist on the expiration of six years from the date of registration of the lien unless before the expiration of that period, and not more than two months before its expiration, the lienholder, his assignee, agent or any person claiming through or under him, files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interest of the lienholder and the amount still owing to him for principal and interest, which statement might be in Form 7 in the Schedule, or to the like effect, with such variations as the circumstances might require.

Section 26 is significant. It provides: (1) that upon application by originating notice a judge having jurisdiction may allow security for, or payment into court of, the amount of the claim and such costs as he may think fit, and may thereupon order that the registration of the lien be vacated, and (2) that any money paid into court shall take the place of the property discharged, and be subject to the claim of all persons for liens to the same extent as if the money was realised by a sale of the property in an action to enforce the lien.

Sections 30 to 37 deal elaborately with the enforcement of a claim for a lien. Proceedings to enforce a lien may be commenced either (as in the present case) by a statement of claim or by originating notice, and in either case by the filing of lis pendens in the prescribed form. Service of the claim or notice is to be made upon all persons who by the records of the Land Titles office appear to have any interest in the land in question, and such other person as the judge may direct. All lienholders served with the statement of claim or notice are to be deemed parties to the proceedings, and any lienholder failing to appear at the hearing after proof of notice duly served on him thereby loses his lien. Section 35 provides that upon the hearing of the application

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the judge shall decide all questions which arise therein, or which are necessary to be tried in order to completely dispose of the action, and to adjust the rights and liabilities of all persons concerned. He may (inter alia) order that the land charged with the lien be sold and, when a sale is held, must direct to whom the money in court shall be paid, and where a claimant fails to establish a valid lien may make a personal order against any party to the proceedings for such sum as may appear to be due to him and which he might recover in an action against such party.

By section 36 the judge is empowered at any time prior to the sale of the property, upon the application of any lienholder, to appoint a receiver to take charge of the property and rent it on such terms and conditions as he thinks fit, and after making such deductions as thereby prescribed, to apply the balance of the rents as directed by the judge. By section 47 (where the improvement consisted of an oil or gas well) the judge might, in appointing a receiver under section 36, authorise him to take charge of the well and operate it and sell the production therefrom or, in the alternative, to take the oil and gas when produced and saved and sell the same and receive and pay into court the proceeds of the gas and oil when sold.

Finally, it was by section 37 (1) provided that all moneys realised by proceedings under the Act, including as therein mentioned, should be applied and distributed in the following order, that is to say, in paying (a) the costs of all lienholders of and incidental to the proceedings, and of registering and proving the liens, (b) six weeks' wages (if so much be owing) of all labourers employed by the owner, contractor or sub-contractor, (c) the several amounts owing to other lienholders other than the contractor, (d) the amount owing to the contractor: subsection (2) provided for the methods of distribution between the lienholders inter se, and subsection (3) for the payment of the balance to the owners or other persons legally entitled thereto.

Their Lordships can now deal with the contention which found favour with two of the judges of the Appellate Division of the Supreme Court of Alberta, viz., that the two liens which had been registered on October 12 and 19, 1949, absolutely ceased to exist on October 13 and 20, 1955, by virtue of section 24 (6) of the Act, and that the lienholders had no longer any rights by virtue of their liens against the fund representing the proceeds of sale of the oil. Upon this question their Lordships are so fully in agreement with the judgment given by Rand J. in the Supreme Court of Canada that they can state their own opinion shortly.

The object of a mechanics' lien is to give a security to those who have by work or services effected an improvement upon land by way of a charge upon that land. Its registration is for the purpose of protecting the title to an estate or interest in land which is created by the lien. It is thus part of the law affecting title to land, as the prescribed form of claim for registration clearly indicates. The extension of the lien by section 44 from

the land "including the oil and gas therein" to the oil and gas when severed, creates a new situation. It is not necessary to consider what are the rights of the parties so long as the oil and gas, though severed, remain on the land. That is not the position here. The relevant question is what are their rights when the oil and gas, formerly subject to the lien, pass into the hands of a receiver appointed by the court, and are sold by him and the proceeds paid into a fund to await the further order of the court. In the first place, it is clear that the original lien can no longer subsist: it is equally clear in the second place, that there is no longer anything, so far as the oil and gas thus sold are concerned, in respect of which a new lien can be registered or an old lien renewed. But from this it does not follow that the lienholders have no rights against the fund representing the proceeds of sale. It may not be correct to say that a new charge against the fund is substituted for the old lien—though the language of section 26 (2) goes far to justify it. But this is a matter of words. The scheme of the Act is that, where land subject to a lien is sold in an action to enforce a claim, the lienholder is not to be prejudiced by the fact of sale and, subject always to prior claims, which may now include the costs and expenses arising out of the action, has the same rights as he would have had against the land itself, including the oil and gas whether severed or not.

It may be pointed out that, if it were otherwise, the action of the lienholder in obtaining the appointment of a receiver with a view to the preservation of the property subject to the lien, would or might result in the loss of the rights which the lien was intended to preserve. In the present case it appears that the application for a receiver was made not by the lienholder but by the owner. But it was made with the consent of the former, and it is not to be supposed that his rights were thereby prejudiced. The appointment is contemplated by the Act as being made, and was in fact made, in an action by the lienholder to enforce his claim, and is part of the statutory machinery for doing so.

It further appears to their Lordships that any doubt that might otherwise exist is set at rest by the provisions of section 37 of the Act, which provides for the application of moneys "realised "by proceedings under this Act." It is clear that the moneys paid into court or into a special fund by the receiver are moneys "realised by proceedings under this Act." If so, they must be applied and distributed in the prescribed order to the persons therein named. But it was urged that the lienholders therein mentioned meant only those persons who had subsisting liens on the land at the date of distribution. This contention cannot be accepted. For the land subject to the lien had been sold and under section 26 (2) the lienholder was relegated to the claim to a lien "to the same extent as if the money was realised by a sale "of the property in an action to enforce the claim." It follows that the lienholders mentioned in section 37 are those persons who

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had at the time of sale a lien on the property sold and brought their action to enforce it. The only consistent interpretation of the Act is to treat the proceeds of sale of oil and gas realised by the receiver in the same way as the proceeds of sale of the land itself. This may be described as creating a charge on the fund: but equally it is the method which a court administering a fund under its control must employ in order to preserve and give effect to the rights of the parties, and it is that principle that is embodied in section 37.

For these reasons, their Lordships are of opinion that the judgment of the Supreme Court of Canada was correct. They will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *Charles Russell & Co.; Lawrence Jones & Co.*

C. C.

[COURT OF APPEAL.]

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June 10, 12.
Sachs J.
C. A.
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July 6, 7.
Lord Evershed M.R. and Romer L.J.

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Husband and Wife—Divorce—Re-marriage of parties to each other—Effect of re-marriage upon custody proceedings in their previous divorce suit—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

Infant—Custody—Divorce Court—Effect of re-marriage of parents upon custody proceedings in their previous divorce—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

After their marriage, of which there was issue one child, had been dissolved the spouses re-married each other. No order for custody was made prior to the re-marriage, an application for custody being adjourned upon certain terms. Shortly after the re-marriage an order was made by consent committing the custody to the spouses jointly. The wife returned soon afterwards to the co-respondent in the divorce proceedings and each of the spouses sought an order for the custody of the child, the summonses being issued in the divorce proceedings:—

Held, per Sachs J. (1) that the order for joint custody, having been made by consent and without consideration of the powers of the court to make such an order, should be regarded as having been made per incuriam and, accordingly, be recited as no longer operative.

(2) That section 26 (1) of the Matrimonial Causes Act, 1950,[1] did not confer on the court power to make in former divorce proceedings fresh orders regulating the day-to-day affairs of the parties and their children when once a re-marriage had taken place

[1] Matrimonial Causes Act, 1950, s. 26 (1): "In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court."

between the parties, and the summonses should accordingly be dismissed.

Per curiam: Where a man and woman are husband and wife the relevant ancillary provisions of the Matrimonial Causes Act, 1950, depend for their application on the existence of a matrimonial cause concerning the marriage that made them husband and wife.

Quaere whether the order made upon the adjournment of the application for custody before the re-marriage should be so read as to have ceased to be operative on the date of the re-marriage.

Held, per Court of Appeal, even though the court had jurisdiction under section 26 (1) the judge, in his discretion, was right in not exercising it.

SUMMONS (adjourned into court).

The husband had taken divorce proceedings against the wife on account of her adultery over a period of months with the co-respondent. On March 25, 1958, he was granted a decree nisi which was made absolute on June 26, 1958. An application was made in those proceedings, under section 26 (1) of the Matrimonial Causes Act, 1950, with regard to the custody of the child of the marriage, a young girl, and an order was made on July 25, 1958, by Davies J. that the application be adjourned for a welfare officer's report, and that meanwhile the child should stay with a third party, a sister of the husband, to whom she was to be handed over. He further made an order that the wife was to have certain access. No order for custody was made on that date.

On February 4, 1959, the parties were re-married to each other, no further order having been made up to that date by the court with regard to the child. On February 16, 1959, Davies J. made an order by consent of both parties discharging the order of July 25, 1958, and committing the custody of the child to the spouses jointly. By March 7, 1959, the wife had gone back to the co-respondent. The child had remained with the father and was being looked after by him with the assistance of his mother.

No proceedings relating to the present marriage had been initiated, but on April 16, 1959, and May 25, 1959, the husband and wife respectively took out cross-applications as in the old proceedings, each claiming custody of the child and neither suggesting that a third party should have that custody.

The assistance of the Queen's Proctor was invoked in argument and the summons was adjourned into court.

I. Starforth Hill for the husband.

H. E. L. McCreery (*J. W. Miskin* with him) for the wife.

James Comyn for the Queen's Proctor.

Pryor v. *Pryor* [2] and *Sugden* v. *Sugden* [3] were cited in argument.

[2] [1947] P. 64; 63 T.L.R. 208; [1947] 1 All E.R. 381.

[3] [1957] P. 120; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300 (C.A.); reversing [1956] 3 W.L.R. 1010; [1956] 3 All E.R. 874.

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SACHS J. stated the facts substantially as set out above and continued: The question arose as to whether after a re-marriage to each other an application purporting to be made in the old divorce proceedings falls within the ambit of the court's jurisdiction, and, if so, whether the court should in its discretion deal with it or decline to do so.

The questions are of some importance and are not without difficulty. In the present case only a few months have passed since the parties re-married each other, but the same question of continuing proceedings in relation to the previous marriage could arise if there was a dispute between the parties many years after such re-marriage. On being informed that there was no authority on this point I adjourned the application for argument in open court, and asked for the assistance of the Queen's Proctor. Mr. Comyn has appeared on his behalf as amicus curiae, and my expression of appreciation for the way in which he presented his submissions is no mere formality.

[His Lordship read section 26 (1) of the Matrimonial Causes Act, 1950, and continued:] It seems to me right first to assume (though the accuracy of the assumption depends upon the exact meaning of the words "proceedings for divorce" to which I will later refer), that this is an instance where, on the literal and grammatical meaning of the words, they would, if taken by themselves, be construed as if they did not limit the period "after the final decree" by reference to any specific event, and in particular as if on such a literal construction the re-marriage thus would not affect the position. Such literal and grammatical constructions of general words do not, however, of themselves solve the problem. It is axiomatic that words and phrases used in a statute must (as stated in Maxwell on the Interpretation of Statutes, 10th ed., p. 52) "be construed not according to the "mere ordinary general meaning of the words, but according to "the ordinary meaning of the words as applied to the subject-"matter with regard to which they are used." To quote another apt phrase, appearing at p. 18 of the same work: "General "words admit of indefinite extension or restriction, according to "the subject to which they relate, and the scope and object in "contemplation."

These canons of construction have been applied more than once to provisions of the Matrimonial Causes Acts on questions relating to the general jurisdiction of the court and to the court's powers to make ancillary orders in particular. The result of their application to some novel but broad point which has not previously been construed is, however, not infrequently a matter of general impression formed upon looking at the wording of the particular section against the background of the contents of the Act as a whole: and thus authorities on other specific words in other sections may prove of little help. That seems to me to be the position here.

The present case simply concerns the powers of the court to

make variable ancillary orders (by " variable " I mean capable of variation from time to time) regulating the day-to-day affairs of the parties. But the relevant provisions of the Matrimonial Causes Act, 1950, in that behalf must obviously be read in relation to the Act as an entirety, having due regard of course to its history. Against that background it seems clear that so far as divorce proceedings are concerned, the subject-matter with which the legislature was dealing in that Act, as in its predecessors, was the provision of powers to make, in relation to those day-to-day affairs, appropriate orders during the period whilst the cause is pending, and then, where a decree absolute results, during the further period whilst the parties are no longer husband and wife. The legislature does not appear either to have contemplated, or to have intended to deal at all with that quite different position and period, which for convenience I will call the third period, that supervenes when the parties have re-married each other and are once more husband and wife. The general scheme of the relevant provisions is indeed not apt to deal with that third period, which to my mind simply is not its subject-matter.

On that broad ground it is my view that the Act of 1950 does not confer on the court by section 26 (1) power to make in the old divorce proceedings fresh orders regulating the day-to-day affairs of the parties and their children when once a re-marriage has taken place between the parties. It is a ground that may perhaps also be properly expressed by stating that where a man and woman are husband and wife the relevant ancillary provisions of the Matrimonial Causes Act, 1950, depend for their application on the existence of a matrimonial cause concerning the marriage that made them husband and wife.

The fact that orders of a different nature, be they in relation to status or property, made in the periods between the initiation of the divorce proceedings and the re-marriage are unaffected by that re-marriage does not touch the point whether thereafter fresh day-to-day orders can be made.

Arguments in support of jurisdiction were bound to concede, and for the most part did concede, that the third period was thus obviously one which the legislature had not had in mind: that one could not hold that the court had the suggested jurisdiction without producing a situation that flew in the face of common sense: and that the anomalies which would result are numerous. As regards those anomalies, to take an example, it was conceded that of all husbands only those that had re-married the same wife either once (or more than once) could be ordered by this court under its Matrimonial Causes Act jurisdiction to pay to their wives or infant children maintenance without proof of wilful neglect and without there being any proceedings in this court touching the existing marriage. Moreover, it was conceded that orders made in the old divorce proceedings for the maintenance of the wife and infant children could, and in the absence of fresh orders normally would, continue in force after the re-marriage and

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indeed could thereafter still be freshly made in the old divorce proceedings.

Mr. Comyn further pointed out that the continued existence of a pre-re-marriage order against a parent in favour of a child would result in the parent and child both continuing to obtain tax benefits—a revenue point which may be of doubtful relevance to the issue before me, but one to which Mr. Comyn very properly drew special attention in view of the fact that the court had no power of its own motion to bring back to itself an order of this kind.

In general it was, in effect, conceded in argument that if the suggested jurisdiction existed, the Matrimonial Causes Act, 1950, gave power to the court to treat this particular husband and this particular wife in relation to day-to-day matters as if they were not in fact husband and wife. All these absurdities, it was submitted, must be held to be produced because of the literal and grammatical construction of the words. The court's duty, it was argued, was to hold that the jurisdiction existed and then to mitigate the position by refraining from exercising that jurisdiction save on limited occasions.

It was also pressed on me that the benefit in certain exceptional cases to an infant of continuity in the court's control was such that the literal construction should be adopted.

If I do not refer in turn to each of the other parallel points addressed to me in favour of jurisdiction, I am sure that counsel will not infer that they have been overlooked. I would, however, mention, as regards such of the submissions as were founded on the inconvenience in certain exceptional events of holding that there was no jurisdiction, that where the court has to consider two opposing constructions of a section, one of which produces a particular inconvenience and the other a general absurdity, the arguments founded on the particular inconvenience must normally give way to those founded on the general absurdity.

On the broad ground already stated, the above arguments in favour of jurisdiction were not accepted. One narrower point against jurisdiction is, however, also worth mentioning—albeit with some hesitation because of the confusingly different expressions (to which Mr. Comyn helpfully directed my attention) used in the various sections and subsections of the Act to indicate exactly in what circumstances the court's power to make orders arises. I would doubt if the words "proceedings "for divorce" in the initial phrase governing the whole of section 26 (1) could, in any event, refer to proceedings between two parties who are husband and wife other than proceedings which concern an existing marriage between them. I would, accordingly, not in any event be disposed so to construe them in the present case as to cover the proceedings which form the subject of the present application.

If, however, the construction of the statute I have adopted is not correct, the question arises how the court should, in its

discretion, deal with applications in the old proceedings to make fresh orders regulating the day-to-day affairs of the parties and their children. In the circumstances it seems desirable to refer further to that point in so far as it concerns the present applications.

In relation to such a discretion questions of general policy were discussed. On the one hand emphasis was laid on the possible interests of the child, and on the other hand there was stressed the evil of it being possible during the second marriage for the parties for a decade or more afterwards to be able to raise as between each other, on a variety of matters, the threat of reviving the old proceedings.

In relation to the interests of the child it seems to me that those are well provided for by the ability of the parties to resort, if any necessity arises, in the normal way as parents, to the various courts, which include those to which the legislature has provided access under more statutes than one. Of those courts some are relatively inexpensive in comparison with the High Court, though if for some reason it were considered of special advantage to come to the High Court, and to this Division of it in particular, then proceedings of one type or another could easily be initiated. As regards the relationship between the husband and wife, however, the idea that the re-marriage should remain bedevilled by the continued existence of the old proceedings, or possible threats of reviving them at any moment, is overridingly repugnant to my mind. Accordingly, the court should, in my view, lean heavily towards letting that re-marriage start with that clean slate which propriety demands, which alone can, as a rule, provide a foundation for the hopes of any re-marriage being successful, and which, so far as the parties are concerned inter se, must be implicit in their very re-marriage. The court could thus generally remit husband and wife to such procedure as would normally be applicable in the case of a married couple.

The present applications are made by legally aided parties who live in Hampshire. The judge who dealt with the matter in July, 1958, is no longer a member of this Division and, moreover, made the interim order simply upon reading affidavit evidence and hearing arguments thereon. The affidavits filed in the applications now before me very properly do not pray in aid any earlier affidavits, the contents of which relate almost entirely to past history that cannot be usefully revived, and which, if it were necessary to revive it, would have to be the subject of cross-examination.

Having read all the papers, it seems to me that this must prove to be one of those relatively clear-cut matters which will be decided in substance upon facts which are common ground, coupled, of course, with the help of Welfare Officers' reports, existing or future. There is no question here of continuity of judicial control and no overriding reason why one court rather than another should deal with the present issue.

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On the basis of the approach indicated above to the question of discretion I would, had there been jurisdiction, have thus been disposed to remit the parties in the present case to the normal procedure for a married couple between whom no matrimonial cause was pending: I would also have been much disposed to say that they should adopt some less expensive method of dealing with the issue between them than that of resorting to the High Court.

There remains the question as to what course could be adopted as regards the order dated July 25, 1958, and nothing I am about to say is intended to refer to other orders drawn differently or dealing with other matters. Prima facie, this order should, if practicable, be so construed as to ensure that it is in conformity with, and does not exceed, the jurisdiction of the court: cf. Denning L.J. in *Sugden* v. *Sugden*.[1] It may well thus be that the order of July 25, 1958, should be so read as to cease to be operative after re-marriage; but whether or not that order thus ceased to have effect on the date of the re-marriage, or alternatively ceased by virtue of the order of discharge made by Davies J. on February 16, 1959, it seems desirable that there should be embodied in the order now to be drawn a recital that the old order is no longer operative.

As regards the order of Davies J. of February 16, 1959, giving the parties joint custody after the re-marriage, this was a consent order made on an occasion when no point was raised as regards the court's powers. In so far as it is on the face of it a fresh order for custody after re-marriage it seems to me that it should be treated as made per incuriam and should also be recited as being no longer operative.

With those additions to the normal form of order these two applications should accordingly be dismissed.

Summonses dismissed.
No order as to costs inter partes.

Solicitors: *Batchelor, Fry, Coulson & Burder for Foster, Wells & Coggins, Aldershot; Waterhouse & Co. for Dutton, Makin & Co., Winchester; The Queen's Proctor.*

J. B. G.

The husband appealed.

I. Starforth Hill for the husband.
J. B. S. Edwards for the wife.

July 7. LORD EVERSHED M.R. stated the facts and continued: Notionally (if I may use that adverb), the husband has appealed: but the wife, as respondent, appears to support the view of the

[1] [1957] P. 120, 134.

husband; so that we have not had the advantage of any argument upon the jurisdiction point or the discretion point in the other direction.

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[His Lordship read section 26 (1) of the Matrimonial Causes Act, 1950, and continued:] It has been the argument of Mr. Hill in this court that there is ex facie no limit imposed by the formula "In any proceedings for divorce . . . the court may from "time to time . . . after the final decree": so, he says, it follows that, even though it strikes the mind at first sight as startling that since the marriage which was the subject of the proceedings when they started has not only been dissolved but has been superseded by a re-marriage between the same parties, still, one may invoke jurisdiction in the proceedings for an order as to custody, the parties being then husband and wife—father and mother of the child—in respect of whose marriage at the time of the application no proceedings whatever are pending.

The judge, in a careful judgment, came to the conclusion that, even though at first sight the language grammatically might involve a jurisdiction, still the general sense and tenor of the section denied it. He said [1]: "It is a ground that may perhaps "also be properly expressed by stating that where a man and "woman are husband and wife the relevant ancillary provisions of "the Matrimonial Causes Act, 1950, depend for their application "on the existence of a matrimonial cause concerning the marriage "that made them husband and wife." I am strongly disposed to agree with that general view of the scope and purpose of the legislation. The judge went on to point out that, if the jurisdiction existed, anomalies of a somewhat startling character would arise. He observed (for example) that an order in what he called "the old divorce proceedings" might be made against the husband for maintenance; and he pointed out also (though counsel for the wife questions whether it is right) that before him it was conceded that maintenance might be ordered as respects infant children without any proof of wilful neglect or there being any proceedings before the court touching the existing marriage. He referred to other apparent absurdities; and the existence of those anomalies and absurdities confirmed his general view of the scope and purpose of the Act so as to lead him to conclude that there was now no jurisdiction in these proceedings under the Act to make the orders which both parties sought.

In the course of the argument I felt myself also somewhat influenced in the same direction by the use of the language "the "children the marriage of whose parents is the subject of the "proceedings"; for it seemed to me that if you look at the relevant date when the application for the order is made, it cannot be said that the marriage of the child's parents is the subject of the proceedings; because there are no proceedings whatever touching the marriage now existing between the parents of the child.

[1] Ante, p. 645.

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Mr. Hill, on the other hand, pointed out that the use of the present tense should not be taken as indicating that the test was to be applied by looking at the date when the application was made and at the marriage then subsisting. And it is true to say that these proceedings (assuming they are still for any purpose on foot) certainly did relate to the then existing marriage between the parents of the child.

I have indicated that my present inclination favours the view—on this point—of the judge. But I am content not to express, and do not express, any concluded opinion upon it, because I am quite satisfied that there is no good ground shown for this court interfering with the judge's discretion, which was exercised adversely to the use of any jurisdiction which might reside in him.

It was said by Mr. Hill that the discretion was, so to speak, coloured by the view that the judge had already taken about jurisdiction. But I see no ground for so supposing. The judge began this part of his judgment by saying[2]: "If, however, the construction of the statute I have adopted is not correct, the question arises as to how the court, in its discretion, should deal with applications in the old proceedings to make fresh orders regulating the day-to-day affairs of the parties and their children"; and a little later his language was as follows: "As regards the relationship between the husband and wife, however, the idea that the re-marriage should remain bedevilled by the continued existence of the old proceedings, or possible threats of reviving them at any moment, is overridingly repugnant to my mind." That is a ground for the exercise of the discretion which is in no sense coloured by the jurisdiction point, but is one which I venture heartily to endorse. I think it is contrary to common sense and public policy—certainly in this case—that, if there be jurisdiction, it should be exercised; and I therefore agree with the judge that, if jurisdiction does exist, nevertheless all he should do was to make the order that he did, expressing the fact that the existing orders made by Davies J. on July 25, 1958, and February 16, 1959, should be treated as no longer effective. The order of Sachs J. states: "It is declared that the orders [of the dates I have mentioned] are no longer operative."

For those reasons, therefore, I would dismiss the appeal. I only add that, as the judge pointed out (and it is obviously relevant if this unhappy state of affairs between the two people is to continue), the order that we make, affirming Sachs J., is by no means a negation of rights to go to other places to get relief. Both parties before us are legally aided; but upon that matter I make no further comment. I would dismiss the appeal.

ROMER L.J. I agree; and have very little to add. I think that the question of jurisdiction is a difficult one, depending primarily,

[2] Ante, p. 646.

as it does, on the construction of section 26 of the Act of 1950. It seems to me that the words, in section 26 (1), " the marriage of " whose parents is the subject of the proceedings " were manifestly directed primarily to the marriage which subsisted between the parties when the proceedings were initiated; and the question is really whether they were exclusively so directed. It could be said that there is now a new marriage subsisting, and that " the " proceedings " cannot really be regarded as applying to that marriage—that the existing marriage is no longer the marriage which was " the subject of the proceedings."

In the course of his judgment the judge said [3]: " I would " doubt if the words ' proceedings for divorce ' in the initial " phrase governing the whole of section 26 (1) could, in any " event, refer to proceedings between two parties who are husband " and wife other than proceedings which concern an existing " marriage between them." I content myself by saying that I share that doubt. But it is not necessary to arrive at or express any conclusion upon the matter, because I entirely agree with the manner in which the judge dealt with the exercise of the discretion which, on the hypothesis that he had got jurisdiction, was vested in him, and which led him to refuse to make an order. The passage to which the Master of the Rolls has referred in his judgment dealing with that aspect of the matter, in which the judge said: " . . . the idea that the re-marriage should remain " bedevilled by the continued existence of the old proceedings, or " possible threats of reviving them at any moment, is overridingly " repugnant to my mind," carries great conviction; and I cordially and entirely agree, on that and on other grounds, in relation at all events to this particular case, with the approach that the judge made to this question of discretion.

Accordingly, basing myself on the question of discretion and leaving the question of jurisdiction open until a case arises in which it may become necessary to decide it, I agree that this appeal fails.

Appeal dismissed. Taxation of costs of husband and of wife under Third Schedule, Legal Aid and Advice Act, 1949.

E. D.

[3] Ante, p. 646.

[QUEEN'S BENCH DIVISION.]

1959
Oct. 6.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

In re SHUTER.

Fugitive Offender—Discharge after one month—Jurisdiction of superior court—"May, unless sufficient cause is shown to the contrary"—Whether "may" means must—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *s.* 7.

Words and Phrases—"May"—Fugitive Offenders Act, 1881, *s.* 7.

By section 7 of the Fugitive Offenders Act, 1881: "If a fugitive "who, in pursuance of this Part of this Act, has been committed to prison in any part of Her Majesty's dominions to "await his return, is not conveyed out of that part within one "month after such committal, a superior court, upon application "by or on behalf of the fugitive, and upon proof that reasonable "notice of the intention to make such application has been given, "if the said part is the United Kingdom to a Secretary of State, "and if the said part is a British possession to the governor of the "possession, may, unless sufficient cause is shown to the contrary, "order the fugitive to be discharged out of custody."

On July 15, 1959, the applicant was committed to Brixton Prison to await his return to Kenya under a warrant issued by the Kenya Government in respect of alleged offences said to have been committed in Kenya. On August 17, over a month after the committal order was made, he had not been conveyed out of the United Kingdom owing to difficulties in finding an escort. On his application for an order that he be discharged pursuant to section 7 of the Fugitive Offenders Act, 1881, on the basis that there was not shown to be any "sufficient cause . . . to the contrary":—

Held, that on the true construction of section 7 the word "may" should be interpreted as mandatory in the absence of sufficient cause being shown to the contrary; that there was, accordingly, no jurisdiction for holding a man beyond one month unless sufficient cause was shown, but that matters of reasonableness in all the circumstances might be taken into account when deciding whether sufficient cause had been shown; and on the facts disclosed the arrangements made were reasonable and the applicant was not being detained for an unreasonable time.

APPLICATION under section 7 of the Fugitive Offenders Act, 1881.

On July 15, 1959, the applicant, Victor Charles Shuter, was committed to Brixton Prison by the chief magistrate at Bow Street to await his return to Kenya under a warrant issued by the Kenya Government in respect of eleven alleged offences said to have been committed in Kenya at the end of 1958 and the beginning of 1959. The applicant had not been conveyed out of the United Kingdom by August 17, and he applied for an order for his discharge pursuant to section 7 of the Fugitive Offenders Act, 1881.

[Reported by Miss E. CARYL-THOMAS, Barrister-at-Law.]

Neil Butter for the applicant.
John C. Mathew for the Secretary of State for the Colonies.
Michael Worsley for the Governor of Brixton Prison.

No cases were cited in argument.

LORD PARKER C.J. This is an application made on behalf of one Victor Charles Shuter now detained in Brixton Prison for an order that he be discharged pursuant to section 7 of the Fugitive Offenders Act, 1881.

The matter arises in this way. As long ago now as June 17 the applicant appeared before the chief magistrate at Bow Street on a warrant issued by the Kenya Government in respect of some eleven alleged offences said to have been committed by the applicant in Nairobi, at the end of 1958 and the beginning of 1959. The chief magistrate, having heard the evidence, committed him to Brixton Prison to await his removal to Kenya and, from the schedule to the warrant, it is perfectly clear that the offences alleged were very serious offences. On June 30 an application was made to this court for habeas corpus on the ground that the chief magistrate had committed the applicant without any evidence or any sufficient evidence as to the law of Kenya which would bring into operation the Fugitive Offenders Act, 1881, and application in the alternative was made under section 10 of the Act. This court, having heard the application on July 7, refused any relief under section 10, but came to the conclusion that no satisfactory evidence had been called before the magistrate as to the law of Kenya, and they thereupon remitted the matter to the magistrate to hear evidence as to that law. He did so on July 15, and on that date, which is the important date in these proceedings, the applicant was committed to Brixton Prison to await his return to Kenya under a fresh warrant. What has given rise to this application is that, although the committal order was dated July 16, when August 17 came, which was over a month from the date of the committal order, he had not been conveyed out of the United Kingdom (he was still in prison), and he applies now to this court saying that, in those circumstances, he ought to be released.

[His Lordship read section 7 of the Fugitive Offenders Act. 1881, and continued:] The application is made on the basis that there is not shown any sufficient cause to the contrary and, accordingly, it is said that this court should order his immediate discharge out of custody. From an affidavit of Mr. Rushford, a senior legal assistant in the Colonial Office, it appears that on July 15, that is, the date of committal, the applicant's solicitor got in touch with Mr. Rushford and suggested that it would be convenient to the prisoner if he was sent back to Kenya at as late a date as possible because of the possibility of recriminations as a result of views he had expressed while in Kenya. However, on

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the same day the solicitor told Mr. Rushford, in effect, to forget about that, and that the applicant did not want any special arrangements made. Mr. Rushford then apparently sought an escort, and he found that two Kenya prison officers, Haddick and Halliday, were due to return from leave on August 12 and August 16 respectively; and on July 21 he booked a passage with British Overseas Airways Corporation for the applicant and for his two escorts to travel on August 16. That air passage was later cancelled, and, in fact, the aircraft on which they would have left went on August 17. By that time, however, this application was being made and, accordingly, that passage was cancelled. Mr. Rushford in booking for August 16 says this: "In so doing I "was aware that this would mean that the time limit laid down "in section 7 of the Fugitive Offenders Act, 1881, would just be "exceeded. I considered, however, that this was preferable to "curtailing the leave of an officer of the Kenya Police, a force "which I was aware had been working under conditions of great "stress for a long time. I was also influenced in this decision "by the request originally made to me by the [applicant's "solicitor]"—that the applicant should be sent out as late as possible—"and by the fact that I considered that even if the said "Victor Charles Shuter were to leave the United Kingdom on "August 14 or 15, 1959, he would not come before a magistrate "in Kenya before Monday, August 17, 1959." He goes on to point out that he wrote to the solicitor for the applicant stating the arrangements which had been made for August 16, and that there was no objection.

The first matter which arises is as to the true construction of this section 7. Mr. Butter maintains that it is a section which does not permit the detention of a fugitive for more than one month unless sufficient cause is shown to the contrary. As against that, two arguments are put forward. First, it is said that that is not the effect of the section, and that the reference there to one month is merely referring to the time when an application may first be made, that is, the application can be made any time after a month. Secondly, it is said that "may, "unless sufficient cause is shown to the contrary, order the "fugitive to be discharged out of custody" is not to be read as Mr. Butter would have it read, namely, as "shall unless sufficient "cause is shown order the fugitive to be discharged." It is said there is a complete discretion. Anything may be taken into consideration save only that if sufficient cause is shown to the contrary then the discretion is cut down to that extent. I can well see the force of those two arguments; but I have come to the conclusion that by far the most natural interpretation of this section is the interpretation for which Mr. Butter contends.

We have been referred also to sections 5 and 6. I need not refer in detail to those sections but, reading them with section 7, I can see no reason for reading the period of one month in

section 7 as referring merely to the time when the application can be made. It seems to me that in ordinary language it is saying that there is no jurisdiction for holding a man beyond one month unless sufficient cause is shown.

As regards the meaning of the word "may," I confess that at one time I was influenced by Mr. Worsley's argument, but if the discretion is completely at large and "may" means "may," then it would be quite unnecessary to have the words "unless "sufficient cause is shown to the contrary." Secondly, it is a case where what is sufficient cause in any particular case may well depend upon opinion and discretion. I think the natural meaning is "shall unless sufficient cause is shown to the contrary "order the fugitive to be discharged out of custody."

So much for interpretation. The question then remains whether the facts disclosed by Mr. Rushford's affidavit and the circumstances of the case do amount to a sufficient cause to the contrary. As regards that, Mr. Butter maintains that "sufficient "cause" there can only relate to something which is quite outside the control of the relevant authorities. It may be that the cancellation of the flight of the aircraft on the last day might be a sufficient cause, or the illness of the fugitive and matters of that sort which are wholly outside the control of the relevant authorities. If that is right, he says, it is perfectly plain here that everything that was done except for the cancellation of the aircraft on the last occasion, were matters within the control of the authorities, and he points out that Mr. Rushford in fact well knew that he was going against the section but found that it was convenient to do so.

I think Mr. Butter's interpretation of "sufficient cause to the "contrary" is too narrow. It seems to me that within those words can be brought matters of reasonableness. If one looks back to section 6, it becomes perfectly clear that the escort or the authorities who were going to receive the fugitive may themselves require the governor of the prison where he is detained to detain him for a reasonable time. I say that because, by section 6, provision is made for a second warrant being issued, namely, a warrant by the Secretary of State in a case such as this, handing the fugitive over to the escort, and it goes on to provide in the last paragraph: "The governor or other chief officer of any prison, "on request of any person having the custody of a fugitive under "any such warrant, and on payment or tender of a reasonable "amount for expenses, shall receive such fugitive and detain him "for such reasonable time as may be requested by the said person "for the purpose of the proper execution of the warrant."

It is true that as far as this court knows, no such warrant has been issued in this case, and that the fugitive is still held under the original committal order. But it is to be observed that if such a warrant had been issued, the Colonial Office acting for the Kenya Government or the police officers, the escort, could themselves, as I understand that section, have produced the warrant

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to the governor of Brixton Prison and said to him in effect: "Please hold this man for a reasonable time." Accordingly, it seems to me that when one is construing the words in section 7, "unless sufficient cause is shown to the contrary," one is entitled to take into account questions such as reasonableness in all the circumstances. Once one gets as far as that as a matter of construction, it seems to me quite plain that on the facts disclosed in Mr. Rushford's affidavit, no one could say that he was not acting perfectly reasonably in making the arrangements he did. One cannot shut one's eyes to the fact that this is only a matter of a day or two's delay and that the alleged offences are serious offences. There is also the fact that the applicant's own solicitor was informed of the arrangements and took no objection. Of course that latter observation is always subject to the comment that he might well not have had section 7 in mind, but when one is thinking of this matter in terms of reasonableness, it is some evidence that what was being done was perfectly reasonable, and that this man was not being detained for an unreasonable time. In these circumstances, I would refuse the application.

ASHWORTH J. I agree, and there is nothing I can usefully add.

HINCHCLIFFE J. I also agree.

Application refused.

Solicitors: *Hopwood, Mote & Leedham-Green; Charles Russell & Co.; The Director of Public Prosecutions.*

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1959

June 8.

Lord Parker C.J., Byrne and Winn JJ.

REGINA *v.* BAINBRIDGE.

Criminal Law—Accessory before the fact—Knowledge of crime—How specific—Oxygen cutting equipment purchased by appellant for thieves—Appellant's knowledge that it was to be used for some criminal purpose—Whether necessary to direct jury as to knowledge of particular crime in view.

A bank was broken into by means of oxygen cutting equipment, which was left behind by the thieves. It was later found that it had been purchased by the appellant some six weeks earlier. He was charged with being accessory before the fact to office-breaking, the case against him being that he had bought the equipment on behalf of the thieves with full knowledge that it was to be used for the purposes of breaking and entering premises. He admitted that he had suspected that the equipment was wanted for something

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

illegal, but denied that he had knowledge that it was to be used for any such purpose as it was used. He was convicted, and appealed against the conviction alleging (inter alia) that the judge misdirected the jury as to what they must be satisfied of in order to convict a person of being an accessory before the fact:—

Held, that the judge was correct in directing that it is sufficient to show knowledge of the intention to commit a crime of the type which was committed, and something done, with that knowledge, to help in the commission of the crime; it is not necessary to show knowledge of the particular date and premises concerned. The appeal would be dismissed.

APPEAL.

The following facts are taken from the judgment. On the night of October 30, 1958, the Stoke Newington branch of the Midland Bank was broken into by cutting the bars of a window, the doors of the strong room and of a safe inside the strong room. They were opened by means of oxygen cutting equipment and nearly £18,000 was stolen. The cutting equipment was left behind and it was later found that that cutting equipment so left behind by the thieves had been purchased by the appellant, Alan Bainbridge, some six weeks earlier. He appealed against his conviction of being accessory before the fact to office-breaking.

Robin Simpson for the appellant.
Mervyn Griffith-Jones for the Crown.

The following cases were cited in argument: *Rex* v. *Wallace* [1]; *Johnson* v. *Youden* [2]; *Bowker* v. *Premier Drug Co. Ltd.* [3]; *Rex* v. *Lomas* [4]; *Reg.* v. *Bullock* [5]; *Rex* v. *Betts & Ridley*. [6]

LORD PARKER C.J., delivering the judgment of the court, stated the facts and continued: The case against him [the appellant] was that he had bought this cutting equipment on behalf of one or more of the thieves with the full knowledge that it was going to be used, if not against the Stoke Newington branch of the Midland Bank, at any rate for the purposes of breaking and entering premises.

The appellant's case, as given in his evidence, was this: "True, I had bought this equipment from two different firms. I "had gone there with a man called Shakeshaft to buy it for him. "As a result of conversation which I had with him I was "suspicious that he wanted it for something illegal, I thought it "was for breaking up stolen goods which Shakeshaft had received, "and as the result in those purchases I gave false names and "addresses, but I had no knowledge that the equipment was "going to be used for any such purpose as it was used."

[1] (1931) 23 Cr.App.R. 32.
[2] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.
[3] [1928] 1 K.B. 227.
[4] (1913) 9 Cr.App.R. 220; 110 L.T. 239; 30 T.L.R. 125.
[5] [1955] 1 W.L.R. 1; [1955] 1 All E.R. 15.
[6] (1930) 22 Cr.App.R. 148; 144 L.T. 526; 29 Cox 259.

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The complaint here is that Judge Aarvold, who tried the case, gave the jury a wrong direction in regard to what it was necessary for them to be satisfied of in order to hold the appellant guilty of being an accessory before the fact. The passages in question are these. He said: "To prove that the prosecution have to prove "these matters: first of all they have to prove the felony itself "was committed. Of that there is no doubt. That is not "contested. Secondly, they have to prove the defendant, this "man Bainbridge, knew that a felony of that kind was intended "and was going to be committed, and with that knowledge he did "something to help the felons commit the crime. The knowledge "that is required to be proved in the mind of this man Bainbridge "is not the knowledge of the precise crime. In other words, it "need not be proved he knew the Midland Bank, Stoke Newing-"ton branch was going to be broken and entered and money "stolen from that particular bank, but he must know the type "of crime that was in fact committed. In this case it is a "breaking and entering of premises and the stealing of property "from those premises. It must be proved he knew that sort of "crime was intended and was going to be committed. It is not "enough to show that he either suspected or knew that some "crime was going to be committed, some crime which might have "been a breaking and entering or might have been disposing of "stolen property or anything of that kind. That is not enough. "It must be proved he knew the type of crime which was in fact "committed was intended."

There are other passages to the same effect, in particular when the jury returned for further directions before they came to their verdict. Later the judge said this: "If, in fact, before it has "happened he, knowing what is going to happen, with full "knowledge that a felony of that kind is going to take place, "deliberately and wilfully helps it on its way, he is an accessory." Then a little further on: "If he was not present he would not be "guilty as a principal, but then you would have to decide "whether he helped in purchasing this equipment for Shakeshaft "knowing full well the type of offence for which it was going to "be used, and with that knowledge, buying it and helping in that "way."

Mr. Simpson, who has argued this case very well, contends that that direction is wrong. As he puts it, in order that a man should be convicted of being accessory before the fact, it must be shown that at the time he bought the equipment in a case such as this he knew that a particular crime was going to be committed, and by a particular crime Mr. Simpson means that the premises in this case which were going to be broken into were known to the appellant and contemplated by him, and not only the premises in question but the date when the breaking was going to occur; in other words, that he must know that on a particular date the Stoke Newington branch of the Midland Bank is intended to be broken into.

The court fully appreciates that it is not enough that it should be shown that a man knows that some illegal venture is intended. To take this case, it would not be enough if he knew—he says he only suspected—that the equipment was going to be used to dispose of stolen property. That would not be enough. Equally, this court is quite satisfied that it is unnecessary that knowledge of the particular crime which was in fact committed should be shown to his knowledge to have been intended, and by "particular crime" I am using the words in the same way in which Mr. Simpson used them, namely, on a particular date and particular premises.

It is not altogether easy to lay down a precise form of words which will cover every case that can be contemplated but, having considered the cases and the law this court is quite clear that the direction of Judge Aarvold in this case cannot be criticised. Indeed, it might well have been made with the passage in Foster's Crown Cases (3rd ed. (1809) at p. 369) in mind, because there the author says: "If the principal totally and substantially "varieth, if being solicited to commit a felony of one kind he "wilfully and knowingly committeth a felony of another, he will "stand single in that offence, and the person soliciting will not be "involved in his guilt. For on his part it was no more than a "fruitless ineffectual temptation," the converse, of course, being that if the principal does not totally and substantially vary the advice or the help and does not wilfully and knowingly commit a different form of felony altogether, the man who has advised or helped, aided or abetted, will be guilty as an accessory before the fact.

Judge Aarvold in this case, in the passage to which I have referred, makes it clear that there must be not merely suspicion but knowledge that a crime of the type in question was intended, and that the equipment was bought with that in view. In his reference to the felony of the type intended it was, as he stated, the felony of breaking and entering premises and the stealing of property from those premises. The court can see nothing wrong in that direction.

A second point is taken by Mr. Simpson to this effect, that even if that direction is a valid direction in law, even so there was no evidence on which the jury were entitled to convict. As Mr. Simpson puts it, there was no evidence which was more consistent with the equipment being needed for a felony of this type than for any other kind of illegal venture. It is enough to say that the court has fully considered the evidence and there was ample evidence on which the jury could convict; accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Dawson & Co.; Director of Public Prosecutions.*

[VACATION COURT.]

1959
Sept. 17.

Winn J.

WINSTONE *v.* WINSTONE.

Husband and Wife—Divorce—Expedition—Jurisdiction to grant interim relief—Originating summons by wife for leave to present petition within three years of marriage—Determination on summons adjourned sine die—Injunction sought to restrain husband from interfering with occupancy of matrimonial home—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957, *No.* 619), *r.* 2—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 45.

Practice and Procedure—Writ—Leave to issue—Position pending leave—Application for interim relief—Injunction—Jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 45.

Injunction—Interlocutory—Jurisdiction to grant—Position pending leave to bring proceedings—Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 45.

A wife who had been married for less than three years sought leave by originating summons, pursuant to section 2 of the Matrimonial Causes Act, 1950,[1] and rule 2 of the Matrimonial Causes Rules, 1957,[2] to present a petition for the dissolution of the marriage. While the decision on her summons stood adjourned she applied to the Vacation Court for an injunction to restrain her husband from interfering with her occupancy of the matrimonial home. On a preliminary question as to the court's jurisdiction to make orders affecting the general matrimonial relations of parties when no petition had yet been, nor could be, filed:—

Held, that the court's jurisdiction under section 45 of the

[1] Matrimonial Causes Act, 1950, s. 2: "(1) No petition for divorce "shall be presented to the court "unless at the date of the presentation of the petition three years have "passed since the date of the marriage: Provided that a judge of the "court may, upon application being "made to him in accordance with "rules of court, allow a petition to "be presented before three years have "passed on the ground that the case "is one of exceptional hardship "suffered by the petitioner or of "exceptional depravity on the part "of the respondent. . . . (2) In "determining any application under "this section for leave to present a "petition before the expiration of "three years from the date of the "marriage, the judge shall have "regard to . . . the question whether "there is reasonable probability of a "reconciliation between the parties "before the expiration of the said "three years."

[2] Matrimonial Causes Rules, 1957, r. 2: "(1) An application for leave "to present a petition for divorce "before three years have passed since "the date of the marriage shall be "made by originating summons in "accordance with Form 1. (2) There "shall be filed in support of the "summons an affidavit by the applicant stating—(*a*) the grounds of "the application; (*b*) particulars of "the hardship or depravity alleged; ". . . (*e*) whether any, and if so "what, attempts at reconciliation "have been made; (*f*) particulars of "any circumstances which may assist "the court in determining whether "there is a reasonable probability of "reconciliation between the parties. ". . ."

R. 3: "(1) Every matrimonial "cause shall be commenced by filing "a petition addressed to the High "Court. . . ."

Supreme Court of Judicature (Consolidation) Act, 1925,[3] to grant injunctions was limited to making orders within the scope of the substantive relief sought in pending proceedings; and as the only proceedings here pending were those seeking leave to present a petition and the injunction sought was outside the scope of those proceedings, the court had no jurisdiction to entertain the application.

Aliter, where the wife had within three years of the marriage presented a petition for judicial separation for which no leave was necessary.

Per curiam. Where an individual is required by some statutory provision to obtain leave before he issues a writ, that individual cannot be regarded as having begun an action until he has, with the leave of the court, issued a writ.

Dicta in *Morgan* v. *Hart* [1914] 2 K.B. 183, 186 explained.

Silverstone v. *Silverstone* [1953] P. 174; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556 distinguished.

MOTION.

A wife applied by originating summons for leave to present a petition for divorce before three years had passed since the date of her marriage in accordance with the provisions of the Matrimonial Causes Act, 1950, s. 2,[1] and the Matrimonial Causes Rules, 1957, r. 2.[2] The originating summons came before Stevenson J. on July 28, 1959, and was adjourned sine die in order to give the husband an opportunity to file evidence in reply to the wife's affidavit.

On September 17, 1959, the wife applied to the judge in the Vacation Court, acting for the Probate, Divorce and Admiralty Division, for an interim injunction asking that cause might be shown why her husband should not be restrained from interfering with or molesting her in her occupancy of the matrimonial home at 7, Cleveland Gardens, London, W. The judge (Winn J.) asked counsel to defer consideration of the application on its merits in order that he might hear as a preliminary issue submissions as to whether or not the court had jurisdiction to grant the interlocutory relief sought when no petition for dissolution of the marriage had yet been, nor could be, filed.

David Hunter for the wife.

D. Armstead Fairweather for the husband.

The cases cited in argument are referred to in the judgment.

[1] For footnote see p. 660.

[2] For footnote see p. 660.

[3] Supreme Court of Judicature (Consolidation) Act, 1925, s. 45: "(1) The High Court may grant a "mandamus or an injunction or "appoint a receiver by an interlocu- "tory order in all cases in which it "appears to the court to be just or "convenient so to do. . . . (3) If, "whether before, or at, or after the "hearing of any cause or matter, an "application is made for an injunc- "tion to prevent any threatened or "apprehended waste or trespass, the "injunction may be granted, if the "court thinks fit, . . ."

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WINN J. In this application for an injunction by the wife a serious question arises as to whether or not, sitting, as I am, in the Vacation Court acting for the Divorce Division, I have jurisdiction to entertain the application for an injunction which is made by the wife. The proceedings before me today arise within proceedings which are pending in the Divorce Court. The proceedings which are pending in that court, and which now stand adjourned by Stevenson J. on July 28 of this year, are proceedings initiated by an originating summons seeking the leave of the court to present a petition for dissolution of the marriage within three years after the date of the celebration of the marriage. The wife, who is desirous of presenting the petition, is Mrs. Myrtle Winstone, the husband being Eric Henry Winstone; the wife, as she was required to do by section 2 of the Matrimonial Causes Act, 1950, has sought the leave of the court to present that proposed petition.

[His Lordship read section 2 (1), and continued:] The Matrimonial Causes Rules, 1957, rule 2, provides similarly how an application shall be made to present a petition within three years of the date of the marriage, and certain procedure must be followed as prescribed by the rule. That section and those rules clearly show that at that stage of the matter Parliament and the Rules Committee both intended that the court should lean in favour of any possibility of reconciliation between persons who have been married to one another for less than three years.

The wife, being unable to present a petition for divorce, though she is able to present a petition for judicial separation, and waiting as she must, at the moment, for an appointment either before Stevenson J. or, it is suggested, before me, for the determination of the question whether she should have leave to present her petition within three years, still seeks the assistance of the court. She would contend, if the matter were gone into, that protection is needed by her against the conduct of her husband by way of an injunction in the pending proceedings initiated by the originating summons.

The question which troubles me, and the question which I invited counsel to help me on, is whether the court has, before the filing of a petition for divorce, become so seised of the control of the matrimonial relations of these two parties that the court has jurisdiction to grant such relief as is asked for today. It is said by counsel on behalf of the wife that, according to Rayden, the accepted textbook authority in these matters (7th ed., p. 435): "When a matrimonial suit is pending . . . the court "will restrain one spouse from forcing his or her society upon "the other, or from other acts of molestation"; but it is plain under the Rules of 1957 that a matrimonial cause is commenced by the filing of a petition which is before the court. That means

that a matrimonial suit cannot be considered to have been commenced until a petition is filed under the rules. By analogy, it is plain that no action is pending in the Queen's Bench Division until a writ is at least issued; therefore, in the special circumstances where an individual is required by some statutory provision to obtain leave before he issues a writ, that individual cannot commence, and cannot be regarded as having commenced, an action until he has, with the leave of the court, issued a writ.

I have been referred by Mr. Hunter, for the wife, to section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that "the High Court may grant . . . an injunction . . . in all cases in which it appears to the court . . . convenient so to do"; and I have also been referred to the words of Buckley L.J. with reference to a predecessor statute, in *Morgan* v. *Hart*.[1] In my view, those words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for the injunction is made. I find myself unable to accede to the cogent and helpful submissions of Mr. Hunter that once any proceedings have been competently and effectively commenced, as these proceedings for leave to file a petition within three years have been commenced, an injunction may be granted for relief on a subject-matter falling outside the ambit, scope and effect of the proceedings in which the injunction is sought. Here the pending proceedings have as their only object the obtaining of the leave of the court to file a petition within three years. Once that leave is obtained, then, of course, the whole matrimonial relations of the parties will be the subject-matter of any petition which is filed.

I regretfully find myself unable to accede to the submission that the Divorce Court has jurisdiction arising from the pendency of the originating summons enabling it to make orders affecting the general matrimonial relations of the parties. I regret that I feel myself compelled to take that view on this preliminary issue, because if it had been within my power to do so, I would have desired to follow and apply in the present case what Pearce J. declared in *Silverstone* v. *Silverstone*[2]; but I do not feel that it is within my power to do so. That judgment sets out the reasons why the Divorce Court should exercise any jurisdiction it has to prevent one party to a marriage from adversely influencing the approach of the other party to the court, or unreasonably interfering in the living conditions of the other party, pending the

[1] [1914] 2 K.B. 183, 186.

[2] [1953] P. 174, 176, 178; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556.

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determination of the matrimonial dispute between them. I find myself regretfully compelled to take the view that that jurisdiction lies outside the jurisdiction relating to obtaining the leave of the court to file a petition within three years. I think that just as Parliament enacted that, without obtaining the leave of the court, a wife not yet married for three years could not commence proceedings for dissolution of the marriage, so it is part of the intention of Parliament that the Divorce Court should not, before such leave had been obtained, entertain applications of this kind in less time than that indicated, save in the case of a petition for judicial separation which is not affected by that parliamentary prohibition, and, it may be, in proceedings under section 23 of the Married Women (Maintenance) Act, 1949, where periodical payments are sought.

My conclusion on this preliminary issue is that while it may well be regrettable, and it may well be that the contrary conclusion might have been the better one in the interests of the parties, I cannot accept jurisdiction to entertain this application for an injunction.

Mr. Hunter has suggested that the originating summons should be treated as adjourned to me, and that I should proceed to consider first that summons and then the application for an injunction. I am unable to accede to that, for a double reason. I do not think that jurisdiction to grant this injunction arises or can be competently invoked until a petition for dissolution or, of course, a petition for judicial separation has been filed. The second reason is that I feel it would be an unwarrantable interference with the control of this matter by Stevenson J., and that it would be most irregular for me to consider the summons today when the relevant evidentiary material may not all be assembled.

Application dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; A. E. Hamlin, Brown, Veale & Twyford.*

M. M. H.

NOTE: On September 18, the wife filed a petition for judicial separation, and on September 24 Winn J., in the Vacation Court, having jurisdiction to do so, heard the motion for an injunction and made an order in terms thereon. [The Times, Sept. 25, 1959.]

[QUEEN'S BENCH DIVISION.]

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CARLTON STEAMSHIP CO. LTD. AND ANOTHER *v.* MINISTRY OF AGRICULTURE, FISHERIES AND FOOD.

CAPE OF GOOD HOPE MOTOR SHIP CO. LTD. *v.* SAME.

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June 9, 10, 11, 12, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 29, 30; *July* 1, 2, 3, 6, 7, 30; *Oct.* 15.

McNair J.

Shipping — Charterparty — Demurrage — Exceptions clause — Charterers excused if loading of cargo delayed by "force majeure, . . . "strikes, . . . or any other hindrance of whatsoever nature beyond "the charterers' control"—Strike preventing loading at nominated port—Duty of charterers to make fresh nomination—Alternative cargoes—"Weather working days"—Treatment of Saturdays.

Shipping — Charterparty — Cargo — Alternative cargo — Loading of intended cargo delayed—Duty of charterer to exercise alternative cargo option—Burden of proving that alternative cargo could have been shipped.

Shipping — Charterparty — Demurrage — Exceptions clause — Charterers excused if loading "of the cargo or the intended cargo" delayed by "force majeure, . . . strikes, . . . or any other hindrance "of whatsoever nature beyond the charterers' control"—Strike at nominated port—Direction of Canadian Wheat Board preventing loading of cargo intended by charterers—Whether bound to load alternative cargo—Whether bound to nominate alternative port—"Weather working days"—Treatment of Saturdays—Reversible lay days—Dispatch payable on "time saved including Sundays."

Shipping—Charterparty—Arrived ship—Ship prevented from arriving because no cargo available.

Shipping—Charterparty—Cargo, obligation of charterer to provide—Ship unable to become an arrived ship unless cargo immediately available—Exceptions clause.

Contract—Frustration—Strike—Whether frustrating charterparty.

Election or Option—Election or selection—Charterparty—Right to nominate—Cargo—Port.

Words and Phrases—"Cargo or intended cargo." "Force majeure." "Other hindrance beyond charterer's control." "Weather working "day." "Working day." "Reversible." "Time saved."

Ships' Names—Queen City. Riverton. Cape Rodney. Agostino Bertani. Moderator.

By four charterparties, dated respectively November 12 and 28, 1952, January 19, 1953, and March 12, 1953, it was provided that "... Vessel shall proceed in ballast and, upon arrival, be made "ready, and shall receive on board at Tacoma and/or Seattle or

[Reported by Miss EIRA CARYL-THOMAS, Barrister-at-Law.]

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"Portland Oregon, Vancouver B.C. or New Westminster or Victoria B.C. or other loading places as hereinafter provided . . . a full and complete cargo . . . of wheat in bulk, . . . and/or barley in bulk and/or flour in sacks as below which [the charterers] bind themselves shall be shipped. . . ." In two of the charterparties it was further provided "Charterer has the option of loading up to one-third of barley in bulk. . . . Charterer has the option of loading up to one-third cargo of flour in bags. . . ." In the third charterparty the loading port and barley options were the same but the flour option was expressed as an option to load "a full cargo of flour in bags . . . ," and in the fourth the port options were the same but there were no alternative cargo options. By a fifth charterparty, dated April 2, 1953, the port options were confined to Vancouver/New Westminster and Victoria and there was no alternative cargo option.

By the first four charterparties it was further provided that "... "Vessel to proceed to such usual loading place or places where she "can safely load always afloat as may be ordered by the charterers ". . . and there receive the cargo in manner customary, alongside, "afloat and/or from the wharf and/or elevators . . . Six weather "working lay days (Sundays, holidays, and rainy days not to be "counted as lay or working days . . .) to commence twenty-four "hours after receipt by charterers' agents at loading ports of the "captain's written notice of readiness accompanied by the surveyor's "certificate that his vessel is . . . ready to receive cargo whether "in berth or not are to be allowed the charterers for loading . . . "Despatch money . . . shall be payable for all working time saved "in loading at the rate of one-half of demurrage rate per day or "pro rata. . . ." By an exceptions clause, "Lay or working days "shall not count at ports of loading during any time when the "supply or loading of stiffening, or the supply or bringing by rail, "craft or otherwise to port of loading or alongside the vessel, or the "loading of the cargo or the intended cargo, or any part thereof, "is delayed by . . . force majeure, . . . strikes, . . . or any "other hindrance of whatsoever nature beyond the charterers' "control . . ."

In the fifth charterparty, the words "whether in berth or not" were omitted but by that charterparty it was provided that "Loading and discharging time shall be reversible . . . If the grain "elevators at Vancouver or New Westminster or Victoria B.C. are "strike-bound when vessel is seven days off Vancouver, this charter-"party to be null and void."

As a result of a strike on February 17, 1953, of elevator men at five out of the seven elevators at Vancouver, and at the single elevator at New Westminster, 31 tramp vessels (including the five to which the charterparties referred to above related) chartered to load full cargoes of wheat, and arriving at the port after the strike began, were subject to serious delays since no full cargoes of wheat were loaded there during the strike. In addition, a number of other tramps were diverted to U.S. ports or had their charters either cancelled by agreement or otherwise postponed. During the strike, though no tramps (with one exception) loaded wheat in bulk from the two elevators not affected by the strike, from these two elevators wheat in bulk amounting to 63,435 tons was by direction of the Canadian Wheat Board loaded as parcel cargoes into liners, and when the loading of bulk wheat into tramps was resumed after the strike ended the tramps were loaded in the order of their arrival at Vancouver.

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On claims for demurrage and despatch money in the five selected cases:—

Held, (1) that it was impossible to imply into these charter-parties any limitation upon the charterers' rights so as to preclude them from nominating a loading port which was strike-bound (in the sense of being a port at which loading of the vessel could not take place within a reasonable time or without such delay as would frustrate the commercial object of the adventure) or to impose upon them an obligation to make a fresh nomination when the port originally nominated became strike-bound (post, p. 694).

Dobell & Co. v. *Green & Co.* [1900] 1 Q.B. 526; dicta of Parker L.J. in *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices* (*The Aello*) [1958] 2 Q.B. 385, 405 applied.

Brightman & Co. v. *Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619; *The Teutonia* (1872) L.R. 4 P.C. 171 distinguished.

Tharsis Sulphur and Copper Co. v. *Morel Bros. & Co.* [1891] 2 Q.B. 647; *Bulman and Dickson* v. *Fenwick & Co.* [1894] 1 Q.B. 179 considered.

(2) That the charterers were protected by the exceptions clause (post, p. 704) because (a) (post, p. 699) there was no settled rule of construction that a specific exception, such as strikes, could not be relied upon if the strike was operative at the time when the contract was made or the ship ordered to the affected port; for in view of the peculiar nature of strikes it could never be said in any particular case that a ship was doomed or that delay was inevitable.

France Fenwick & Co. v. *Spackman* (*Philip*) *& Sons* (1912) 18 Com.Cas. 52; *Ciampa* v. *British India S.N. Co. Ltd.* [1915] 2 K.B. 774; *Taylor* v. *John Lewis Ltd.*, 1927 S.C. 891; *Safadi* v. *Western Assurance* (1933) 46 Ll.L.Rep. 140; *S.S. Induna* v. *British Phosphates Commissioners* [1949] 2 K.B. 430 distinguished.

(b) There was no authority to support the proposition that because work was going on in the port throughout the strike, the charterers could not bring themselves within the exceptions clause (post, p. 702).

In re Richardsons and Samuel (*M.*) *& Co.* [1898] 1 Q.B. 261; *Central Argentine Railway Ltd.* v. *Marwood* [1915] A.C. 981 distinguished.

(c) The charterers were protected by the exceptions of "force "majeure" and "any other hindrance of whatsoever nature beyond "the charterers' control," since the Canadian Wheat Board was not the agent of the charterers in making and acting upon its policy direction (post, p. 701).

Crawford & Rowat v. *Wilson Sons & Co.* (1895) 1 Com.Cas. 277 applied.

(3) That (a) no obligation to exercise any of the alternative cargoes options was imposed on the charterers; once it was proved or admitted in each case (i) that the charterers intended to load wheat in bulk and (ii) that the supply or bringing to the port of loading or alongside the vessel or the loading of that intended cargo was delayed by the specific exceptions, the exceptions clause operated and must be given its literal effect (post, p. 707).

Brightman & Co. v. *Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619 and *S.A. Dispatch Line* v. *S.S. Niki* (*Owners*) [1959] 1 Q.B. 238 distinguished.

(b) If, however, the charterers succeeded only for the time being in bringing themselves within the protection of the clause and remained under the burden of fulfilling their original obligation of loading a full and complete cargo, the onus would remain on them to show that they required a reasonable time to change over and

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that, if they had changed over, the delay would have been the same (post, p. 708).

(4) That, in relation to the fifth charterparty, the charterers, having made proper arrangements for the supply and bringing down of the cargo, were not in breach of their obligations in having no cargo available for the vessel at any material time, nor were they in breach in knowing at the time they ordered the vessel to the port and at all material times thereafter that they had no cargo and no contract for the acquisition thereof and no reasonable prospects of obtaining the necessary cargo at the port within a reasonable time (post, p. 716).

Ardan Steamship Co. v. *Andrew Weir & Co.* [1905] A.C. 501; *The Aello* [1958] 2 Q.B. 385 distinguished.

(5) The issue whether Saturday counts as a "working day" or not, or half a working day must be determined with reference to the particular trade involved (post, p. 711).

Robert Dollar v. *Holman* (1920) 4 Ll.L.Rep. 343; *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.* [1916] 2 A.C. 527; *"Z" Steamship Co. Ltd.* v. *Amtorg New York* (1938) 61 Ll.L.Rep. 97 considered.

Meaning of "working day," and effect of bad weather preventing discharge for part of day, considered (post, p. 716).

Alvion Steamship Corporation Panama v. *Galban Lobo Trading Co. S.A. of Havana* [1955] 1 Q.B. 430 applied (post, p. 710).

Effect of making lay days reversible considered (post, p. 717).

Meaning of dispatch payable on "time saved including Sundays "and holidays" considered (post, p. 717).

ACTION.

The following facts are taken substantially from the judgment:

On February 17, 1953, a strike of elevator men at five out of the seven elevators at Vancouver and at the single elevator at the neighbouring port of New Westminster, which together normally handled 85/87 per cent. of the bulk grain shipments from those ports, broke out and continued without interruption until May 7, a period of 82 days. As a result 31 tramp vessels chartered by the Ministry of Food and the Governments of India and South Africa to load full cargoes of wheat and arriving in Vancouver after the strike began, were subject to very serious delays, since no full cargoes of wheat were loaded there during the strike. In addition a number of other tramps were diverted to U.S. ports or had their charters either cancelled by agreement or otherwise postponed.

The shipowning interests and the three governments concerned selected five cases which were the subject of five separate actions.

The five cases selected are as follows:

(a) The *Queen City*. This vessel was chartered by the Ministry of Food on November 12, 1952, was ordered to Vancouver on February 12, 1953, and gave notice of readiness to load on February 18, commenced loading on May 7 and completed on May 12.

(b) The *Riverton*. This vessel was chartered by the Ministry of Food on November 28, 1952, was ordered to Vancouver on March 22, 1953, gave notice of readiness to load on March 25, commenced loading May 7 and completed on May 12.

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(c) The *Cape Rodney*. This vessel was chartered by the Ministry of Food on January 19, 1953, was ordered to Vancouver on March 27, gave notice of readiness on April 2, commenced loading on May 13 and completed loading on May 15.

(d) The *Agostino Bertani*. This vessel was chartered by the President of India on March 12, 1953 (i.e., after the strike began), was ordered to Vancouver on April 23, gave notice of readiness on April 29, commenced loading on May 20 and completed loading on May 27.

(In each of these four cases the vessels were chartered on the terms of the Pacific Coast grain charter and the general terms of the relevant clauses of the charters were identical except for variations in the options as to the cargoes to be shipped. In each case the range of loading ports, in addition to the Canadian ports of Vancouver, New Westminster and Victoria, included the U.S. ports of Seattle/Tacoma and Portland. In each of these cases it was agreed that the ship was an "arrived ship" when she gave notice of readiness in view of the inclusion in the lay day clause in the charters of the words "whether in berth or not.")

The fifth case selected was:

(e) The *Moderator*. This vessel was chartered by the Government of South Africa on April 2, 1953 (i.e., during the strike), was ordered to Vancouver on June 4, gave notice of readiness on June 6, commenced loading on June 12 and completed loading on June 18, 1953.

In this case the main fabric of the charterparty was in the same form as in the other four cases, but a special provision was contained making lay days at loading ports and discharging ports reversible and a further special clause dealing with ordering to strike-bound ports.

During the strike, though no "tramps" (i.e., vessels chartered to load full cargoes), with one exception, loaded wheat in bulk from the two elevators at Vancouver not affected by the strike, in fact from these two elevators wheat in bulk amounting to 63,435 tons was by direction of the Canadian Wheat Board loaded as parcel cargoes into liners, i.e., vessels on regular scheduled services taking parcel cargoes of varying kinds for different shippers. Of this quantity 17,000 tons approximately went into liners chartered by persons other than the Ministry of Food, the Governments of India and of South Africa. Furthermore, when the loading of bulk wheat into tramps was resumed after the strike ended, the tramps were loaded substantially, if not wholly, in the order of their arrival at Vancouver.

The material terms of the charterparties are as follows:

The charterparty in the case of the *Queen City* provided (so far as is material) as follows (the words underlined being inserted in the printed form in type): "... Vessel shall proceed in ballast "and, upon arrival, be made ready, and shall receive on board "at Tacoma and/or Seattle or Portland Oregon, Vancouver B.C.

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" or New Westminster or Victoria B.C. or other loading places " as hereinafter provided . . . a full and complete cargo . . . " of wheat in bulk, any bags and/or bagging required for safe " stowage to be supplied and paid for by the shipowners, and/or " barley in bulk and/or flour in sacks as below which the said " parties of the second part " (viz., the charterers) " bind themselves shall be shipped, and being so loaded shall therewith " proceed to one safe port in the United Kingdom . . . or Continent " between Antwerp and Hamburg . . . or so near thereunto as " she may safely get and there deliver the same being paid freight " as hereinafter provided: 80/- per ton wheat. . . .

" Charterer has the option of loading up to one third of barley " in bulk in which case the above rate of freight is increased by " 2/6d. per ton on the quantity of barley loaded. Charterer has " the option of loading up to one third cargo of flour in bags at " 10/- per ton extra over the rate of freight for wheat on the " quantity of flour loaded if loaded in British Columbia, and " 12/6d. per ton extra if loaded at U.S. Pacific."

(In the case of the *Cape Rodney* the loading port and commodity options were the same: in the case of the *Riverton*, loading port and barley options were the same but the flour option was expressed as an option to load " a full cargo of flour " in bags at 10/- per ton extra over the rate for wheat if loaded " at British Columbia and 12/6d. per ton extra if loaded at U.S. " Pacific." In the case of the *Agostino Bertani*, the port options were the same but there were no alternative cargo options. In the case of the *Moderator*, the port options were confined to Vancouver/New Westminster and Victoria and there was no alternative cargo option.)

Clause 11. Readiness. " The Captain shall give charterers " usual written notice of readiness, accompanied by certificate of " charterers' competent surveyor that vessel is ready to take in " cargo and the quantity required. . . . Upon receipt of the said " written notice and certificate . . . charterers shall furnish the " vessel with the required cargo."

Clause 14. Loading places. " Vessel to proceed to such " usual loading place or places where she can safely load always " afloat as may be ordered by the charterers at Vancouver B.C. or " New Westminster or Victoria B.C. or Tacoma and/or Seattle or " Portland and/or Astoria and/or loading places in the Columbia " and/or Willamette Rivers, and there receive the cargo in manner " customary, alongside, afloat and/or from the wharf and/or " elevators. Should the vessel be required by charterers to move " more than twice after being in her loading berth, extra cost of " towage to be paid by them. . . ."

Clause 15. Lay days. " Six weather working lay days (Sun- " days, holidays, and rainy days not to be counted as lay or " working days . . .) to commence twenty-four hours after receipt " by charterers' agents at loading ports of the Captain's written

" notice of readinesss accompanied by the surveyor's certificate " that his vessel is fitted with shifting boards and dunnage " according to underwriters' requirements and is ready to receive " cargo whether in berth or not are to be allowed the charterers " for loading at places as hereinbefore provided, but should the " loading be completed in less time the charterers have the privi- " lege of detaining the vessel until expiry of the said lay days."

Clause 16. Despatch money. " Despatch money (which is to " be paid to charterers before vessel sails) shall be payable for " all working time save in loading at the rate of one half of " demurrage rate per day or pro rata. . . ."

Clause 30. Demurrage and liens. " It is agreed that for each " and every day's detention or demurrage at the port of loading by " default of the " (charterers) " or their agents eightpence per " G.R.T. per day, or pro rata, shall be paid. . . ."

(The rates of demurrage and despatch respectively were subsequently altered to 10d. and 5d. by an amendment dated July 22, 1953.)

Clause 31. Act of God, war, etc. " Lay or working days " shall not count at ports of loading during any time when the " supply or loading of stiffening, or the supply or bringing by " rail, craft or otherwise to port of loading or alongside the vessel, " or the loading of the cargo or the intended cargo, or any part " thereof, is delayed by Act of God, war, restraint of princes, " rulers, or people, force majeure, blockade, quarantine, earth- " quake, inundations, storms, floods, rain, snow, ice, fire, riots, " strikes, lock-outs, civil commotions, political disturbances or " impediments, holidays (ecclesiastical or civil), cessations or " stoppages of labour, epidemics, perils of the seas, railway " accidents or impediments or any other hindrance of whatsoever " nature beyond the charterers' control. . . ."

The following typed clauses were added to the printed form:

Clause 37: " Overtime at loading or discharging port to be for " the account of the party ordering it. If ordered by the Port " Controller or his representative charterer to pay all extra " expenses incurred."

Clause 38: " Despatch money and/or demurrage at loading " and/or discharging ports to be adjusted on completion of " discharge."

Clause 42: " Where charter calls for loading port orders, " Master to make application to Messrs. Thomson and Earle, " Vancouver . . . by wireless 96 hours before vessel is due to " arrive off Pacific Coast. Orders for loading port are to be given, " by wireless, within 48 hours of receipt of Master's application, " unless given earlier."

(In the case of the *Agostino Bertani*, application for loading port orders had to be made to the India Supply Mission at Washington.)

And in the case of the *Moderator*, the corresponding clause was as follows:

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Clause 31: "The Master to wireless Sesostris Vancouver" (i.e., Empire Shipping Co. Ltd.) "when approximately 96 hours "off Vancouver giving time of expected arrival in the Vancouver "district. Loading orders to be given on receipt of the Master's "application to Sesostris on arrival in Vancouver district."

As stated above, the charterparties for the *Riverton*, *Cape Rodney* and *Agostino Bertani* were, so far as is material and save as aforesaid, in identical terms. The charterparty for the *Moderator* was also substantially the same except for the special provisions relating to reversible lay days and ordering to strike-bound ports, viz.: clause 27, which provides that loading and discharging time shall be "reversible"; and clause 36: "If the "grain elevators at Vancouver or New Westminster or Victoria "B.C. are strike-bound when vessel is seven days off Vancouver, "this charterparty to be null and void."

On September 19, 1952, the Ministry of Food entered into a master agreement with the Canadian Wheat Board for the purchase of wheat and flour for shipment from Canadian ports between August 1, 1952, and July 31, 1953. By this agreement the Board undertook to make available through its agents for sale to the Ministry between these dates 2,614,000 tons of wheat and 350,000 tons of flour at the current selling price for each grade, such purchases being registrable under the International Wheat Agreement, 1949. Of the 2,614,000 tons of wheat, 1,422,000 tons were to be made available for shipment from the St. Lawrence and Atlantic Winter ports, and 850,000 tons from Canadian Pacific Coast ports, of which approximately 100,000 tons were to be made available for each of the months, January, February and March, 1953, and 90,000 tons in each of the months of April and May, shipment of the total quantity of flour to be purchased from the mills to be a matter of arrangement between the Ministry and the mills concerned. It was further provided as follows: Clause 4 (c): "To facilitate the carrying out of this agreement "each party undertakes to advise the other party from time to "time of its progress in meeting supply requirements or in "securing tonnage as the case may be. While it is the intent "of this agreement that the respective parties will endeavour to "the best of their ability to make available the supplies to "meet the tonnage and the tonnage to lift the supplies, it is "agreed that failure to carry out their respective obligations in "that regard will not result in the charging by the Ministry of "demurrage charges to the Board or its agents or the charging "by the Board of any additional carrying charge to the Ministry "or its agents."

The Canadian Wheat Board (hereinafter referred to as the Board) is a statutory authority established under the Canadian Wheat Board Act, 1935, which, as in force at the material time, is to be found in the Revised Statutes of Canada, 1952, Ch. 44.

By section 4 (1) of the Act the Board has capacity to sue and be sued in the name of the Board, but by subsection (2) it is

provided that "the Board is, for all purposes, an agent of Her "Majesty in right of Canada, and its powers under this Act may "be exercised by it only as an agent of Her Majesty in the said "right." It enjoys the monopoly of exporting wheat and barley from parts of Canada known as "the designated areas" which together produce 95 per cent. of the grain fit for export. Parts of British Columbia are excluded from the designated territories and such export of grain as does take place from the ports of British Columbia so excluded is controlled by the Board by a licence or permit system. The object of the Board's incorporation is stated to be the marketing in an orderly manner in inter-provincial and export trade of grain grown in Canada, and for this purpose it is given the wide powers set out in section 4 (4).

The Board exercises a large measure of autonomy as to the manner in which it exercises its powers; but by section 10 of the Act it is provided that "the Governor in Council may by order "not inconsistent with the provisions of this Act direct the Board "as to the manner in which any of its operations, powers and "duties under this Act shall be conducted, exercised or "performed."

Though the Board has apparently no express statutory power of control over the loading berths at the ports of shipment (unless such power is conferred by the general words in paragraph (*h*) of section 4 (4)), it does in fact control such loading berths by reason of the fact that the property in the grain for export remains in the Board from the time it reaches the up-country elevators until it is discharged from the terminal elevators at the port of shipment, the Board by its officers at the ports giving instructions to the terminal elevators as to the quantities and grades to be loaded into each ship, and giving instructions to the ship's agents as to the berth at which the ship is to receive the designated quantities and grades.

Captain Lancaster, the Harbour Master at Vancouver, agreed that "so far as ships loading grain berths are concerned, the "orders to do so are given by the Wheat Board and not by either "the Harbour Master or the Port Authority." No appropriation of any particular parcel of wheat takes place until the elevator begins to shoot it into the ship.

The grain is delivered by the prairie farmers into the up-country elevators situated by the railways and then passes into the ownership of the Board.

The two railway lines serving Vancouver and New Westminster are the Canadian Pacific Railway and the Canadian National Railway, in whose box cars the grain is loaded for transmission to the terminal elevators at Vancouver and New Westminster. The flow of grain from the up-country elevators to the terminal elevators was controlled by the Board.

As to the factual position as to the terminal elevators at Vancouver, New Westminster and Victoria:

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At Vancouver there were at all material times seven terminal elevators, viz.: (1) National Harbour Board No. 1 operated by Messrs. Kerr & Gifford, (2) National Harbour Board No. 2 leased to Saskatchewan Wheat Pool, (3) National Harbour Board No. 3 which was used for storage, the jetty alongside not being available for loading, (4) National Harbour Board No. 4 or Richardson's Columbia Elevator, (5) the Alberta Pacific Grain Elevator, (6) the Alberta Pool Elevator, and (7) the Midland Pacific or Burrows Elevator. Of these, five elevators, viz.: (1), (2), (3), (5) and (6) were strike-bound by reason of the strike of the elevator men from February 17 to May 7. Two, viz.: (4) National Harbour Board No. 4 or Richardson's, and (7) Midland Pacific or Burrows, were freely operating throughout the strike.

The single elevator at New Westminster was strike-bound throughout the strike, and the single elevator at Victoria was at the outbreak of the strike being used simply as a storage elevator for the storage of American maize. By the middle of March this maize had been moved and there was loaded from this elevator one full cargo of wheat on to the *S.S. Trelyon* which had arrived at Vancouver before the strike and before any of the vessels with which these actions are concerned, this wheat having after the strike been diverted to Victoria by the Transport Controller. There was some evidence that other smaller parcel shipments were made from Victoria on to liners, and there was never at Victoria sufficient to make up a full cargo.

The normal output of the six strike-bound elevators and of the two non-strike-bound elevators was of the order of 20,000 tons per day, of which the Midland Pacific handled about 10 per cent. and Richardson's 3 to 5 per cent. Richardson's never in normal times loaded a full cargo of wheat in bulk, and Midland Pacific very rarely, viz., one in every 12 to 18 months. This elevator concentrated on the loading of parcel cargoes of wheat into liners and by preference in the form of bagged wheat.

On February 17, 1953, there were in these eight elevators at Vancouver and New Westminster about 1,500,000 tons of wheat, of which about 3,400 tons was in Richardson's and about 13,500 tons in Midland Pacific, which had apparently been set aside for completion of contracts for bagged wheat. In normal times each of these elevators drew its supplies from particular up-country elevators.

As to the strike in relation to the dates upon which the vessels were nominated to and arrived at Vancouver: (For loading grain in bulk two classes of workmen are necessary—the elevator men and the longshoremen or stevedores—the latter never went on strike.)

Up to the time of the strike the elevator men at all the elevators referred to above, other than Richardson's and Midland Pacific, were organised in a local union known as "Local 433 "Grain," a branch of the International Union of Brewery, Flour, Soft Drinks and Distillery Workers of America. Up to the

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autumn of 1952 the elevator men working at these elevators were working under an agreement with their employers regulating wages and conditions which could be terminated by notice expiring at the end of November. Richardson's men and the Midland Pacific men were working under a separate agreement subject to a different termination date. Mr. E. C. Sims was the manager of Local 433 Branch.

In October, 1952, with a view to negotiating a new agreement for the elevator men, the union gave notice of termination in respect of the elevators other than Richardson's and Midland Pacific covered by the agreement and making six demands: (1) an overall wage increase of 12 cents an hour, (2) dust premium, (3) two statutory holidays with pay, (4) double time for Sunday pay, (5) night shift premium for work in the shift from midnight to 8 a.m., and (6) classification of jobs. Direct negotiations between the union and the employers took place and led to no result, and, accordingly, on January 2, 1953, a Conciliation Board appointed by or through the intervention of the Canadian Department of Labour met and heard representatives of both sides. The employers, so far from conceding any increase in wages, argued for a reduction in view of the alleged fall in the cost of living throughout Canada since the making of the previous agreement. On January 26 the Conciliation Board by a majority reported in favour of no change in pay but suggested certain minor amendments as to the fringe benefits. On February 3 the union notified their rejection of the report, and on February 4 the employers in turn rejected the report but offered a renewal of the 1952 agreement. A strike vote was taken and carried by the necessary two-thirds majority, and on or about February 10 notice was given that the strike would be effective as from midnight, February 16/17.

On February 12 the *Queen City* was ordered by the charterers to load at Vancouver, arriving at Vancouver and giving notice of readiness at 9.45 a.m. on February 18. Meanwhile, work stopped at all the elevators other than Richardson's and Midland Pacific as from midnight, February 16/17.

The Vancouver Chamber of Shipping on March 2 discussed and accepted, as being in the best interest of the community, a policy decision by the Board to confine the use of the two non-strike-bound elevators to the supply of parcels to "liners" or "F.I.C. bottoms." This decision affected about 100 liners and tramps arriving at Vancouver between February 17 and May 7.

Mr. Bernard Wilson, an official of the Federal Conciliation Service, arrived at Vancouver on March 9. On March 20 he returned to Ottawa, having put forward a new series of proposals which involved for the first time the suggestion that part of the matters in dispute should be referred to arbitration.

On March 22 the *Riverton*, and on March 27 the *Cape Rodney*, were ordered by the Ministry of Food to Vancouver.

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On April 10 the operators agreed to accept arbitration but on April 11 the union refused.

On April 15 Mr. St. Laurent (the Prime Minister) in the House of Commons at Ottawa indicated that the Government might take over the elevators. But on April 17 Mr. Milner, the Federal Transport Controller, came to Vancouver and had unofficial discussions with the union officials and apparently with the operators which had these results: (1) that the operators, who up to that time had steadfastly refused to consider any wage increase, in an open letter to the union dated April 22 offered to submit all outstanding issues to the arbitration of a judge of the Supreme Court of one of the provinces of Canada; and (2) on April 23 the union offered to cut their wage demands by 5 cents per hour.

On April 23 the *Agostino Bertani* was ordered to Vancouver.

On April 30 a meeting took place between the union and the operators, this being the first meeting for many weeks; on May 7 the strike was settled.

It was agreed that for Vancouver the normal working hours on weekdays other than Saturdays were eight hours. By clause 15 of the charterparties (or clause 9 in the case of the *Moderator*) it was provided that six weather working lay days (Sundays, holidays and rainy days not to be counted as lay or working days) were to be allowed charterers for loading.

By letters dated March 2 and April 9, 1959, passing between the solicitors for the parties it was agreed after the evidence had been taken at Vancouver that at all material times the normal working hours in the port of Vancouver were for grain elevator operators a 5-day Monday to Friday 40-hour week, and for the longshoremen a 5½-day Monday to Saturday morning inclusive 44-hour week, and that the labour of both these classes of employees was essential for the operation of loading grain (scilicet) grain in bulk. For loading flour in bags the elevator men were not required, the work being performed by longshoremen working their normal week of 44 hours. There was also evidence that elevator men do work on Saturday when required, being paid overtime or premium pay of 1½ times the normal rate, but that they do not normally work on Saturdays. In fact, in the five cases with which these actions are concerned, no work was done on Saturday. If work had been done on Saturday, then by clause 37 of the charterparties in the cases other than the *Moderator*, the overtime would be for the account of the party ordering it. In the case of the *Moderator* it was provided by clause 25 as follows: "Overtime to be paid by the party ordering "it but in any case any overtime services rendered by ship "personally to be for ship's account."

In relation to the *Moderator* the factual position as to provision of cargo and the nomination of the loading berth is as follows: On June 4, 1952, the South African Wheat Board on behalf of the South African Government entered into a master-contract

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for the purchase of 150,000 long tons of wheat to be shipped from Pacific Coast between January and July, 1953. The *Moderator* was chartered to lift part of this quantity. On or about June 6, 1953, the charterers on receipt of the master's notice of readiness and statement that the vessel was being tendered to load about 10,100 tons bulk wheat, so advised Mr. Smith, the manager of the Canadian Wheat Board at Vancouver. They received in reply a letter dated June 8, 1953, in the following terms: " With regard " to your advice that the *S.S. Moderator* has been tendered to " you for loading and your request that we nominate a loading " berth from which a cargo of wheat will be supplied to her, we " wish to advise that all available berths are occupied at this " time and there are other vessels already waiting their turn to " load as berths become vacant. The *S.S. Moderator* is being " placed in rotation for loading in accordance with time of " presentation along with those other vessels in port awaiting " loading berths and a berth will be nominated in due course when " one is available."

The shipowners claimed demurrage and the charterers counterclaimed for despatch money.

Eustace Roskill Q.C., *T. G. Roche Q.C.* and *A. J. Bateson* for the shipowners.

A. A. Mocatta Q.C. and *Michael Kerr* for the charterers.

The following cases were cited in argument in addition to those referred to in the judgment: *Dawson Line* v. *Aktiengessellschaft Adler für Chemische Industrie of Berlin* [1]; *Board of Trade* v. *Temperley S.S. Co.* [2]; *Owners of Steamships Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies* [3]; *Vingeshuel* v. *Pickering* [4]; *Bakubhai and Ambalal Ltd.* v. *South Australian Farmers' Co-operative Union Ltd. of Adelaide* [5]; *Waugh* v. *Morris* [6]; *Lewis* v. *Louis Dreyfus & Co.* [7]; *Hindley & Co.* v. *General Fibre Co.* [8]; *Pound (A. V.) & Co. Ltd.* v. *M. W. Hardy & Co. Inc.* [9]; *Grace (G. W.) & Co.* v. *General Steam Navigation Co.* [10]; *S.S. Knutsford Ltd.* v. *Tillmanns & Co.* [11]; *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp & Paper Mills* [12]; *Braemount S.S. Co. Ltd.* v. *Weir (Andrew) & Co.* [13]; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [14]; *Maritime National Fish* v. *Ocean Trawlers* [15]; *New Zealand Shipping Co. Ltd.* v. *Société des*

[1] [1932] 1 K.B. 433.
[2] (1927) 27 Ll.L.Rep. 230.
[3] (1923) 15 Ll.L.Rep. 32, 81.
[4] 84 Ll.L.Rep. 89.
[5] (1941) 69 Ll.L.Rep. 138.
[6] (1873) L.R. 8 Q.B. 202.
[7] (1936) 31 Com.Cas. 239.
[8] [1940] 2 K.B. 517; 56 T.L.R. 904; 67 Ll.L.Rep. 272.
[9] [1956] A.C. 588; [1956] 2 W.L.R. 683; [1956] 1 All E.R. 639.
[10] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.
[11] [1908] 2 K.B. 385; [1908] A.C. 406; 24 T.L.R. 786.
[12] [1955] 2 Q.B. 68; [1954] 3 W.L.R. 894; [1955] 2 W.L.R. 998; [1955] 2 All E.R. 241; [1954] 3 All E.R. 563.
[13] (1910) 26 T.L.R. 248; 15 Com. Cas. 101.
[14] [1926] A.C. 497; 42 T.L.R. 359.
[15] [1935] A.C. 524.

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Ateliers et Chantiers de France [16]; *Schilizzi* v. *Derry* [17]; *Bastifell* v. *Lloyd* [18]; *St. Enoch Shipping Co. Ltd.* v. *Phosphate Mining Co.*[19]; *Carapanayoti & Co.* v. *E. T. Green Ltd.*[20]; *Metcalfe* v. *Britannia Ironworks Co.*[21]; *Akt. Eriksen and Andersen's Rederi* v. *Foy, Morgan & Co.*[22]; *Inverkip S.S. Co.* v. *Bunge & Co.*[23]; *Universal Cargo Carriers Corporation* v. *Citati* [24]; *Stanton* v. *Richardson* [25]; *Bank Line* v. *Capel (A.) & Co.*[26]; *Gas Float Whitton No. 2 (Owners)* [27]; *The Don Francisco* [28]; *Brauer & Co. (Great Britain)* v. *James Clark (Brush Materials)* [29]; *Matsoukis* v. *Priestman* [30]; *Stewart (J.) & Co.* v. *Rank (J.) Ltd.*[31]; *William Cory & Son Ltd.* v. *London Corporation* [32]; *Watson* v. *Borner (H.) & Co. Ltd.*[33]; *Ogmore S.S. Co.* v. *Borner* [34]; *Tabb & Burletson* v. *Briton Ferry Works Ltd.*[35]; *S. A. Maritime et Commerciale of Geneva* v. *Anglo-Iranian Oil Co. Ltd.*[36]; *Pteroti Compania Naviera S.A.* v. *National Coal Board* [37]; *Sethia (K. C.) (1944) Ltd.* v. *Partabmull Rameshwar* [38]; *Lazard Bros. & Co.* v. *Midland Bank.*[39]

McNAIR J., stating the facts, said that the demurrage claims involved in the ships which were delayed at Vancouver amounted to very large sums, and involved in many cases complicated and difficult issues of fact and law. In addition on certain views of the facts and law, claims for despatch money arose. The five selected cases had been tried together in the hope and expectation that the decision in these cases would enable settlement to be reached in other cases, though the selected cases were not strictly test cases. His Lordship continued to state the issues argued as follows:

I. The point of widest importance raised by these cases is as to the obligations of the charterers when one of the loading ports becomes strike-bound in the sense that loading cannot be completed within a reasonable time, or without such delay as would frustrate the commercial adventure.

Is the charterer, when, after the date of the charter but before any loading port is nominated, the port he intends to nominate

[16] [1919] A.C. 1; 34 T.L.R. 400.
[17] (1855) 4 E. & B. 873.
[18] (1862) 1 H. & C. 388.
[19] [1916] 2 K.B. 624.
[20] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.
[21] (1877) 2 Q.B.D. 423; 46 L.J. Q.B. 443; 36 L.T. 451.
[22] (1926) 25 Ll.L.Rep. 442.
[23] [1917] 2 K.B. 193, C.A.
[24] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 714; 1957] 2 All E.R. 70.
[25] (1872) L.R. 7 C.P. 421.
[26] [1919] A.C. 435; 35 T.L.R. 150, H.L.
[27] [1897] A.C. 337; 13 T.L.R. 422.
[28] 167 E.R. 213.
[29] [1952] W.N. 422; [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497, C.A.
[30] [1915] 1 K.B. 681.
[31] (1920) 36 T.L.R. 728.
[32] [1951] 2 K.B. 476; [1951] 2 T.L.R. 174; [1951] 2 All E.R. 85; 66 T.L.R. (Pt. 2) 265.
[33] (1900) 16 T.L.R. 524; 5 Com. Cas. 377, C.A.
[34] (1901) 6 Com.Cas. 104.
[35] (1921) 6 Ll.L.Rep. 181.
[36] [1953] 1 W.L.R. 1379; [1954] 1 W.L.R. 492; [1953] 2 All E.R. 1325; [1954] 1 All E.R. 529.
[37] [1958] 1 Q.B. 469; [1958] 2 W.L.R. 505.
[38] [1950] 1 All E.R. 51.
[39] [1933] A.C. 289; 49 T.L.R. 94.

becomes strike-bound, obliged to nominate another port within the range which is not strike-bound? And if after the date of the charter and after a loading port has been nominated that loading port becomes strike-bound after the vessel's arrival there, is the charterer obliged to nominate another loading port within the range which is not strike-bound? Or alternatively, does the charterer by nominating a particular loading port warrant that the nominated port is at the date of nomination or of the vessel's arrival and will remain a loading port which is not strike-bound?

These questions clearly involve, in addition to the difficult problems of law, a close examination of the facts as to the strike and its likely duration at the dates material in the case of each ship.

II. But counsel on behalf of the shipowners, while accepting for the purpose of this branch of his argument that Vancouver was originally and remained a proper loading port, submitted in the forefront of his argument that on the facts and in law the charterers were not protected against claims for demurrage by the exceptions clause in each of the charters, which provides that "lay or working days shall not count at ports of loading during "any time when the supply or loading of stiffening, or the "supply or bringing by rail, craft or otherwise to the port of "loading or alongside the vessel, or the loading of the cargo or "intended cargo or any part thereof is delayed by . . . force "majeure . . . strikes . . . or any other hindrance of whatsoever "nature beyond the charterers' control."

This submission was based on the following cumulative or alternative contentions:

(a) that the charterers are under an absolute obligation (i) to have sufficient cargo alongside the ship to start loading when she gives notice of readiness, and to have made satisfactory arrangements for bringing the balance of the cargo down, and (ii) to load such cargo within the lay days subject to any relevant exception in the exceptions clause;

(b) that clause 31 does not qualify the obligation to provide cargo, but merely takes out from the lay time any time by which the provision of the cargo is delayed or the actual loading is delayed;

(c) that, even if clause 31 is to be regarded as qualifying the obligation to provide cargo, then inasmuch as the charterers elected to fulfil their obligation to provide cargo by contracting with the Canadian Wheat Board, who thus became the agent or contractor of the charterer for fulfilling that obligation, the charterers must show that they and the Canadian Wheat Board were delayed by excepted causes which they cannot do as the delay was in fact caused by the action of the Board as such agent or contractor for the charterers in giving preference to liners and withholding wheat for full cargoes from tramps;

(d) that, if the action taken in pursuance of the policy decision of the Canadian Wheat Board is to be considered as

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action taken by the Wheat Board in its official or executive capacity, and not as agent or contractor for the charterers, the charterers cannot rely upon that factor as they took no steps to protest against or obtain a reversal of that policy;

(e) further or alternatively, that inasmuch as it was proved that at all times there was in the non-strike-bound elevators at Vancouver sufficient wheat in bulk to load any particular ship in question, or, I think, all the ships with which I have to deal, the charterers cannot bring themselves within the clause;

(f) that in so far as the charterers rely upon strikes they cannot in the cases when the nomination was made after the strike broke out (or, as in the case of the *Queen City*, after it was known to be a probability) rely upon an exception which must inevitably operate.

III. Furthermore, on the assumption (which was not conceded) that the charterers were initially protected, it was contended that when it became apparent that the shipment of wheat in bulk would become subject to indefinite delay, the charterers were then, or within a reasonable time thereafter, bound to exercise their option to load alternative cargoes, and it was argued that even in those cases, i.e., *Queen City* and *Rodney*, where the option was limited to one-third barley and one-third flour, the exercise of such option would have enabled the ships to be treated as liners so as to fill up with wheat in bulk.

In addition, in all the cases controversy arose as to the proper treatment of Saturday for the purpose of calculating lay days, and as to the proper calculation of the length of "working "days."

IV. In the case of the *Moderator* it was argued on behalf of the ship that, while conceding in this court, and I think in the Court of Appeal, that it was not open to the ship to claim that she became an arrived ship before she actually got into berth, the charterers by their failure to have cargo ready or available at the time of the ship's arrival, had by this breach of contract prevented the ship getting into berth on her arrival.

In summary the argument made on behalf of the charterers ran on the following lines:

I. As to the suggested obligation to nominate a substitute port, and as to the suggested warranty that the nominated port will remain a port in which loading can take place in a reasonable time or within such time as would not frustrate the commercial adventure, it was submitted

(a) that, there being in the charterparty no express limitation on the right of selection except as to the safety of the loading place at the selected port, the charterer in making his choice of a loading port need not take into account the convenience of the shipowners;

(b) that the only possible implied limitations on the choice were (i) that the port must not be unsafe or more than temporarily unsafe either from political or physical causes at the time when

the ship is ordered there or (possibly) when the ship arrives at or is about to arrive at the port if, on its true construction, the contract impliedly provides that the port shall be safe; and (ii) that it must not be impossible for the ship to get in and load (or discharge as the case may be), and that the test of impossibility whether physical or legal, is that the obstacle, impediment or prohibition was not likely to be operative so long (or be reasonably anticipated to be of such duration) as to defeat the commercial object of the adventure;

(c) that once a proper nomination has been made the charter is to be construed as if the nominated port had been originally written in as the loading port;

(d) that on the facts here it could not be said with any degree of certainty at any material time that the strike was likely to continue for such length of time as to make the port an "impossible port";

(e) that in the eye of the law strikes, as distinct from war, have always been treated, and rightly treated, as subject to such unexpected termination that they cannot without more be treated as abrogating contracts or involving substituted obligations.

II. It was further submitted on behalf of the charterers:

(a) that there was no settled rule of construction which would disentitle the charterers from relying on the exception of strikes merely because the strike was in existence or about to begin when the material nomination was made;

(b) that if (contrary to the charterers' contention) the Canadian Wheat Board was the agent of the charterers, and its decision not to make wheat available to the charterers for the loading of full cargoes was an act for which the charterers were in law responsible, both the Board and the charterers were delayed in providing the cargoes by strikes, but

(c) that in fact the decision of the Canadian Wheat Board to withhold wheat for bulk cargoes for tramps and to give liners preference was an act taken by them in their executive capacity on behalf of Her Majesty in the right of Canada, and as such was from the charterers' point of view within the expression "force "majeure . . . or any other hindrance whatsoever beyond the "charterers' control," and that as such policy was reasonable in the circumstances, the charterers were not debarred from relying upon it by reason of the fact that they did not protest against it and seek its reversal;

(d) that the fact that there was at all material times in the non-strike-bound elevators at the port wheat sufficient to load a particular ship, does not debar the charterer from relying upon the exceptionally wide exceptions in the charterparties concerned.

III. As to the suggested obligation to ship alternative cargoes at Vancouver, it was submitted:

(a) that, it being established that, in fact, the charterers intended to ship wheat in bulk, the presence in the exceptions

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clause of the words " the cargo " as well as the words " intended " cargo " prevented the obligation attaching;

(b) that the onus lay upon the shipowners to show that substitute cargo was available, and would have secured earlier loading of the vessel, which onus they had not discharged;

(c) that, if on the facts it is shown that substitute cargoes were available, it is not established that the exercise of the one-third options in the case of the *Queen City* and *Cape Rodney* would have enabled the ships to load the balance of their cargoes in bulk wheat any earlier, and that, in any event, before making a decision to switch over to substitute cargoes, the charterers were entitled to have regard in relation to each ship to the strike position as at the date when the decision to switch fell to be taken.

IV. As to the *Moderator*, the main submissions on behalf of the charterers were:

(a) that the original nomination of Vancouver could not be attacked in view of the fact that the vessel arriving on June 6 got into berth on June 12, and that by the charter the risk of normal delay in getting into berth lay on the ship, and

(b) that the failure to get into berth earlier was not caused by any default on the part of the charterers in their arrangements for having cargo available, but by the fact that there were other ships in turn for loading before the *Moderator*.

I am conscious that in this bare outline I may not have done full justice to the arguments of counsel, which extended over some 24 days, and involved reference to just under a hundred reported decisions.

[His Lordship referred to the facts relating to the agreement between the Ministry of Food and the Canadian Wheat Board, and continued:] It was agreed before me that the court need not be concerned with the actual machinery by which the Board made the wheat available to the Ministry through its commercial agents. In effect, individual pro forma contracts for each shipment were made shortly before the date of the ship's arrival with these agents. A similar master agreement was entered into between the India Supply Mission and the Board on October 11, 1952, covering 300,000 tons of wheat to be shipped from Pacific Coast ports over the months January to July, 1953, and a similar master agreement was entered into between the South African Wheat Board and the Board for the supply of 150,000 tons of wheat to be shipped from Pacific Coast ports over the months of January to July, 1953.

I am satisfied that in these agreements the respective charterers made reasonable and proper arrangements for securing the delivery of the cargoes to the ships in due time and it was not disputed that the quantities of bulk wheat required from the Board for each of the ships with which I am concerned were properly notified in due time by the respective charterers.

[His Lordship referred to the position of the Canadian Wheat Board and said that no relevant order under section 10 of the

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Canadian Wheat Board Act, 1935, had been proved before him; it had been agreed before him that he should be at liberty to construe the Canadian Act without formal proof and without expert evidence from experts versed in Canadian law. His Lordship next referred to the factual position as to the terminal elevators at Vancouver, New Westminster and Victoria, and to the facts as to the strike in relation to the dates upon which the vessels were nominated to and arrived at Vancouver, and continued:] According to Mr. Glendenning, an experienced ship's agent, it was not even clear up to 24 hours before the strike began that there would be a strike. In the negotiations which had led to the 1952 agreement the dispute had been settled an hour before the strike deadline, and in fact, within the memory of the witnesses who were called, no strike of elevator men had in fact ever taken place.

The contemporaneous letters and records put in evidence show a rather confused picture at this time as to the generally accepted view as to the likely duration of the strike. For instance, Messrs. Thomson & Earle on February 18/19 cabled to the Ministry as follows: "Strike settlement general opinion strike may last one "to three weeks but no negotiations between operators' union "present."

The Vancouver News Herald of February 21 published a statement that the grain elevator workers' union had stated that they were confident of an early end to the dispute. Others took a less favourable view of the situation. Meanwhile, on February 18 an embargo was placed by the railways on any movement of grain from up-country elevators to the strike-bound terminal elevators and an understanding was reached between the union and the operators of Midland Pacific and, I think, Richardson's, that they would only handle wheat coming from their own regular suppliers and would notify the union if any wheat from other sources was offered to them. In fact none was offered and Midland Pacific and Richardson's were virtually unaffected by the strike. I am satisfied that if wheat not coming from their regular suppliers had been handled, these elevators would also have come out.

On February 19 Mr. Phelps of the Prairie Farmers' Union, whose members were of course vitally affected by the embargo on movement of grain from up-country, offered to mediate and, though the union accepted the offer on February 23, the operators, who had difficulty in getting their members' views, on March 6 turned down Mr. Phelps's offer.

By cable dated February 26/27 Messrs. Thomson & Earle Ltd. reported to the Ministry as follows: "Vancouver strike situation "obscure. No negotiations: anybody's guess duration: local "opinion settlement may still be two three weeks away or "longer."

Mr. Phelps reported his inability to get the parties together to the Federal Government and asked for governmental intervention. The refusal by the operators to accept the mediation of

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Mr. Phelps may be said to mark the end of the first stage of the strike.

Meanwhile the Canadian Wheat Board had not been inactive. Faced with the situation that only two out of the eight elevators were working and not knowing how long the strike would last, the Board, acting through Mr. Smith, the manager for the Board in Vancouver, decided as a matter of policy, in order to make the best possible use of the port and the available supplies of wheat, to confine the use of the two non-strike-bound elevators to the supply of parcels to "liners" or "F.I.C. bottoms," viz., vessels plying in and out of Vancouver on more or less regular schedules for passengers and goods and loading on berth terms and not to use these elevators for loading full cargoes of wheat on chartered tramps, but to load these vessels after the strike in the order of their arrival in the port. Mr. Smith summarised his evidence on this point in the following passage: "There are certain liners in "and out of here (Vancouver) regularly which have to keep a "regular schedule both for passengers and cargoes up and down "the coast and it was felt by all of us concerned that the proper "thing to do would be to keep as many of these vessels running "as possible and use what small amount of wheat we had avail-"able to the best advantage." This policy decision was discussed with and accepted by the Vancouver Chamber of Shipping on March 2 as being in the best interests of the community. No criticism was directed against this decision at the time and, so far as it is a question of fact for me, I find that the policy of the Board acting through Mr. Smith was a reasonable policy to adopt in the discharge of their duties. This policy was pursued throughout the strike and no tramp (with the exception of the *Trelyon*, which, as stated above, was diverted to Victoria) was loaded with either a full or part cargo of wheat during that time. This decision affected about 100 liners and tramps arriving at Vancouver between February 17 and May 7 to load grain; only a proportion of these vessels were under engagement to load for the three governments.

I now return to the second stage of the strike. Mr. Phelps having asked for government intervention, Mr. Bernard Wilson, an official of the Federal Conciliation Service, arrived at Vancouver on March 9. After examining the position Mr. Wilson on March 16 put up six proposals for the parties' consideration, the most important being a wage increase of 3 cents per hour retrospective to December 1. The union rejected all six proposals, while the operators, rejecting the proposed wage increase, were prepared to accept part of the remaining proposals. On March 20 Mr. Wilson returned to Ottawa, having put forward a new series of proposals which involved for the first time the suggestion that part of the matters in dispute should be referred to arbitration. This may be said to mark the end of the second stage of the dispute.

Before either party had replied to this suggestion for arbitration,

the *Riverton* on March 22 and the *Cape Rodney* on March 27 had been ordered by the Ministry of Food to Vancouver to load.

[His Lordship referred to the settlement of the strike on May 7 and the preceding events, and continued:] When evidence was taken on commission in Canada in April, 1958—five years after the events in question—Mr. Tupper Q.C., who acted in the discussions for all the elevators except the New Westminster elevator, and Mr. Munro Q.C., who acted for the New Westminster elevator, were examined and cross-examined at length, as was Mr. Sims of the union and other witnesses, as to their views as to the likely duration of the strike and of the detailed steps in the strike, and as to their opinion as to what the man in the street or a charterer would at the time have thought. I have read and re-read their evidence and that of other witnesses dealing with these points and all the voluminous contemporary newspaper cuttings and correspondence. It would extend this judgment to an inordinate length if I attempted to set out even in summary form the effect of this evidence. I content myself with saying that on this evidence I have reached the following conclusions:

(a) That at no time before the strike began or at any stage during its continuance was the position such that a well-informed observer in the position of a shipowner or charterer making use of the facilities for inquiry open to him could have formed any really reliable appreciation as to the likely duration of the strike.

(b) That in fact at no time before the strike began or at any stage during its continuance was it on balance of probabilities likely—still less was it certain—that the strike would last more than two or three weeks or more than a further two or three weeks.

It seems to me that the fact strongly relied upon by counsel for the plaintiffs that a relatively small number of men, viz., about 250/260 in all, were actually on strike, works both ways. With a compact body of strikers it may well be argued that decisions may be easier to arrive at; but I see no reason for thinking that this factor should be put in the scales in favour of a long strike. Two cogent factors in favour of the less pessimistic view are, in my view, (1) that there was no history of embittered industrial relations in this particular industry before the strike in question, and (2) that the strike was never more than partial.

This strike, although it turned out to be a long strike, did not in my judgment differ in its essentials from other strikes. It is an obvious truism that no one can predict in advance how long a strike will last, and, even when the contestants appear to be far apart, a strike may end suddenly without any advance warning. In this connection I was usefully referred to a number of reported cases in which the courts have had to consider strikes in relation to problems of frustration, and it is true to say that

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in no case, except possibly *The Penelope*,[1] has it been held that a strike has brought into operation the doctrine of frustration. For instance, in *Bulman and Dickson* v. *Fenwick & Co.*[2] the question arose whether under a charterparty containing an exception of any delay occasioned by strikes, which provided that the vessels should discharge at a number of places in the Thames, including the Regent's Canal, the charterers were entitled to insist upon the vessel remaining at Regent's Canal when a strike broke out after Regent's Canal had been nominated. Though, as appears from the argument as reported in *Dobell & Co.* v. *Green & Co.*,[3] it had been argued that the strike was a labour war and was bound to last so long as to defeat the adventure, Pollock B. held[4] that the strike was very sudden and unexpected, and again no one could tell at what period the strike would be over, and Lord Esher M.R. said[5] "this is as clear a case as can be." In *Dobell & Co.* v. *Green & Co.* Collins L.J. said[6]: "I think it "would be unreasonable, having regard to the uncertainty of the "duration of strikes, to impose upon the charterers an obligation "to name a colliery where there was no strike in existence at "the time." In *Ropner* v. *Ronnebeck* Bailhache J. said[7]: "I "have never heard it suggested before today that a charterer is "not bound to load a steamer which is ready to take a cargo on "board because of the existence of a strike which might affect "the time of her sailing. I am not prepared to be the first to "apply the principle which, as I have said, has been applied in "cases arising at a time of war to cases arising through the exist-"ence of a strike: to do so would be a new principle. Strikes, "of course, vary in length. No man can say when a strike begins "whether it will be a long strike or a short one." Again, in *Metropolitan Water Board* v. *Dick Kerr & Co. Ltd.*, Scrutton L.J., approving the reasoning of Bailhache J. in the case last cited, said[8]: "Strikes have always been treated by the courts as "subject to such unexpected termination that they cannot with-"out more be treated as abrogating contracts." (As regards *The Penelope*,[9] it seems to me that the better view of this confusing case is that Lord Merrivale held that it was the coal embargo rather than the strike that produced frustration.) Finally, in *South African Despatch Line* v. *Panamanian S.S. Niki* (*Owners*), Diplock J., obiter, said[10]: "A strike being something which may end "at any time, the charterer is entitled to exercise his rights under "the charterparty to send a vessel to a strike-bound port in the "hope and expectation that the strike will be over when he gets "there. I cite these passages for the moment as merely indicating

[1] [1928] P. 180; 44 T.L.R. 597.
[2] [1894] 1 Q.B. 179; 10 T.L.R. 45.
[3] [1900] 1 Q.B. 526; 16 T.L.R. 204.
[4] [1894] 1 Q.B. 179, 182.
[5] Ibid. 185.
[6] [1900] 1 Q.B. 526, 533.
[7] (1914) 20 Com.Cas. 95, 99; 112 L.T. 723.
[8] [1917] 2 K.B. 1, 35.
[9] [1928] P. 180.
[10] [1959] 1 Q.B. 238, 252; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590.

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the approach of the courts to the problem of strikes rather than for the legal consequences that follow from such approach.

I now turn to the questions which I have referred to above as being the questions of primary importance under head 1, viz., as to the obligations of the charterers when the intended port of loading or a nominated port of loading becomes "strike-bound" in the sense of being a port at which loading of the vessel cannot take place within a reasonable time or without such delay as would frustrate the commercial object of the adventure. These questions I take first, as in the case of each ship they arise first in chronology.

Though on my findings of fact as to the strike it is not necessary for me to express any final opinion on these questions, it is probably desirable that I should do so in view of the sustained and interesting arguments addressed to me upon them.

There is no dispute between the parties on one point at least. The obligation, if any, to name a substitute port after a properly nominated port becomes strike-bound and the limitation (if any) upon the charterers' option as to nominating loading ports which are not strike-bound do not arise by reason of any express provision of the charter, but arise, if at all, by implication from its express terms. For my part I approach the question of implying terms into a written contract with great caution, especially when the material contract is a charterparty such as those in the present cases which make detailed and elaborate provisions for a great and varied number of contingencies. As Scrutton L.J. observed in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* [11] in relation to the charterparty there in question: "It contains "phrases which are not easy to construe, as is often the case "when parties with conflicting interests adopt an ambiguous form "which each side dare not make more precise for fear the other "party should disagree with their meaning if stated precisely."

The limits within which terms can be implied are now well settled in principle, though difficulty still lies in their application. The court will only imply such terms as are necessary to give such business efficacy to the contract as both parties must have intended. It is not sufficient to show that an implication would be reasonable, for it is not the function of the court to make a contract for the parties. I bear in mind the often quoted passage in Lord Watson's speech in *Dahl* v. *Nelson, Donkin & Co.*[12]

In broadest outline the argument on behalf of the ship proceeded upon these lines:

(1) In the opening clause of the charterparties the range of loading ports and the range of permitted cargoes is dealt with in substantially the same language, and a priori it is reasonable to suppose that the options as to ports should be exercised in the same manner and subject to the same limitations as the options for cargo.

[11] [1924] 2 K.B. 619, 629.

[12] (1881) 6 App.Cas. 38, 59.

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(2) If, as is established by the decision in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*,[13] it is the duty of the charterer when once a class of contractual cargo becomes impossible to load to take steps after a reasonable time to ship another class of contractual cargo not subject to such impossibility, it must be by analogy the duty of the charterer to nominate a substitute loading port when the port first nominated becomes strike-bound, and, if no port has been nominated, to nominate a port which is not strike-bound.

(3) On the authority of *Duncan* v. *Köster* (*The Teutonia*),[14] it is the duty of the charterer, when the port first nominated becomes strike-bound, to nominate from the range a further port which is not strike-bound.

(4) That just as the court must in considering the content of the phrase "proceed to a port as ordered" or "proceed to X "or so near thereto as she can safely get" imply the term that the vessel can get to the port in safety within a reasonable time or without such delay as will frustrate the commercial adventure, so the court by analogy in considering whether the port nominated is or remains a proper port from the point of view of the loading facilities, must imply the term that the port must be in such a condition that loading can take place within a reasonable time or without such delay as will frustrate the commercial adventure.

As to (1), my first comment is that argument by way of analogy is dangerous; if the facts are the same, the analogy is unnecessary; if the facts are different, the difference in fact may destroy the analogy. Secondly, accepting as I must that the decision in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* [15] is good law, it seems to me that there is a striking difference between a switch over from one type of cargo to another, which may not involve even the movement to another loading berth, and a switch over to another port in the range which will necessarily involve clearance from the port which is being vacated, probably an ocean voyage to a new port and entry into the new port, all at the expense of the shipowner. If it is said that in the circumstances contemplated the shipowner would readily shoulder these expenses, this, as it seems to me, is no answer, since if the charterer is under the obligation alleged, he must have the right to switch over even though the shipowner objects.

I now turn to the argument (2) based on *The Teutonia*.[16] This decision is, of course, a decision of the Privy Council on appeal from Phillimore J., sitting as judge of the High Court of Admiralty, and as such is not strictly binding upon me though entitled to the greatest respect. It is a decision which, in later decisions and in the textbooks, has been the subject of much differing comment, but so far as I know, except in one passage in Scrutton on Charterparties, 11th ed., p. 124, and 16th ed., p. 129, Case 1, it has never been suggested to be an authority

[13] [1924] 2 K.B. 619.
[14] (1872) L.R. 4 P.C. 171.
[15] [1924] 2 K.B. 619.
[16] L.R. 4 P.C. 171.

for the proposition that, the charterer having nominated a safe port which becomes unsafe before the vessel arrives at or off the port, the master is entitled to call upon the charterers to nominate another safe port within the charter range.

As appears from the report of the proceedings before Phillimore J.,[17] the proceedings were instituted under section 6 of the Admiralty Court Act, 1861, by petition by the assignees of cargo shipped on board the *Teutonia*, a Prussian vessel at Pisagua and bound for Cork, Cowes or Falmouth for orders, which orders by the charterparty were limited to orders to any safe port in Great Britain or on the Continent between Havre and Hamburg. The vessel proceeded to Falmouth and arriving there on July 10 received orders to discharge at Dunkirk. At that time no war had broken out between France and Prussia. But on arrival off Dunkirk the master received information that war had broken out and so proceeded to the Downs. While at the Downs it was confirmed that war had broken out, and on instructions from the owner the master proceeded to Dover, where the ship remained with the goods on board. The consignees demanded possession of their cargo at Dover without paying or offering to pay the freight or any portion thereof, but the master refused to deliver the goods to them. The main issue in the action was as to the master's right not to put into Dunkirk on receipt of intelligence that war had broken out. This point, which was decided in favour of the master, is irrelevant in the present case. On the second point, namely, the right of the merchant to delivery of the cargo freight free, Phillimore J.[18] makes it quite clear that even if there were such a right at common law it would not necessarily be the law administered by a Court of Equity or by the Admiralty Court, and he concludes as follows[19]: "After as "careful a consideration as I have been able to give to the general "principles of jurisprudence applicable to the circumstances of "this case, in the absence of any direct judicial precedent I have "arrived at the following conclusion, that the owners of the "*Teutonia* have not committed a breach of contract contained "in the charterparty and bill of lading, first by refusing in the "circumstances to carry the cargo to the port of Dunkirk or, "secondly, by refusing to deliver up the cargo to the plaintiffs "at Dover without any payment of freight whatever either pro "rata itineris or by way of compensation for the carriage of his "goods." Though in the Privy Council the advice as delivered by Mellish L.J. proceeded on the lines that the original contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, I can find nothing which suggests that the Board were accepting the shipowners' argument "that the charterer was "bound to select another port from among those named in the "charterparty" or that its acceptance of that argument was implicit in the conclusion at which the Board arrived. Although

[17] L.R. 3 A. & E. 394, 395.
[18] Ibid. 417.
[19] Ibid. 424.

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it was argued [20] that the Court of Admiralty can only exercise a common law jurisdiction, I do not understand the Privy Council to be accepting this contention. So to hold would be contrary to the later decisions of the Court of Appeal in *The Gaetamo and Maria, per* Brett L.J.[21]

In my judgment *The Teutonia* [22] is no authority for the proposition that according to English common law a charterer, having once made a proper nomination of a port, is obliged to make a second nomination when the port first nominated becomes an impossible port. At most (apart from the point as to the master's right to act on reasonable intelligence) it supports the proposition that the port nominated must be safe both at the time of ordering and at the time when the ship gets there; for which proposition it is cited in Scrutton on Charterparties, 11th ed., p. 123, note (4), and 16th ed., p. 128, note (*d*).

Against the wider proposition that a substitute port must be ordered after a proper nomination has been made, there is a well-settled line of authority to the effect that, once a port has been properly nominated, the charterparty is to be construed as if the nominated port had been originally written into the charterparty. See *Tapscott* v. *Balfour, per* Bovill C.J.,[23] which was accepted in *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co., per* Lord Esher M.R.,[24] *per* Bowen L.J.[25] and *per* Kay L.J. as reported,[26] as supporting that proposition. To the same effect is the judgment of Kennedy L.J. in *Leonis S.S. Co.* v. *Rank Ltd. (No.* 1).[27] More recently the same principle was restated by Devlin J. in *Anglo-Danubian Transport Co. Ltd.* v. *Ministry of Food*,[28] where the judge adds the further point that the charterer, having once made a proper nomination, has not the right—still less the obligation—to make a second nomination.

With this class of case must be contrasted cases where the original nomination has been held to be bad and therefore nugatory. In such a case—at least unless the shipowner has treated the original nomination as an anticipatory breach—the charterer can, so long as his time for doing so has not expired, make a fresh nomination which, if good, will be treated as written into the contract. Such a case is *A/S Olivebank* v. *Dansk Svovlsyre and Supherphosphat Fabrik*.[29] In that case the nomination of a Danish port to which a British ship could not lawfully proceed to deliver nitrate was held by Bailhache J.[29] as a "mere nugatory "nomination," and he held that the charterers were obliged to give a fresh nomination of a port within the charter range. In the Court of Appeal each of the Lords Justices treated the original nomination as ineffective, though Bankes L.J. preferred to rest

[20] L.R. 4 P.C. 171, 175.
[21] (1882) 7 P.D. 137, 143.
[22] L.R. 4 P.C. 171.
[23] (1872) L.R. 8 C.P. 46, 52.
[24] [1891] 2 Q.B. 647, 650.
[25] Ibid. 652.
[26] 65 L.T. 662
[27] [1908] 1 K.B. 499, 518; 24 T.L.R. 128.
[28] 65 T.L.R. 762; [1949] 2 All E.R. 1068; 83 Ll.L.Rep. 137, 139.
[29] [1919] 1 K.B. 388, 392; [1919] 2 K.B. 162 (C.A.).

his judgment on rather different grounds to that adopted by Bailhache J.

Next, as to point (4) of the summary of the shipowners' argument, viz., that just as the court in considering the content of the phrase "proceed to a port as ordered," or "proceed to X or so "near thereunto as she can safely get," will imply the term that the vessel can get there in safety within a reasonable time or without such delay as will frustrate the commercial adventure, so the court by analogy in considering whether the port nominated is or remains a proper port from the point of view of loading facilities must imply the term that the port must be in such a condition that loading can take place within a reasonable time or without such delay as will frustrate the commercial adventure.

For my part, I derive little assistance for the purpose of solving the present problem from *Nelson* v. *Dahl*,[30] important as that case is in other branches of shipping law. In that case the question for determination was whether under a charterparty to "proceed to London, Surrey Commercial Docks or so near "thereunto as she might safely get and deliver her cargo," the shipowners were entitled to deliver the cargo at Deptford Buoys outside the Surrey Commercial Docks by reason of the fact that no berth could be obtained in the docks owing to congestion which was likely to last for many months. The importance of the case in other branches of shipping law is that it decided that in construing the phrase "or so near thereunto as she can safely "get" it was legitimate to treat as "permanent not only "obstacles which will remain for ever but also obstacles which "will prevent entry for a time which is unreasonable having "regard to the object of the common adventure." See *per* Lord Watson[31]: "There must in each case be some limit of time "within which an obstacle ceasing to exist cannot be regarded as "permanent and beyond which a continuing obstacle ceases to "be permanent." This case, in my judgment, throws no light, or at least a very indirect light, on the problem in the present case.

Admittedly, with the exception of the obiter observations of Diplock J. in *South African Despatch Line* v. *Panamanian S.S. Niki* (*Owners*),[32] to which I have already referred, there is no reported case in which the strike-bound port problem has been considered. But in the argument before me both sides in turn relied upon the well-known cases of *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[33] and *Bulman & Dickson* v. *Fenwick & Co.*[34] In *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[35] (in which the court consisted of Lord Esher M.R., Bowen and Kay L.JJ.) the vessel was chartered to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered by the harbour-master

[30] (1879) 12 Ch.D. 568, sub nom. *Dahl* v. *Nelson, Donkin & Co.* (1881) 6 App.Cas. 38.
[31] 6 App.Cas. 38, 59.
[32] [1959] 1 Q.B. 230, 252.
[33] [1891] 2 Q.B. 647.
[34] [1894] 1 Q.B. 179.
[35] [1891] 2 Q.B. 647.

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as customary, but there was delay in unloading due to the crowded state of the dock, which prevented the vessel being berthed for some time and the shipowners claimed demurrage.

The actual decision was that the vessel did not become an arrived ship until she got into berth, but in Bowen L.J.'s judgment there is a valuable passage dealing with exercise of the option. The learned Lord Justice says [36]: "Then we were told "that an option was given to the charterer and that it was not "properly exercised unless a berth was chosen that was empty. "But I think there was confusion in this argument also. The "option is given for the benefit of the person who has to exercise "it. He is bound to exercise it in a reasonable time, but he is "not bound in exercising it to consider the benefit or otherwise "of the other party. The option is to choose a port or berth "which is reasonably fit for the purpose of delivery. It will not "do, for instance, to choose a dock the entrance of which is "blocked—that would be practically no exercise of the option "at all, and I think this is what Lord Blackburn meant in *Nelson* "v. *Dahl*,[37] and follows from the cases which he there cited of "*Ogden* v. *Graham* [38] and *Samuel* v. *Royal Exchange Association* "*Co.*[39] To limit the option of the charterer by saying that, in "the choice of a berth, he is to consider the convenience of the "shipowners is to deprive him of the benefit of the option. The "most that can be said is that the charterer does not exercise his "option at all unless he chooses a berth which is free or is "likely to be so in a reasonable time." I have compared this report with the reports in the Law Times [40] and the Law Journal Queen's Bench,[41] and I think it is quite clear that Bowen L.J. was using the word "free" as opposed to physically obstructed. He was so understood by Pollock B. in *Bulman and Dickson* v. *Fenwick & Co.*[42] In that case the vessel was to proceed to "London, either to the Pool, Regents Canal, Victoria Docks, the "Derricks, Beckton, or other safe berth as ordered." After the voyage commenced but before arrival of the vessel off the Thames, the charterers ordered her to Regents Canal. After the order was given they became aware of the fact that there was a strike of coal-porters at Regents Canal which did not extend to the other places named in the charterparty. It was argued on behalf of the ship that the charterers should have changed the order. The argument on behalf of the ship in the Court of Appeal based upon the judgment of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*,[43] namely, that "the charterers must "choose a berth where the commercial adventure can be carried "out and ought not to send the ship to any place where there is "a strike" was rejected, Lord Esher M.R. (in whose judgment

[36] [1891] 2 Q.B. 647, 652.
[37] 6 App.Cas. 38, 44.
[38] (1861) 1 B. & S. 773.
[39] (1828) 8 B. & C. 119.
[40] 65 L.T. 659.
[41] 61 L.J.Q.B. 11.
[42] [1894] 1 Q.B. 179, 184.
[43] [1891] 2 Q.B. 647.

Lopes and Kay L.JJ. concurred) saying[44]: "This is as clear a "case as can be. The question is whether the defendants did "anything more than they were by the terms of the charterparty "entitled to do in ordering the vessel to the Regents Canal. The "shipowners undertook that the vessel should proceed to London, "either to the Pool, Regents Canal, Victoria Docks, the Derricks, "Beckton, or other safe berth as ordered. There is nothing from "which any limitation can be implied on the power of the "charterers as to the choice of the place to which the ship should "go unless, perhaps, there is an implied limitation in case some-"thing arises which makes the Regents Canal one to which a "ship of this kind cannot go as, for instance, if the entrance is "blocked. At the time when the charterers ordered the ship to "the Regents Canal there could be no objection to such an order, "and there was nothing which happened afterwards to oblige the "charterers to alter their order." (In the report in the Law Journal Queen's Bench[45] Lord Esher is reported as having given a different illustration from the illustration of a blocked port, namely, the illustration of a port which had become unsafe by reason of the outbreak of war, but the principle is the same.)

In Scrutton on Charterparties, 11th ed., p. 137, note (*h*); 16th ed., p. 142, note (*h*), the comment is made that "in *Bulman and* "*Dickson* v. *Fenwick & Co.*[46] [the Court of Appeal] appears to "hold that the only limitation to the charterer's power to select "a berth is that he must not choose one that is so blocked that "the obstacle cannot be removed in a time consistent with the "commercial adventure."

(In both these cases the obligation was to name a *safe* berth or place. Mr. Mocatta, on behalf of the charterers, was (as I understand his argument) prepared to accept for present purposes that even if, as in the present cases, the qualification of safety is not used, there would be an implied limitation to nominate safe berth or place in the sense of berth or place to which the vessel could proceed without such delay as would defeat the commercial purpose. For my part, I should wish to reserve this question, which does not arise for solution in the present case, as I do not feel that it is wholly covered by authority.)

In my judgment, it is impossible to derive from these cases any support for the proposition that the charterer is not entitled on a charterparty in the present form to nominate a loading port which is "strike-bound" as defined above, or is bound to make a fresh nomination when the originally nominated port became "strike-bound." I further consider that strong support for the contrary view is to be found in *Dobell & Co.* v. *Green & Co.*[47] (the argument in 5 Com.Cas. 161 showing that the alternative port point was argued). The facts of that case may be summarised as follows: On January 14, 1898, the vessel was chartered to load a

[44] [1894] 1 Q.B. 179, 185.
[45] 63 L.J.Q.B. 123, 127.
[46] [1894] 1 Q.B. 179.
[47] [1900] 1 Q.B. 526; 5 Com.Cas. 161.

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cargo of South Wales coal from Cardiff for delivery at Iquique. By the charter the vessel was to proceed to such loading berth as the freighters may name, and there load a cargo of steam coal as ordered by the charterers which they "bind themselves to ship "(except in the event . . . of strike of shippers' pitmen): the "vessel to be loaded as customary but subject in all respects to "the colliery guarantee in . . . colliery working days. . . ." On February 3 the charterers purchased two cargoes, one intended for the vessel in question, from Hoods Colliery. On April 6 the South Wales coal strike began, lasting till September 1. On April 20 the charterers obtained from Hoods Colliery the usual colliery guarantee: this was rejected by the ship's agents who demanded a colliery guarantee from, and the nomination of, a colliery which was not on strike. The charterers refused to give way and the vessel, after proceeding to Cardiff, remained there throughout the strike when she loaded without undue delay. The argument advanced on behalf of the ship, based upon the judgment of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Bros. & Co.*[48] was rejected. A. L. Smith L.J. says[49]: "Where "can be found in the charter any term that an order must be "given to load from a colliery which is not on strike? As I have "already pointed out, the charterparty expressly provides that "any loss from a strike is to fall upon the shipowners. I can find "nothing in the charter which imports any such limitation of the "charterer's right to select the colliery from which the coal is to "be shipped, as is contended for by the plaintiffs." So, too, Collins L.J.[50]: "It seems to me that by the terms of the charter-"party as between these two business firms the risk of any "difficulty arising from a strike was deliberately put upon the "shipowners, and, that being so, that the very case contemplated "by the exception as to strikes has arisen." (I have already referred to the passage from his judgment referring to "the "uncertainty of the duration of strikes.")

If reinforcement for the view that the charterer's choice is unfettered is needed, it is to be found in the judgment of Parker L.J. in *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices, S.A. (The Aello)*,[51] where he says: "Having by the contract obtained the right to exercise "different options, it seems to me that they [the charterers] can "choose which to exercise regardless of how it may affect the "shipowners. Otherwise one would be introducing a qualifica-"tion into the exercise of what is by the contract an absolute "right."

In my judgment, having regard to the authorities and to the express provision in clause 31 dealing with delay by strikes, it is quite impossible to imply into these charterparties any such limitation upon the charterers' rights as is contended for by the

[48] [1891] 2 Q.B. 647.
[49] [1900] 1 Q.B. 526, 532.
[50] Ibid. 533.
[51] [1958] 2 Q.B. 385, 405; [1958] 3 W.L.R. 152; [1958] 2 All E.R. 695.

shipowners, or to impose an obligation upon the charterers to make a fresh nomination when the port originally nominated becomes strike-bound. From this point of view, it is immaterial whether on the facts the charterer is or is not protected by the exceptions clause.

I am reinforced in this view I have formed by the observations of Diplock J. (admittedly obiter though made after hearing full argument) in *South African Despatch Line* v. *S.S. Niki (Owners)*,[52] though part of his reasoning may not apply to the particular charterparties in these cases.

On this branch of the case no separate argument was addressed to me in support of the alleged warranty. It is sufficient for me to say that, in my judgment, this contention equally fails for substantially the same reasons. Further, the nomination when made was either good or bad. If good, no warranty is required; if bad, the shipowner's remedy lies elsewhere.

For completeness I should add that, though there was some evidence that the Ministry of Food might have been in some temporary difficulty in undertaking the dollar commitments which would be involved in purchasing grain in the United States, there was evidence, which was not seriously challenged, that supplies were available in United States ports and could have been shipped without undue delay.

II. I now turn to the second main branch of the argument in these cases which poses the question whether, accepting that Vancouver was and remained a properly nominated loading port, the charterers can bring themselves within the exceptions clause?

This question primarily involves (1) the proper construction of the particular clause, and (2) the application of the clause so construed to the particular facts.

On the question of construction it must first be observed that the clause in question is drawn in particularly wide terms—wider, I think, than in any corresponding clause in any of the many cases to which I have been referred. In the first place, it deals not only with delay in loading the cargo or the intended cargo, but also with delay in the supply or bringing down of the cargo. In *Pinch & Simpson* v. *Harrison, Whitfield & Co.*,[53] in commenting upon a somewhat less extensive clause which included the phrase "provision of cargo," Denning J. said: "It seems to me that "these words 'provision of cargo' are expressly put in to deal "with the situation which has arisen in some cases whereby the "word 'loading' has sometimes been construed as applying only "to the operation of loading from the wharf or quay on to the "ship. The words 'provision of cargo' were probably taken from "Lord Dunedin's judgment in *Arden S.S. Co. Ltd.* v. *Mathwin & "Son*,[54] and were put in to expand the scope given to the "word 'loading.'" Whether this is a legitimate method of

[52] [1959] 1 Q.B. 238, 253.
[53] (1948) 81 Ll.L.Rep. 268, 273.
[54] 1912 S.C. 211.

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approach, it undoubtedly emphasises what may be said to be a truism that the court is primarily concerned with the particular words in the charterparty before it, and has to exercise caution in drawing inferences or principles from decisions upon other types of clause. Secondly, the enumerated causes of delay are extremely varied and exhaustive. Thirdly, the concluding words "or any other hindrance of whatsoever nature beyond the "charterers' control" are not limited to causes ejusdem generis with the specified causes and must be given their literal meaning. See *Larsen* v. *Sylvester & Co.*[55] Fourthly, this clause, though expressed to be a clause which cuts out from the lay or working days the time during which the delays operate, is properly to be regarded as a qualification upon the charterers' absolute obligation to have the cargo or sufficient cargo ready at the loading port. See *per* Lord Sumner in *Bunge y Born Limitada Sociedad* v. *Brightman & Co.*,[56] and Lord Dunedin.[57]

Fifthly, there is, in my judgment, if I may respectfully say so, great force in the observation of Fletcher Moulton L.J. in *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd.* (*No. 2*),[58] where he says: "We have had a very able argument from Mr. Hamilton in "which he tried to make very fine distinctions as to the real scope "of the several words used in the clause. In my opinion, this "is a business document drawn up by business men to be used "in a business sense, and there is no room for these very fine "distinctions. We have to look at the question from the point "of view of business men and ask: Was this a strike which "stopped the cargo being delivered to the steamer?" See, too, *Larsen* v. *Sylvester & Co.*[59] Finally, it is well to bear in mind the essentially practical approach of Lord Dunedin in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* [60] in reference to the proper application of the causa proxima rule in policies of marine insurance where he says: "My Lords, we have had a very "large citation of authority in this case and much discussion on "what is the true meaning of causa promixa. Yet I think the case "turns on a pure question of fact to be determined by common "sense principles. What was the cause of the loss of the ship? I "do not think that any ordinary man would have any difficulty in "answering that she was lost because she was torpedoed."

On the facts as I have so far found them, I have little doubt that the ordinary man would without hesitation say that the delay in bringing down the cargo or intended cargo and the loading of it on to those ships was caused by the strike which broke out on February 17 and continued until May 7. I do not believe that the ordinary man, if he had reached the conclusion which I have reached that the policy decision of the Canadian Wheat Board to use the small quantity of wheat available for loading liners rather

[55] [1908] A.C. 295; 24 T.L.R. 640.
[56] [1925] A.C. 799, 816–817.
[57] Ibid. 807.
[58] (1908) 13 Com.Cas. 295, 297.
[59] [1908] A.C. 295.
[60] [1918] A.C. 350, 362.

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than tramps was a reasonable policy taken in the emergency created by the strike, would have had any hesitation in saying that looking at it from a "business point of view" or "on "common sense lines" it would be absurd to differentiate between the strike and the emergency taken in view of the strike. Unless I am concluded by authority to the contrary (which I do not believe I am), I should come to the same conclusion and hold that on each of the cases with which I am concerned the cause of the delay was the strike.

The first answer in logical order (though not in order of presentation) made by counsel on behalf of the ships was that, by a well-settled rule of construction, exceptions clauses in a charterparty should not be construed to apply a state of facts which was in existence when the contract was made. (See II (f) above.) In other words, the specified event in order to operate as an exception must be exceptional or abnormal and not one which was bound to be operative. The earliest case in which this doctrine was adumbrated appears to be *France Fenwick & Co.* v. *Spackman (Philip) & Sons*,[61] in which Bailhache J. obiter said: "If I had not found that the circumstances at the time of "discharge were exceptional, I should have acceded to Mr. "Roche's argument that to bring themselves within the excep- "tions clause, it is not enough for the defendants to say that "they were prevented, but that they must say that they were "prevented by some cause which was exceptional. If a person "contracts to discharge in 36 hours unless prevented by some "cause beyond his control which always would prevent discharge "within that time, then, in my opinion, it is not an exception "at all, and, if in such a case he fails to discharge within the "36 hours, he is not within the exceptions clause." See also Scrutton on Charterparties, 11th ed., p. 240, note (f), commenting on the phrase "other causes beyond charterers' control": "In "any case the 'cause' must be something abnormal. If a "charterer undertakes to do a thing (e.g., discharge in so many "hours) which in all the circumstances is impossible for him, the "cause or causes which prevent him doing it cannot be within "such a clause." Next, in *Ciampa* v. *British India S.N. Co. Ltd.*,[62] Rowlatt J. acceded to Mr. Roche K.C.'s argument based upon *France Fenwick & Co. Ltd.* v. *Spackman (Philip) & Sons*,[63] and held that the ship, which after calling at a plague-contaminated port had loaded lemons at Naples for London, could not, when the lemons were damaged at Marseilles by a process of "deratisation" under the ordinary municipal law of France, rely upon the exception of "restraint of princes." The learned judge says[64]: "I am not deciding that the application "of the ordinary law of a country may not in some circumstances "constitute a 'restraint of princes,' but I think that the facts "which bring that law into operation must be facts which have

[61] (1912) 18 Com.Cas. 52, 57.
[62] [1915] 2 K.B. 774.
[63] (1912) 18 Com.Cas. 52.
[64] [1915] 2 K.B. 774, 779.

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" supervened after the ship has started on the voyage in question. " When facts exist which show conclusively that the ship was " inevitably doomed before the commencement of the voyage " to become subject to a restraint, I do not think there is a " ' restraint of princes.' "

In *Naamlooze Venootschap A.C. Lensens Stoomvart/Maatschappij* v. *Muller & Co. (London) Ltd.*[65] Roche J., while accepting the correctness of Bailhache J.'s dictum in the *France Fenwick* case,[66] refused to apply it to the facts of that case (which involved a delay in discharge through labour trouble over night work) on the ground " that abstention from night work, at " the time when the charterparty was entered into and at the " time when the discharge began, was still quite an exceptional " matter and not an established and ordinary matter." There is also rather an obscure reference to the same point in *Mitsubishi Shoji Kaisha Ltd.* v. *S. Soskin & Co. Ltd.*[67]

The next appearance of the doctrine seems to be in the judgment of Lord Hunter in *Taylor* v. *John Lewis Ltd.*[68] in the Inner House of the Court of Session, where the learned judge applied the reasoning of Rowlatt J. in the *Ciampa* case[69] saying: " In " the present case both parties knew at the time when the " contract was entered into that a permit to discharge at Aber- " deen had to be obtained, and therefore I do not think that the " delay occasioned in procuring a permit constituted a restraint of " princes within the meaning of the exception clause." (The other four members of the court decided the case on other grounds). In *Safadi* v. *Western Assurance*[70] Roche J., in construing the clause in a policy " Trans-shipment if any . . . arising " from circumstances beyond the control of the assured," says: " There is a good deal of doctrine and authority to the effect that " you cannot apply language such as ' cause or circumstances " ' beyond the control of the assured ' to excuse performance " when those causes and circumstances and matters are repre- " sented by causes and circumstances and matters in existence " and known to be in existence by the person relying upon them " at the time he makes the contract from the performance of which " he seeks to be excused. . . . An illustration of the principle " to which I am referring (it is only an illustration) is afforded by " the decision of Rowlatt J. in the case of *Ciampa*."[71] Finally, in *S.S. " Induna " Co. Ltd.* v. *British Phosphates Commissioners*[72] Sellers J., after reference to the decisions of Bailhache J. in *France Fenwick & Co. Ltd.* v. *Spackman (Philip) & Sons*[73] and Rowlatt J. in *Ciampa*,[74] expressed the doubt[75] " whether either " learned judge was intending to lay down any general principle."

[65] (1921) 7 Ll.L.Rep. 248.
[66] 18 Com.Cas. 52.
[67] (1925) 23 Ll.L.Rep. 198.
[68] 1927 S.C. 891; 28 Ll.L.Rep. 329.
[69] [1915] 2 K.B. 774.
[70] (1933) 46 Ll.L.Rep. 140, 143 (col. 1).
[71] [1915] 2 K.B. 774.
[72] [1949] 2 K.B. 430; 65 T.L.R. 149; [1949] 1 All E.R. 522.
[73] 18 Com.Cas. 52.
[74] [1915] 2 K.B. 774.
[75] [1949] 2 K.B. 430, 436.

and continued as follows: " In the present charterparty the parties " have made it clear that lay days are not to count where delay " in discharging arises by reason of a cause beyond the charterer's " control . . . The intention of the parties is clearly expressed. " If both of the parties or one of the parties knew at the time of " making the contract of existing circumstances which would or " might occasion delay, other considerations would arise, but " where neither party knew, as here, I see no reason why effect " should not be given to that which they have made clear by " their contracts. If parties are contracting on the basis of a " state of affairs known to them, or which it can be shown they " were prepared to accept, then an exception relating to some- " thing outside their control would, no doubt, be construed to " relate to some circumstances or event not so known or some- " thing outside the basis of their bargain, that is something " exceptional or abnormal in comparison with the contemplated " state of affairs."

Having considered these authorities I have come to the conclusion that there is no settled rule of construction that a specific exception, such as strikes or war, cannot be relied upon if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port. Further, I find difficulty in seeing how knowledge of both or either parties can be material unless possibly upon the ground that all contracts must be construed in the light of surrounding circumstances. At the most, the authorities referred to decide that for a particular state of facts to amount to " restraint of princes " or " any cause " beyond the charterers' control," they must be exceptional or abnormal. I do not regard these authorities as entitling me or compelling me to hold that in clause 31 the word " strikes " must be read as " strikes coming into existence after the date of the " charterparty." To do so would be to write into the charterparty words which are not there, and which are not necessarily to be implied. Furthermore, in view of the peculiar nature of strikes, to which reference has been made in the cases cited earlier, it cannot be said in many cases, or, indeed, in any case, that the ship was doomed or that delay was inevitable. In addition, there are a great many cases, of which *Dobell & Co.* v. *Green & Co.*[76] (strike after charterparty but before nomination), *Leonis S.S. Co. Ltd.* v. *Joseph Rank Ltd. (No. 2)*[77] (strike before charter) and *Matheos (Owners)* v. *Dreyfus (Louis) & Co.*[78] (onset of ice reasonably to be anticipated), where, though the point was not taken, the decision was contrary to the application of the doctrine. Furthermore, I can see no justification at all for applying the doctrine to the *Queen City*, in which case the charterparty was entered into and the nomination made before the strike began, or for extending the doctrine in the case of the *Riverton* and *Cape Rodney* (where the charterparties were entered into before the strike) merely

[76] [1900] 1 Q.B. 526.
[77] (1908) 13 Com.Cas. 295.
[78] [1925] A.C. 654, 663; 41 T.L.R. 393.

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because the nomination was made after the strike began. In the case of the *Agostino Bertani*, whose charterparty was made after the strike, it seems to me to be quite inconceivable that the parties would have intended, and unreasonable that they should be deemed to have intended, to exclude the existing strike which might have ended at any moment and did, in fact, and within nine days of the vessel's arrival; and in the case of the *Moderator* there is a special clause restricting the right to send to strike-bound ports which is inconsistent with the application of the doctrine.

I, accordingly, reject this first argument raised on behalf of the shipowners.

The second main argument advanced on behalf of the ship (see II and (a), (b), (c), (d) and (e) above) was on the following lines which, for convenience of reference, I have again set out, viz.:

(a) that charterers are under an absolute obligation (i) to have sufficient cargo alongside the ship to start loading when she gives her notice of readiness, and to have made satisfactory arrangements for bringing the balance of the cargo down, and (ii) to load such cargo within the lay days subject to any relevant exceptions in the exceptions clause;

(b) that clause 31 does not qualify the absolute obligation to provide cargo but merely takes out from the lay-time any time by which the provision of cargo is delayed or the actual loading is delayed;

(c) that even if clause 31 is to be regarded as qualifying the obligation to provide cargo, then inasmuch as the charterers elected to fulfil their obligation to provide cargo by contracting with the Canadian Wheat Board, who then became their agents or contractors, the charterers must show that they or the Canadian Wheat Board were delayed by excepted causes, which they cannot do as the delay was in fact caused by the action of the Board as agent for the charterers in giving preference to liners and withholding wheat for full cargoes from tramps;

(d) that, if the action taken in pursuance of the policy decision of the Wheat Board is to be considered as action taken by the Wheat Board in its official or executive capacity and not as agent or contractor for the charterers, the charterers cannot rely upon this policy decision as they took no steps to protest against it or to have it reversed;

(e) further or alternatively, that inasmuch as it was proved that there was at all times sufficient wheat in bulk in the non-strike-bound elevators to load any particular ship or (I think) all the ships with which these five actions are concerned, the charterers cannot bring themselves within the clause.

I have already held that on its true construction clause 31 does qualify the obligation to furnish cargo and to load the cargo to the extent of the proved delay by exempted causes. Furthermore, on the facts which I have set out above as to the constitution of the Board and the action taken by the Board through

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Mr. Smith, I consider and so hold that it would be artificial in the extreme and wrong to hold that the policy decision of the Board was an act done by the Board in its capacity as agent for the charterers. I hold that it was an executive action taken by the Board on behalf of Her Majesty in right of Canada and that, accordingly, the delay in bringing cargo down and in loading was from the point of view of the charterers delay caused by "force majeure" or "other hindrance of whatsoever nature "beyond the charterers' control." I further hold that this action being reasonable, it would have been unreasonable for the charterers to have attempted to obtain its reversal or modification. It was faintly argued that the decision of the Ministry of Food not to protest against the preference being given to liners was dictated by the financial consideration that it would cost the Ministry more in dead freight and/or detention if the liners were not so far as possible cleared. It is sufficient to say, having considered the booking notes, that there was no evidence in support of this suggestion and I reject it.

The two cases mainly relied upon by counsel on behalf of the ships on this branch of his argument, more particularly on head (e), were *In re Richardsons & Samuel (M.) & Co.*[79] and *Central Argentine Railway Ltd.* v. *Marwood.*[80] In *In re Richardsons & Samuel (M.) & Co.*[81] the ship was chartered to proceed to Batoum and there load case oil from a named factory owned by Bnito at a specified rate per day. The charter excepted (inter alia) "strikes, lock-outs, accident to railway." The vessel was ready in berth to receive her cargo but owing to an accident on the railway by which oil was brought to Batoum, there was on that date no substantial quantity of oil at Bnito's factory or at Batoum. On April 14 oil began to flow and by April 16 there was sufficient oil at Bnito's factory for the work of filling the cases to be resumed on April 17. Bnito had, however, for their own purposes discharged the men engaged in filling cases when the oil flow ceased. After the oil started to flow again delay took place in filling the cases with oil and the vessel was delayed. Furthermore, two vessels which had arrived earlier were loaded in front of her. The Court of Appeal held that the delay from April 17 onward was not (i) caused by accident on railway, as there was sufficient oil at Bnito on April 17, and (ii) that the shortage of men for filling the cases was not within the expression "other "causes beyond the charterers' control" as the phrase had to be construed as ejusdem generis with "strikes and lock-outs." As it seems to me, it is only on the latter point that that case decides any point of principle.

In *Central Argentine Railway Ltd.* v. *Marwood*[82] the vessel was chartered to carry coals to Villa Constitucion. The charter provided as follows: "The cargo to be taken from alongside by "consignees at port of discharge . . . at the average rate of 200

[79] [1898] 1 Q.B. 261; 14 T.L.R. 5.
[80] [1915] A.C. 981.
[81] [1898] 1 Q.B. 261.
[82] [1915] A.C. 981.

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" tons per day . . . In case of strikes . . . or any other causes " beyond the control of the consignees which prevents or delays " the discharging such time is not to count." On the vessel's arrival all the berths were occupied, and there was at the time a strike of stokers at the port. For the first 14 days after the ship's arrival no discharging was done at all; for the next 19 days there was a partial resumption of work and there were discharged from other ships 6,000 tons of coal equal to 6½ days' normal work. The charterers admitted that time started to count from the time when full working was resumed; the shipowners, however, claimed that they were entitled to count against the charterers the 6½ days above referred to, which the charterers claimed were lost by the strike. In the House of Lords the shipowners succeeded, and though the reasoning of their Lordships does not appear to me at least to be identical, I consider that the majority view was that, inasmuch as the 6½ days would have been lost by reason of the occupation of the berths by other ships, whether there had been a strike or not, it could not be said that these 6½ days were time lost by the strike. It is also to be observed that in that case, as in *Richardson's* case,[83] the concluding exception was " or any other cause or accident beyond the control of " charterers." It seems to me that the decision in *Marwood's* case[84] turned almost wholly on the proper appreciation of the facts as set out in a rather confused statement of facts, and that no general principle can be deduced from it, except that the mere existence of a strike is not sufficient; it must have some causative effect upon the operations of the particular ship concerned.

I cannot find in either of these authorities any support for the proposition that because work was going on in the port of Vancouver throughout the strike, the charterers cannot rely upon or bring themselves within the exceptions clause.

Furthermore, it seems to me to be contrary to common sense. Suppose the charterer having 10 ships on charter for loading at a particular port at about the same time the port facilities being such that, with cargoes available, 10 ships could be loaded at or about the same time and without undue delay, and suppose the charterer makes in advance proper arrangements to have cargo brought down sufficient to load the 10 ships in due time, but owing to exempted causes (e.g., accident on railways) only cargo sufficient for one ship can be made available. Can it be said that each ship could maintain that, as the charterers had sufficient cargo down to load the particular ship, the charterers cannot bring themselves within an exception clause such as this? I venture to think not, though counsel for the ships in the present cases frankly and logically submitted that the answer should be in the affirmative.

In my judgment, the answer to this apparent difficulty is to be found in the width of the exception clause in the present cases,

[83] [1898] 1 Q.B. 261. [84] [1915] A.C. 981.

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and particularly the words " or any other hindrance of whatsoever " nature beyond the control of the charterers," and in the construction which the courts have placed upon the words " hindering " or " hindrance."

In *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[85] sellers who were importers of magnesium chloride agreed to sell to buyers their requirements of magnesium chloride over 1914 estimated at 400 to 600 tons. The contract provided that deliveries " may be suspended pending any contingency beyond the control " of the sellers . . . (such as . . . war . . .) causing a short supply of " . . . raw material or manufactured produce or otherwise prevent- " ing or hindering the manufacture or delivery of the article." The greater part of the supplies of magnesium chloride came from Germany. On August 4, 1914, on the outbreak of war, the sellers had 17 running contracts and the German source of supply was cut off. The sellers, though able at an increased price to obtain sufficient magnesium chloride to satisfy the particular buyers' contracts if they disregarded their other contracts and the normal requirements of their business, suspended delivery to these buyers. It was held in the House of Lords that the suspension was justified. Lord Loreburn[86] said that by hindering delivery was meant interposing obstacles which it would be really difficult to overcome, and said[86]: " To place a merchant in a position of " being unable to deliver unless he dislocates his business and " breaks his other contracts in order to fulfil one, surely hinders " delivery." Lord Dunedin said[87]: " They (the buyers) say, " however, that if (the sellers) had supplied them in preference " to all others, there would have been sufficient for them. It is " obvious that, if this is a good answer, each of the other contract- " ing parties could have made it in turn, damages would have " been due to all and the clause would be no protection at all."

I was usefully referred to *Crawford & Rowatt* v. *Wilson, Sons & Co.*,[88] in which similar principles were applied to a charterparty case. The facts are complicated. It is sufficient to say that the ship in question was chartered to deliver coal at R. " all unavoid- " able accidents or hindrances in . . . discharging cargo excepted." When the ship arrived at R. a rebellion was in progress and the ship, together with a number of other ships chartered by the defendants, were delayed. It was argued on behalf of the ship that, as they had succeded in discharging 6,000 tons of cargo from other ships, they could have discharged the ship in question. This argument was rejected.

Lord Esher, affirming the judgment of Mathew J., states the ruling principle as follows[89]: " In my opinion, if by something " happening at the port of discharge which the defendant could " not possibly avoid, they could not take delivery without doing " something which it was wholly unreasonable that they should

[85] [1917] A.C. 495.
[86] Ibid. 510.
[87] Ibid. 515.
[88] (1896) 12 T.L.R. 170; 1 Com. Cas. 154, 277 (C.A.).
[89] Ibid. 280.

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" be called upon to do, they would be hindered although by " doing the unreasonable thing they might possibly have taken " delivery."

This principle was applied by Scrutton L.J. in *Scheepvaart Maatschappij Gylsen* v. *North African Coaling Co.*,[90] in a sale of goods case; and in *Phosphate Mining Co.* v. *Rankin, Gilmour & Co.*[91] Bailhache J. paraphrased Lord Esher's judgment to fit the case before him in the words " if owing to an excepted peril the " defendants could not provide a steamer without doing something " which it was wholly unreasonable they should be called upon to " do, they would be prevented although by doing the unreasonable " thing they might possibly have provided the steamer," and described Lord Esher's principle as " the test which is now " always applied by the court to the problem presented by such a " case as this."

Applying that test to the facts of these cases, the strike having occurred without the fault of the charterers or the Canadian Wheat Board, and the policy decision taken by the Board having been found to be reasonable, there was in the case of each ship delay in bringing down the cargo and in loading the cargo by a hindrance outside their control, notwithstanding that possibly the charterers by taking the unreasonable course of persuading the Board to reverse their reasonable policy or, if the Board are to be regarded as the charterers' agent, the Wheat Board by reversing its reasonable policy, might have succeeded in loading all the wheat which was in fact loaded from the non-strike-bound elevators into the five vessels in question.

As stated above, 63,435 tons of wheat in bulk were loaded from the two non-strike-bound elevators. If all this wheat had been loaded into tramps as full cargoes, seven tramps would have been released. Assuming an average parcel of 2,000 tons, the policy adopted released 32 liners.

The conclusions I have reached on this branch of the case are, accordingly, as follows: (1) That the charterers are protected by the exception of strikes; (2) that, whether or not the Board is to be regarded as the charterers' agents, the charterers are protected by the exception of " any other hindrance of whatsoever nature " beyond the charterers' control "; (3) that, in fact, the Board was not the agent of the charterers in making and acting upon the policy decision, and that that policy being raesonable, it would have been unreasonable for the charterers to attempt to have that decision modified, and that they are protected by the exception of " force majeure " and the exception of " any other cause of what- " soever nature beyond the charterers' control."

III. I next turn to the question of the obligation to ship alternative cargoes if (contrary to the shipowners' submission) the charterers are entitled to the protection of clause 31 as regards the loading of wheat in bulk.

[90] (1916) 85 L.J.K.B. 1386, 1389. [91] (1916) 21 Com.Cas. 248, 251

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This question involves first difficult questions of law, viz.: (1) whether this court is bound by the decision of the Court of Appeal in *Brightman* v. *Bunge y Born*,[92] and (2) upon whom does the onus lie of proving that alternative cargoes could have been shipped and within what time, and, secondly, the examination of the evidence as to the availability of alternative cargoes.

It must be remembered that in the case of the *Queen City* and the *Cape Rodney*, the options were limited to one-third barley and one-third flour in bags; in the case of the *Riverton* the options were one-third barley and a full cargo of flour in bags; in the case of the *Agostino Bertani* and the *Moderator* there were no alternative cargo options. In no case was there an option to load wheat in bags beyond what was required for safe stowage.

In *Brightman* v. *Bunge y Born* [92] the appeal arose under the Centrecon form of charter. The charterers undertook to load a "full and complete cargo of wheat and/or maize and/or rye" at a certain specified rate, with an exception that "if the cargo "cannot be loaded by reason of riots, civil commotions or of a "strike or lock-out of any class of workmen essential to the "loading of the cargo or by reason of obstructions or stoppages "beyond the control of the charterers on the railways, or in the "docks, or other loading places . . . time for loading . . . shall not "count during the continuance of such causes." The charterers intended to load a cargo of wheat and had made arrangements to have it sent down from the interior by railway. A "ca-canny" movement on the railway delayed the flow of cargo and on the last day of the lay days a prohibition of export of wheat came into force. The Court of Appeal held (1) that the fact that the charterers had intended and made arrangements to load wheat did not amount to an election so as to convert the charter into a wheat charter; (2) that the charterers could not rely upon delay in bringing the cargo down to the port by reason of a "ca-canny" movement on the railway bringing the cargo down, *per* Bankes L.J. on the ground that it was not an obstruction, and *per* Scrutton and Atkin L.JJ. on the grounds that the exception of "obstruction" was limited to an obstruction preventing the loading of the cargo as distinguished from an obstruction preventing the cargo being brought down, and, further, that the phrase "obstruction on the railways" must be read as referring to the railways in the port directly connected with the process of loading; and (3) that though, when the prohibition of export of wheat came into force, the charterers became under an obligation to load maize or rye, they were not bound to load it immediately but were entitled to a reasonable time to see whether the prohibition would be lifted and to make arrangements for loading the substituted cargo, and to that extent they were excused from paying demurrage.

On this case two points at the outset should be observed:

[92] [1924] 2 K.B. 619.

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(1) that the exceptions clause (corresponding to the present clause 31) was limited to events preventing loading stricto sensu; and (2) that the expression "the cargo" is twice used in the present clause and no reference is made to the "intended cargo."

The clause with which I am concerned differs from that clause in three significant respects: (1) that it extends the ambit of the exceptions to the process of the supply or bringing . . . to the port of loading or alongside of the cargo or the intended cargo or any part thereof; (2) that it expressly deals with both the cargo and the intended cargo, and (3) that it deals with delay, not prevention.

It may, of course, be said that the words "the intended "cargo" were added merely to cover the extension of the exceptions to the process of supply and bringing down, but in that case the words "the cargo" would not be necessary: see *per* Diplock J. in *South African Despatch Line* v. *Niki* (*Owners*),[93] where an attempt to distinguish *Brightman's* case[94] failed. But here, as I believe for the first time, the court has to construe a clause in which both expressions "the cargo" and "intended "cargo" are used. In my judgment the clause in the present case covers two distinct events (subject to what is said below as to the effect of expressing the alternative cargo as an option), (1) delay affecting all kinds of contractual cargo, and (2) delay affecting the intended cargo. The effect is, in my judgment, that, if either of these events occurs, time is not to count during its continuance.

Furthermore, as it seems to me, there is a vital distinction between prevention by a prohibition of export, which for the time being at least involves a permanent and complete ban on loading, and delay by a strike which may or may not last long. Two further examples may be given: (i) ship loading grain in bulk, bad weather sets in; assuming that there is an alternative option to ship a cargo not affected by rain: must the charterer change over as soon as he can?; (ii) ship loading case goods by crane; crane breaks down but is repairable in 10 days: must charterer, having the option, change over to loading bulk grain by elevator?

There is, in my judgment, a further valid point of distinction between the two cases. In *Brightman's* case[94] (as appears from the charterparty in the House of Lords record) the cargo obligations were expressed as follows: clause 2: "steamer . . . to "proceed as ordered by the charterers . . . to the undermentioned "ports . . . and there receive from them a full and complete "cargo of wheat and/or maize and/or rye in bags and/or in "bulk."

By clause 5 the freight provided for was the same whatever the nature or composition of the cargo, though it varied with the place of loading and discharge.

By clause 6 (other cargo) it was provided that "the charterers

[93] [1959] 1 Q.B. 238, 250. [94] [1924] 2 K.B. 619.

" shall have the option of supplying other lawful merchandise . . . " in which case freight to be paid on steamer deadweight capacity " for wheat in bags."

In the present case, as stated above, the provisions as to alternative cargoes or part cargoes are expressly stated to be options to be exercised by the charterer and the exercise of each of these options attracts an additional freight. For instance, the *Riverton* loaded 8,600 tons of wheat in bulk at 77s. 6d. per ton. There is no evidence either way to show whether, if the flour option had been exercised, she could have stowed 8,600 tons of flour in bags. But if she could, this would involve an additional freight liability of some £4,000. I find great difficulty in believing that by any process of implication it would be right or proper to impose this additional burden upon a charterer who had decided in his own mind to ship and had made arrangements to ship wheat in bulk.

In my judgment, for the reasons stated, the ratio decidendi of *Brightman's* case [94] does not apply to the present cases, and not being bound by authority, I have reached the conclusion that once it is proved or admitted in each case (1) that the charterer did in fact intend to load wheat in bulk (as was admitted before me), and (2) that the supply or bringing to the port of loading or alongside the vessel or the loading of that intended cargo was delayed by the specific exceptions (as I have found), the clause operates and must be given its literal effect and that no obligation to exercise any of the alternative cargoes options is imposed on the charterers.

If, however, I be wrong in this conclusion, the next question is upon whom does the onus of proof lie to show that alternative cargoes could have been shipped and within what time. This problem is but lightly touched upon in *Brightman's* case.[94] Atkin L.J. alone [95] uses words which suggest that in his view the onus lies upon the charterer to show what amount of time he requires to change over. A somewhat similar matter was discussed in *Matheos (Owners)* v. *Louis Dreyfus & Co.*,[96] where Lord Sumner said: " It has been decided that when a prima facie case of " exempted peril is met by an allegation of negligence (*The Glen-* " *darroch* [97]) or unseaworthiness (*The Northumbria* [98]), the burden " of proof shifts to the party interested in establishing this allega- " tion affirmatively and I do not see why the same rule should " not apply to an allegation of the existence of a practicable " alternative mode of loading." Lord Dunedin, however, as I read his speech, deals with the problem rather differently where he said [99]: " But further I think that, once the proper and usual " mode of loading was negatived as rendered impossible by ice, " it really fell on the owners to get from the Umpire a finding " of commercial possibility, seeing that the possibility could only

[94] [1924] 2 K.B. 619.
[95] Ibid. 637.
[96] [1925] A.C. 654, 666.
[97] [1894] P. 226.
[98] [1906] P. 292.
[99] [1925] A.C. 654, 662.

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"rest on a novel and, so far as we can see, hitherto untried "method" (i.e., loading by manual labour). ". . . It is not "as if the alternative method to the usual method, which ex "hypothesi is found impracticable, is a usual one. Given impos- "sibility by crane I do not doubt it would be incumbent on the "charterer to prove impossibility by lighter. But this is quite "a different thing, unused, untried and problematical. In such "a case it seems to me the onus shifts and the owners, on whom "the shifted onus falls, have not discharged it."

On the whole, seeing that I am considering this problem on the hypothesis that the charterers have only succeeded for the time being in bringing themselves within the protection of the clause and remained under the burden of fulfilling their original obligation of loading a full and complete cargo, in my judgment the onus would remain upon them to show (1) that they required a reasonable time to change over, and (2) that if they had changed over, the delay would have been the same.

I now turn to the facts. I take first the case of the *Riverton*, which is the simplest case inasmuch as in that case there was an option to load a full cargo of flour. Flour is produced at the mills up-country from grain made available to the millers by the Canadian Wheat Board and is brought down to the loading port in bags and there loaded by longshoremen. The longshoremen were never on strike. It was agreed between the parties before me that the actual operation of loading would have taken four weather working days and it was assumed for the purpose of the argument that a full and complete cargo of flour would have amounted to about 9,000 tons. In 1953 the total exports of flour from British Columbian ports to the United Kingdom were of the order of 12,000 tons out of a total of 300,000 tons in all exported from British Columbia. Under their master contract with the Canadian Wheat Board the Ministry of Food were entitled to call for 350,000 tons of flour during the year from East and West Coast ports, but there was no evidence of how much of this had been shipped or how much from West Coast ports. My impression is that 12,000 tons above referred to represents the whole of the flour shipments from British Columbian ports by the Ministry of Food. The chief mills supplying flour for export from British Columbia were at the time very busy preparing shipments for the Orient and Philippines. Nevertheless I think that on the balance of the evidence, and so find, 9,000 tons of flour could have been made available at Vancouver in 30 days after the placing of the order by the Ministry of Food. (If there were competitive demands for flour for other earlier ships (the details of which are not before me) the period would have to be lengthened.)

I have set out above in my summary as to the facts of the strike the position at the time when the *Riverton* was ordered to Vancouver on March 22 and when she arrived on March 25. If my findings as to the likely duration of the strike are accurate, it would seem that it would be quite unreasonable to require the

charterers to enter into arrangements for procuring a full cargo of flour which at best could not make the flour cargo available for a month. On the other hand, if the proper view of the facts is that at the time when the nomination of the *Riverton* was made on March 22 the strike was bound to last a very long time, it seems to me that the charterers on the hypothesis upon which this point is being considered ought to have started to make their alternative arrangements at least by that date: see *per* Diplock J. in *South African Despatch Line* v. *Panamanian Niki* (*Owners*).[100]

As regards the other two vessels, the *Queen City* and the *Cape Rodney* with the one-third barley and one-third flour options, the factual position is as follows. As regards flour, I consider on the balance of the evidence that if each ship be considered in isolation, a parcel of flour equivalent to one-third of a full cargo could have been made available at Vancouver within 10 or 12 days of the placing of the order. As regards barley (which was under the same control by the Wheat Board as wheat) it appears that at the Midland Pacific elevator, which was not strike-bound, the barley stocks which stood at 12,383 bushels (about 340 tons) on February 17 had risen to 437,242 bushels (about 11,000 tons) by May 8, but according to Mr. Smith's recollection this barley had been sold elsewhere. This seems to be confirmed by the record of a shipment of 9,829 tons on *S.S. Illenao* for Japan after the strike. I think on balance of probabilities that no barley was in fact available for the Ministry of Food and that if a request for a part cargo of barley had been made by the Ministry of Food to the Board, it would not have been complied with.

Furthermore, seeing that the declared policy of the Board was to use the small quantity of wheat which could be shipped from the non-strike-bound elevators for liners in order to free them so far as possible, I am satisfied that the Board would not have made available wheat in bulk to the Ministry to complete a ship for which they had succeeded in getting one-third cargoes of barley and/or flour. It is true that the matter was never tested out, for the Ministry never made the request. I take the effect of a series of answers given by Mr. Smith to be that the ship having been tendered for a full cargo of wheat in bulk, he personally would not have agreed, and though he could not five years after the event definitely say what would have happened if the matter had been taken up at Ottawa, he did not think that he would have been overruled so as to permit parcel shipments of wheat into tramps, as this would be contrary to the policy adopted by the Board. In so far as it is a question of fact for me, I find that parcel shipments of wheat to complete tramps which had tendered for full cargoes of wheat and had succeeded in getting part cargoes of barley or flour would not have been permitted.

It was also submitted on behalf of the ship that the charterers should have shipped at Vancouver wheat in bulk produced in

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[100] [1959] 1 Q.B. 238, 253.

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those parts of British Columbia which lie outside the designated areas. In respect of the wheat so grown, the Canadian Wheat Board have not a monopoly of export though such wheat can only be exported by licence from the Board. The factual evidence as to the existence and availability of such British Columbian wheat is incomplete and confusing. It is agreed that in fact no such British Columbian wheat was in fact shipped in bulk, and in my judgment the fair conclusion on the evidence is that the only British Columbian wheat available for shipment during the strike period consisted of five shipments of bagged wheat (probably seed wheat) which was not a permitted cargo under the charterparties, and that, even if such British Columbian wheat had been available, it could not have been shipped from the two non-strike-bound elevators at Vancouver as these elevators were concentrating on obtaining bulk wheat to be loaded as liner parcels from their normal sources of supply and were fully occupied with such wheat.

Before considering the case of the *Moderator*, which in some respects stands by itself, it is convenient that I should deal with two independent points on the calculation of demurrage and dispatch common to all the four other cases which turn on (a) the meaning of " working " day and (b) the treatment of Saturdays.

As to (a), so far as this court is concerned it is agreed that by reason of the decision of the Court of Appeal in *Alvion Steamship Corporation of Panama* v. *Galban Lobo Trading Co. S.A. of Havana* [101] (to which I shall refer as the *Alvion* case), affirming a decision of my own, it is accepted that a " working day " is a length of time consisting of a number of hours which, according to the custom of the port, are usually worked at the port of discharge or loading, as the case may be, and the presence of the word " weather " qualifies " working day," so that from the number of hours which would be the ordinary hours of the port is to be deducted the length of time during which weather interferes with the " work ": see *per* Lord Goddard.[102] In the *Alvion* case [101] it was found that there was an established custom of the ports at Cardenas and Havana that the normal working periods were eight hours on weekdays other than Saturdays and four hours on Saturdays. On the facts here it is agreed that for Vancouver the normal working hours on weekdays other than Saturdays were eight hours. Accordingly, weekdays other than Saturdays must be taken as periods of eight hours each, from which must be deducted the number of hours, if any, during those working periods during which weather interferes with loading, or I think would have interfered with loading if loading had been in operation. (See the exception of " rainy days " in clause 15.)

As to (b), the treatment of Saturdays, the position requires more detailed examination. By clause 15 of the charterparties (or clause 9 in the case of the *Moderator*) it was provided that six weather working lay days (Sundays, holidays and rainy days not

[101] [1955] 1 Q.B. 430; [1954] 2 W.L.R. 543; [1955] 1 All E.R. 457.

[102] Ibid. 449.

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to be counted as lay or working days) are to be allowed charterers for loading.

[His Lordship referred to the facts relating to "normal working hours" and the treatment of Saturdays, and continued:] On behalf of the ship it was argued (1) that ordinarily Saturday is not counted a holiday (see *Robert Dollar & Co.* v. *Blood, Holman & Co.*,[103] *per* McCardie J.), and (2) that on the facts Saturday in Vancouver is "*a* working day" and must be counted as such, or, alternatively, must be counted as half a day.

On the other hand, it was argued on behalf of the charterers that, so far as the loading of grain in bulk was concerned, Saturday is not a working day and should not be counted as a whole or part of a day.

The relevant authorities to which I was referred were as follows:

In *Robert Dollar & Co.* v. *Blood, Holman & Co.*[103] McCardie J. on a claim for discharge demurrage at Sharpness under a charter which provided that the vessel should "discharge afloat with "dispatch according to the custom at port of discharge but at "the rate of not less than 300 tons per working day" found that at Sharpness the usual working day was eight hours but only four hours were worked on Saturday, and held that Saturdays, though in practice only half days, counted as working days, citing in support Lord Sumner's speech in *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.*,[104] where, however, there was an exception on Sundays, general or local holidays.

In "*Z*" *Steamship Co. Ltd.* v. *Amtorg New York*[105] Goddard J. on a charterparty which provided for discharge "at the "rate of 800 tons per weather working day, Sundays, official and "local holidays excepted," held obiter that Saturday, on which men worked at time and a half rates, was not an official or local holiday.

In addition, reference was made to the *Alvion* case,[106] where the umpire had left to the court the question whether, on the true construction of the charterparty and the weight of evidence, the charterers were correct in applying the principle of a day of eight hours and four hours on Saturday to their computation of laytime; but in that case the question I have to consider was not in issue in view of the exception of "Saturday afternoon."

In my judgment of the facts here proved and admitted, Saturday does not count either as a whole or half a working day. The issue must be determined with reference to the particular trade involved—in this case the loading of bulk grain from elevators. In that trade for one essential class, viz., the elevator men, Saturday did not form any part of their usual working hours any more than night work, for which time and a half was paid, or Sunday work, for which double time was paid, and the fact that,

[103] (1920) 4 Ll.L.Rep. 343, 350 (col. 1); 36 T.L.R. 843.
[104] [1916] 2 A.C. 527, 536.
[105] (1938) 61 Ll.L.Rep. 97; 54 T.L.R. 849, 850.
[106] [1955] 1 Q.B. 430.

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if required, they did in fact work on Saturday at time and a half rates, did not make Saturday part of their normal working week. I decide this point not by reason of the fact that Saturday is a holiday but on the ground that it is not a day which formed part of the usual working week of 40 hours.

Had I been of the contrary opinion on this point I should have held that Saturday morning should be counted as half a working day and that, if there had been rain for two hours during the working hours of Saturday morning, only a quarter of a weather working day would count. I would reject the contention that, if Saturday counted at all, the working week was a week of six working days consisting of eight hours each on Monday to Friday and four hours on Saturday. Neither the language used nor any authority cited leads to that result.

IV. I now turn to the case of the *Moderator*.

It will be recalled that this vessel was chartered by the Government of South Africa on April 2, 1953, viz., at a time when the strike, which had started on February 17, was still continuing. She gave notice of readiness on Saturday June 6 at 11.15 a.m., commenced loading on June 12 and completed loading on June 18. In the case of this vessel the range of loading ports was Vancouver/New Westminster or Victoria B.C., and the cargo to be loaded was a full and complete cargo of wheat, with no alternative cargo option. This charter did not, as did the others, contain the words "whether in berth or not," and it was not contended by the ship that, this being a berth charter, time could begin to count before 24 hours after she got into berth and gave notice of readiness. This she did at 8.20 a.m. on Friday June 12. The charterparty did, however, contain two relevant special clauses not present in the other cases, viz., clause 26: "Any time lost to the vessel by bad weather preventing discharge "... to be calculated on the basis of 24 hours at the ratio which "the actual time lost bears to the normal working hours of the "port"; and clause 36: "If the grain elevators at Vancouver "or New Westminster or Victoria B.C. are strike-bound when "vessel is seven days off Vancouver, this charterparty to be null "and void."

Though in paragraphs 8 to 11 of the Reamended Points of Claim it was alleged that a fresh nomination of a loading port within the range should have been made in view of the fact that the port of Vancouver was congested, it was agreed before me by counsel for the ship that he could not claim that the nomination of Vancouver as a loading port was bad or that the vessel should have been switched to Victoria or New Westminster and that paragraphs 8 to 11 of the Reamended Points of Claim should be treated as withdrawn while still (as I understand him) relying upon the post-strike congestion as a material fact to be considered on other branches of the case.

The main point taken on behalf of the ship is to be found in paragraph 12 of the Reamended Points of Claim, which is in the

following terms: "In further breach of their obligations under "the charterparty the defendants had no cargo available for the "vessel at any material time prior to June 11 or 12 and did not "make any contract for the acquisition of cargo until on or about "June 11 or 12, 1953. Further or in the alternative the defen- "dants knew at the time they ordered the vessel to Vancouver "and at all material times thereafter that they had no cargo and "no contract for the acquisition thereof and no reasonable pros- "pects of obtaining the necessary cargo at Vancouver within a "reasonable time."

In effect the ship claimed that, by reason of the charterers' failure to have cargo available on the ship's arrival, they prevented the ship from getting into berth at once. They relied in particular upon the two decisions of *Ardan Steamship Co.* v. *Andrew Weir & Co.*[107] and *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*[108] (to which I shall refer as *The Aello*). The charterers by way of defence relied upon clause 18, which is in identical terms to clause 31 of the charterparty in the other cases and on the facts which I have already dealt with in relation to the purchase of cargo from and control of cargo by the Canadian Wheat Board and the policy decision of the Board as to the use of the available wheat for the loading of parcels into liners and the postponement of tramp vessels tendering for full cargoes of wheat until the cessation of the strike which resulted in the congestion of the port with tramp vessels waiting to load wheat in bulk in the order of their arrival.

[His Lordship referred to the factual position as to provision of cargo and the nomination of the loading berth, and continued:] The facts stated in this letter [dated June 8, 1953, from the manager of the Canadian Wheat Board, Mr. Smith, to the charterers] were confirmed by Mr. Smith as being accurate, and I so find.

Consistently with my findings earlier in relation to the other cases, I also find that the master-contract of June 2, 1952, constituted a reasonable arrangement for making cargo available, that no wheat in bulk was available from any source other than the Canadian Wheat Board and that the Canadian Wheat Board in its control of the wheat in fact controlled the loading berths and did in fact nominate the loading berths, and, subject to the authorities to which I am about to refer, I also find that the application made to Mr. Smith for cargo and for a loading berth was the reasonable step for the charterers to take to obtain cargo for the ship under the master-contract and, indeed, was the only step they could take in the circumstances.

The extent of the congestion caused by the strike and continuing after the strike ended may be judged from the following figures: No less than 19 tramp vessels chartered by the three

[107] [1905] A.C. 501; 21 T.L.R. 723.

[108] [1958] 2 Q.B. 385.

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governments and arriving at Vancouver between February 16 and the end of April and six more arriving in May (after allowing for diversions to U.S. ports, cancellations and postponements) waited and ultimately loaded full cargoes of bulk wheat at New Westminster and Vancouver in order of their arrival, and, therefore, in turn before the *Moderator* (in addition to an unspecified number of tramps chartered by other persons); and after the strike ended on May 7 seven tramps chartered by persons other than the three governments loaded full cargoes of bulk wheat before the *Moderator*, being in turn before her. In addition, parcel shipments of bulk wheat were being made into liners.

I now turn to *Ardan Steamship Co.* v. *Andrew Weir & Co.*[109] In that case the vessel was chartered to load a full and complete cargo of coals as ordered by charterers which they "bind themselves to ship (except in the event of riots, commotion by keelmen, strike or lock-out of shippers' pitmen, or any hands striking work, frosts or floods or any other accident or cause beyond the control of the charterer which may delay the loading." There was no provision as to the time within which the ship was to be loaded. In other words, the time for loading was a reasonable time. On June 9 the charterers ordered a cargo of coal from Lambton Colliery, Newcastle, intending to ship this on the chartered vessel. The chartered vessel arrived on July 14; two other vessels, having coaling orders from the same colliery, had arrived before her but did not complete until August 13, when the chartered vessel went into berth and began to load; but twice she had to leave berth, no coal being available, and she did not complete until August 23. The House of Lords, reversing the unanimous decision of the Inner House, restored the judgment of the Lord Ordinary, Lord Pearson, who had held that the delay complained of was caused not by the exceptional congestion of ships but by the failure of the (charterers) to perform their primary duty of providing a cargo and that there were no clauses in the charterparty which on a sound construction would excuse the respondent for the delay. Lord Halsbury[110] refers to "the absolute obligation to furnish the stipulated cargo" and observed "the delay in the loading is one thing and the failure to provide a cargo to load is another and very different thing." So, too, Lord Davey[111]: "There is nothing to be found in the charterparty in the present case which in my opinion should be held to qualify this absolute obligation of the charterers. The exception of riots, etc., 'and other causes beyond the 'control of the charterer which may delay her loading' in my opinion applies only to the process of loading the cargo when ready and not to delay in providing the cargo."

I have already observed earlier that the exception clause in these charterparties, including that of the *Moderator*, quite clearly applies to delay in the supply or bringing down of the cargo, and

[109] [1905] A.C. 501.
[110] Ibid. 510.
[111] Ibid. 512.

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that, properly construed, the clause qualifies the absolute obligation to supply cargo for loading on the vessel's arrival to the extent of the delay arising from the excepted causes: see the observation of Denning J. in *Pinch and Simpson* v. *Hanson Whitfield*.[112]

In my judgment the case of *Ardan Steamship Co.* v. *Andrew Weir & Co.*[113] is no authority for the proposition that the charterers, having made proper arrangements for the supply and bringing down of the cargo, were in breach of their obligation as to the provision of cargo for the vessel.

In *The Aello* case[114] the one point which may be material in the present case was whether the charter being a "port" charter and the entry of the ship into the commercial area of the port so as to be an "arrived ship" not being possible until a cargo or part cargo was known to be available, the charterers were to be held liable for the failure of the ship to get into the commercial area of the port by not having cargo available. On this point Parker L.J. said this[115]: "Now it is true that in [*Ardan Steamship Co.* v. *Andrew Weir & Co.*[116]] the ship had undoubtedly "got to the commercial area of the port and was only prevented "by the absence of cargo from getting a berth. Further, as Mr. "Roskill points out, there is no case in which it has been held "that a cargo must be ready to enable a ship to get into the "commercial area. However, bearing in mind that the charter-"party in the *Ardan* case[116] was a berth charterparty I should "have thought that the principle was plain, namely, that if the "provision of a cargo is necessary to enable the ship to perform "its obligation, namely, to become an arrived ship, the absolute "obligation of the shipper is to provide the cargo, or, at any rate, "a reasonable part of it, in time to enable the ship to perform "its obligation." It is to be observed, however, that the clause in *The Aello*[117] which corresponds to the present clause 18 is clause 30, which reads as follows: "If the cargo cannot be loaded "by reason of . . . obstruction or stoppages beyond the control "of the charterers."[118] There is no exception relating to the supply or bringing down of cargo. Furthermore, in both these cases it was the fact that, if cargo had been available, the ship could have become an "arrived ship" at once. But quite apart from these rather refined arguments I should have thought that the ordinary man approaching the problem "in a business sense" or "on common sense lines" would, if asked what prevented the *Moderator* starting to load on the date of her arrival, have said, and said truly: "The strike which, though it ended on May 7, "still had the result that the berths were congested by ships "held up by the strike and that cargo from the only available

[112] (1948) 81 Ll.L.Rep. 268, 273.
[113] [1905] A.C. 501.
[114] [1958] 2 Q.B. 385.
[115] Ibid. 404–405.
[116] [1905] A.C. 501.
[117] [1958] 2 Q.B. 385.
[118] Ibid. [1957] 3 All E.R. 627, 628.

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" source could not be made available to the ship until the earlier " ships had loaded."

I, accordingly, hold that the charterers were not in breach in either of the respects alleged in paragraph 12 of the Reamended Points of Claim.

If I had been of the contrary view, the damages on the authority of *The Aello* [119] would apparently have been assessed on the following basis: (1) the plaintiffs would be entitled to recover (a) any dispatch money to which they were liable on the facts as they existed, and (b) the demurrage to which they would have been entitled if the vessel had been able to get into berth on June 8. See Amended Particulars of Damage claimed under paragraph 12 of the Reamended Points of Claim.

There still remain certain points of detail as to the proper calculation of demurrage and dispatch in the case of the *Moderator*.

First, as to the meaning of " working day."

As regards the working day at Vancouver, this has, on the authority of the *Alvion* case,[120] to be calculated as a working day of eight hours for weekdays other than Saturdays. As regards Saturdays at Vancouver, what I have said above equally applies and Saturday does not count.

As regards the working day at the discharging port of East London, the position is complicated by the existence of a special clause as follows: " Clause 26. Any time lost to the vessel by " bad weather preventing discharge or the shifting as above to " be calculated on the basis of 24 hours at the ratio which the " actual time lost bears to the normal working hours of the port." This clause was introduced into this charterparty before the date of my decision in *The Alvion* case [120] (October 20, 1954), and is based upon the assumption, held by me and the Court of Appeal to be erroneous, that a working day is a period of 24 hours commencing either from the commencement of the work or from midnight on the first day. Though this assumption must now be taken to be erroneous in the absence of express or implied provision to that effect in the charterparty, I do not consider that it would be proper to disregard clause 26 altogether. In my judgment the effect of clause 26 is that by agreement between the parties the working day at the port of discharge is to be taken as a period of 24 hours running uninterruptedly from the moment when the time starts to count, with the following exceptions, viz.: (i) those contained in clause 22, i.e., (a) Sundays, (b) holidays, (c) " from noon on Saturday to 7.20 a.m. on the following " working day," and (ii) the exceptions contained in clause 26, i.e., (d) " any time lost to the vessel by bad weather preventing " discharge," or (e) " by shifting as above." As regards (d) and (e), the time lost is to be calculated at the ratio which the actual time lost bears to the normal working hours of the port. The normal working hours of the port on Monday to Friday are agreed

[119] [1958] 2 Q.B. 385. [120] [1955] 1 Q.B. 430.

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to be 8 hours 40 minutes and on Saturdays 4 hours 40 minutes. Accordingly, if 4 hours 20 minutes are lost by bad weather or by shifting on a weekday, 12 hours only would be counted; if 2 hours 20 minutes are similarly lost by bad weather or by shifting on a Saturday, 6 hours only would be counted.

Finally, I have to consider the effect of clause 27, which provides that "loading and discharging time shall be reversible," and clause 17, which provides that "if charterers elect to treat "lay days in loading and discharging as per clause 17, despatch "or alternatively demurrage to be settled on completion of dis- "charge. . . ." It is common ground that the charterers did so elect.

The effect of making lay days reversible has been considered in *Love & Stewart Ltd.* v. *Rowtor Steamship Co. Ltd.*,[121] *per* Lord Sumner; in *Verren* v. *Anglo-Dutch Brick Co. (1927) Ltd.*,[122] *per* Roche J., and in *"Z" Steamship Co. Ltd.* v. *Amtorg New York*,[123] *per* Goddard J. In *Rederiaktiebolaget Transatlantic* v. *Compagnie Française des Phosphates de l'Oceanie* [124] a clause to the effect that "any day or parts of days not consumed in loading "may be added to the time for discharging and any extra time "consumed in loading may be deducted from the time for dis- "charging" was under consideration, and finally in *Alma S.S. Co. S.A.* v. *V. M. Salgaoncar e Irmaos* [125] Devlin J. had to consider the effect of a clause giving charterers the right "to average "days allowed for loading and discharging." In the present case I have only to consider the effect of making the lay days reversible and need not express any opinion as to whether the same or different effect is produced by either of the other formulae.

On the authorities cited as to reversible lay days and in principle it seems to me that where, as here, dispatch is payable on "time saved including Sundays and holidays," the result is as follows: First you ascertain the number of days of the particular quality specified in the charter which are allowed for loading and for discharging, which days so ascertained form a pool. For example, eight weather working days for loading; 12 weather working days for discharging; total 20 weather working days. If at the loading port less than the quantity of days allowed for loading has been used, the balance of the days of that quality, say three weather working days, is carried forward to the discharging port or if more than the number of such days have been used for loading, you draw on the days of that quality available for discharge to meet the excess, with the result that there are fewer days of that quality (say 12 days less 5) left for discharging. Finally, you ascertain how many days of the specified quality have been used at the discharging port; if the days so used exceed the number of days available for discharge whether that number has

[121] [1916] 2 A.C. 527, 536.
[122] (1929) 34 Ll.L.Rep. 56, 58; 45 T.L.R. 404.
[123] (1938) 61 Ll.L.Rep. 97, 102; 54 T.L.R. 849.
[124] (1926) 32 Com.Cas. 126.
[125] [1954] 2 Q.B. 94.

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been increased (i.e., 12 plus 3) or diminished (i.e., 12 minus 5) demurrage is payable on such excess; but, if the days so used are less than the number of days available for discharge, whether that number has been increased or diminished, dispatch money is payable on the number of days of that quality by which the days used is less than the number of days of that quality available. For the purpose of this calculation the factor that the working day is a period of eight hours at the loading port and a period of 24 hours at the discharging port is only brought into play in determining how many working days or parts have been used at the loading and discharging port respectively. What is carried forward or drawn on is a number of weather working days or parts of such days.

I have not attempted in this judgment to quantify the result of my findings in any of the cases in terms of demurrage or dispatch money, it having been agreed before me by counsel that the parties would attempt to reach agreement on the question of quantification on the basis of my findings.

Finally, while I am conscious that I have not in this judgment—already over-long—dealt with all the arguments addressed to me with their numerous supporting authorities in addition to those to which I have referred, I desire to express to counsel my great indebtedness for the assistance I have received, and for their readiness to agree certain facts where agreement has been possible.

Judgment for the charterers on claim and counterclaim with costs was entered on October 15.

Solicitors: *Richards, Butler & Co.; Treasury Solicitor; William A. Crump & Son; Jaques & Co.*

[COURT OF CRIMINAL APPEAL.]

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Lord Parker C.J., Hilbery, Donovan, Ashworth and Paull JJ.

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Criminal Law—Plea—Fitness to plead—Burden of proof—Principles applicable—Hysterical amnesia causing loss of memory for events during period material to commission of crime — Mind otherwise normal — Whether able to make a "proper" defence — Whether "insane"—Criminal Lunatics Act, 1800 (39 & 40 *Geo.* 3, *c.* 94), *s.* 2.

Burden of Proof.

Criminal Law—Court of Criminal Appeal—Jurisdiction—Preliminary issue—Fitness to plead—Conviction—Whether right of appeal on preliminary issue—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19 (*a*).

Criminal Law—Court of Criminal Appeal—Reference by the Home Secretary—Consideration of court confined to ground of reference—

Issue involved by necessary implication—Whether section 19 (*a*) *can give jurisdiction where convicted person would have no right of appeal—Criminal Appeal Act,* 1907, *s.* 19 (*a*).

The Criminal Lunatics Act, 1800, provides, by section 2: "If "any person indicted for any offence shall be insane, and shall "upon arraignment be found so to be by a jury lawfully empanelled "for that purpose, so that such person cannot be tried upon such "indictment . . . it shall be lawful for the court . . . to direct "such finding to be recorded, and thereupon to order such person "to be kept in strict custody until His Majesty's pleasure shall be "known."

Before the arraignment of a defendant indicted for capital murder, counsel for the defence told the judge that he had evidence available raising the preliminary issue whether the defendant was fit to plead to the indictment on the ground that he had completely lost his memory for all events before the day after his arrest, and that the Crown would contest that preliminary issue. The trial judge ruled that it was for the defence to establish that the defendant was insane so as to be unfit to plead to the indictment, and that it was sufficient to discharge the burden if the defence could show on the balance of probabilities that he was unfit to stand his trial. The trial of the preliminary issue was taken in two stages, and in the first stage the jury empanelled to try it were required to answer the specific question: "Is the defendant now suffering "from a genuine loss of memory covering at least all the events "with which he was concerned between" certain dates material to the commission of the crime? After evidence had been given on both sides the judge directed the jury in accordance with his ruling and they returned the answer that the defendant was not suffering from genuine loss of memory. In the second stage the judge directed the jury that in view of their answer to the specific question, and in the absence of any other evidence pointing to the defendant's insanity, it was their duty to say that he was fit to stand his trial, and the jury brought in a verdict accordingly. The defendant was then tried on the charge of capital murder; he pleaded not guilty but was convicted and sentenced to death. The defendant did not appeal against his conviction, but a petition was submitted and the Secretary of State, being of the opinion that the "question of law "raised by the case, namely, whether the onus of proof on the issue "of fitness to plead rests on the prosecution or on the defence" ought to be considered by the Court of Criminal Appeal, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.[1]

The defendant had relied solely on an hysterical amnesia preventing him from remembering events during the whole of the material period; there was no suggestion that his mind in other respects was not a normal mind, his case being that that defect in

[1] Criminal Appeal Act, 1907, s. 19, as amended by the Criminal Justice Act, 1948, s. 79 and Sch. 9: "Nothing in this Act shall affect the "prerogative of mercy, but the Secretary of State on the consideration of "any petition for the exercise of His "Majesty's mercy, or of any representation made by any other "person, having reference to the "conviction of a person on indictment . . . may . . . either— "(*a*) refer the whole case to the Court "of Criminal Appeal, and the case "shall be heard and determined by "the court . . . as in the case of an "appeal by a person convicted; or "(*b*) if he desires the assistance of "the court . . . on any point arising "in the case with a view to the determination of the petition, refer that "point to the court . . . for their "opinion thereon . . ."

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memory rendered him unable properly to instruct his advisers, with the consequence that he could not make a proper defence:—

Held, (1) that notwithstanding that the finding on the preliminary issue was not a conviction, the court had jurisdiction to hear and determine the case referred, since the defendant could have appealed to the court against his conviction on the ground that the hearing of the preliminary issue was open to objection in law in that the judge had misdirected the jury, so that he should never had been tried upon the substantive charge at all (post, p. 727).

Crane v. *Director of Public Prosecutions* [1921] 2 A.C. 299; 37 T.L.R. 788 applied.

Dictum of Darling J. in *Rex* v. *Jefferson* (1908) 24 T.L.R. 877; 1 Cr.App.R. 95; 72 J.P. 467 doubted.

Quaere whether the court has jurisdiction to hear and determine a case referred under section 19 (*a*) of the Criminal Appeal Act, 1907, when the convicted person has no right of appeal against the finding complained of.

(2) That the following were the principles applicable to the onus of proof on the preliminary issue: (i) In all cases in which a preliminary issue as to the accused person's sanity was raised, whether contested or not, the jury should be directed to consider the whole of the evidence and to answer the question: "Are you "satisfied upon that evidence that the accused person is insane so "that he cannot be tried upon the indictment?"; (ii) if the contention that the accused was insane was put forward by the defence, and contested by the prosecution, there was a burden upon the defence of satisfying the jury of the accused's insanity, which burden was discharged if the jury were satisfied on the balance of probabilities that the insanity was made out; and (iii) conversely, if the prosecution alleged, and the defence disputed, insanity, there was a burden upon the prosecution of establishing it. Accordingly, the trial judge's direction as to the onus of proof on the preliminary issue was right (*post*, p. 729).

Rex v. *Dyson* (1831) 7 C. & P. 305; *Rex* v. *Pritchard* (1836) 7 C. & P. 303; *Reg.* v. *Turton* (1854) 6 Cox C.C. 385, and *Russell* v. *H.M. Advocate*, 1946 S.C.(J.) 37 approved.

Ley's case (1828) 1 Lewin 239, *Reg.* v. *Davies* (1853) 3 C. & K. 328; and *Reg.* v. *Sharpe* (1958) post, p. 735; [1958] 3 All E.R. 62; 41 Cr.App.R. 197 overruled.

(3) That the question as to the onus of proof on the preliminary issue could only arise if the alleged amnesia could in law bring the defendant within the scope of section 2 of the Criminal Lunatics Act, 1800, so that in considering the legal effect of amnesia the court was considering a matter involved by necessary implication in the specific question referred (post, p. 728).

Reg. v. *Caborn-Waterfield* [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636 applied.

(4) That, although the word "insane" in section 2 of the Criminal Lunatics Act, 1800, had in practice been extended to include persons who were not insane within the M'Naughten Rules but who by reason of some physical or mental condition could not follow the proceedings at the trial and so could not make a proper defence, it could not be extended to include persons who were mentally normal at the time of the proceedings and were capable of instructing their solicitors as to what submission was to be put forward with regard to the commission of the crime. The defendant could plead to the indictment and had the physical and mental capacity to know that he had the right of challenge and to understand the case as it proceeded, and, therefore, the loss of memory, even if genuine, would not of itself have rendered the defendant

insane so that he could not be tried upon the indictment (post, p. 734).

Direction of Alderson B. in *Rex* v. *Pritchard*, 7 C. & P. 303, and *Russell* v. *H.M. Advocate*, 1946 S.C.(J.) 37 applied.

REFERENCE by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

On September 10, 1959, Gunter Fritz Erwin Podola, "the "appellant," appeared before Edmund Davies J. at the Central Criminal Court on a charge of capital murder. Before arraignment counsel for the appellant told the judge that he had available and desired to call evidence which raised the preliminary issue whether he was fit to plea to the indictment, it being his case that he was suffering from hysterical amnesia and had completely lost his memory for all events before July 17, 1959, the day after his arrest, and that the Crown would contest the preliminary issue. After argument had been addressed to the court as to whether the burden of proof in that issue rested on the prosecution or the defence, the following ruling was given:

EDMUND DAVIES J. A preliminary issue is raised in this case in relation to the fitness of the accused man to plead to the indictment and to stand his trial thereupon. The first issue that is thereby raised is as to where the burden of proof lies; in other words, is it for the prosecution to establish that the accused man is fit to stand his trial, or is it for the defence to establish unfitness to stand his trial?

Counsel for the defence, to whose submissions, like those of counsel for the Crown, this court is greatly indebted, desires to call, in the first place, evidence as to unfitness, but he urges that, although he desires to do that, there is no burden upon the defence at all—the burden is wholly the other way. Unhappily the authorities on this matter are conflicting, and have occupied a great deal of time, but certainly no excessive time, today. I do not propose to go through the authorities again for the purposes of this ruling, but as recently as 1957, in *Reg.* v. *Sharpe*,[2] the matter came before Salmon J. on circuit. Although Mr. Maxwell Turner, for the Crown, has submitted that the reports are in some respects unsatisfactory and that it is not easy to explain exactly what the judge did decide in that case, I for my part have no doubt, and I have taken steps to make some inquiries, that the judge did in fact rule that the burden of proof upon this issue was upon the Crown. A decision so recently given and, if I may be allowed to say so, by so exalted a member of the bench, is one which must command and certainly does receive from this court the profoundest respect. That was not the first decision in which it had been so held; there are in fact decisions both ways.

2 (1958) post, p. 735, note; [1958] 1 All E.R. 62; 41 Cr.App.R. 197.

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I come back to this: there is no doubt that it is well-established law that where an accused person is charged with a crime, and it is sought on his behalf to establish that at the time of the commission of the alleged offence he was suffering under such a mental defect as to justify and call for a verdict of guilty but insane, it is for the defence to call evidence and establish that defence, to establish it on the balance of probabilities. That matter was dealt with by section 1 of the Criminal Lunatics Act, 1800, now replaced by section 2 of the Trial of Lunatics Act, 1883. Section 2 of the Act of 1800 deals with the matter upon which this court is now engaged, namely, as to the capacity of the accused to plead on arraignment. It uses the word "insane," the wording so far as it is relevant in the section being: "If any "person indicted for any offence shall be insane, and shall upon "arraignment be found so to be by a jury . . ."

I cannot myself see any reason in law, logic or fairplay why the approach to the application of those two sections contained in the same Act of Parliament should be different. I asked Mr. Lawton if he could point to any rational distinction which would lead to a different approach in the one case from the approach adopted in the other. Mr. Lawton submitted such considerations as occurred to him, but for my part I can see no valid distinction to be drawn between the two. It is not necessary, I repeat, for me to go through the whole of the authorities. I differ from Salmon J. with extreme reluctance, but having had the inestimable advantage of having all the authorities which appear to be available cited to me and exhaustively dealt with by counsel, that is my conclusion. I rule, accordingly, upon this preliminary issue that it is for the defence to establish that the accused man is insane so as to be unfit to plead to this indictment.

It must be understood, and indeed it is a matter of common agreement between counsel, that whereas if the burden of proving fitness were upon the Crown, the Crown would have to establish it in accordance with the ordinary standards of proof in criminal trials, namely, beyond all reasonable doubt, the burden which is cast upon the defence in accordance with the ruling which I have just enunciated is of a different order. In my judgment, therefore, it is sufficient for the defence to discharge the burden if they can show on balance of probabilities that the accused man is unfit to stand his trial.

The trial of the preliminary issue then proceeded, and the jury empanelled to try it was required, in the first stage, to answer the specific question: "Is the defendant now suffering from a "genuine loss of memory covering at least all the events with "which he was concerned between July 1, 1959, and the time "of his arrest on July 16?," it being left for the judge to rule whether, if the jury found a genuine amnesia, that would bring the appellant within the scope of section 2 of the Criminal Lunatics Act, 1800. Witnesses (including the appellant himself) were called, and evidence given on behalf of both sides.

During the course of his summing-up to the jury on the specific question the judge said: "Of course, it is not only the "community as a whole that has to be considered in this matter. "There is most certainly to be borne in mind throughout that "member of the community who is the accused man himself, "and it is a cardinal principle of our criminal law that no man "may be brought to trial upon any criminal charge unless and "until he is mentally capable fairly of standing his trial . . . "; and: "The only matter that you have to decide is: Is he now "unfit to take his trial? and as a preliminary issue to that: Is "the loss of memory which is claimed here established? It "matters not, except in so far as you find it of assistance at the "present time, what his state of mind was two months ago, or "two weeks ago. It is: Is he now fit to stand his trial? Now "under our law every man is presumed to be sane until the "contrary is proved, and I direct you, for the purposes of this "trial, that the presumption of sanity includes a presumption "that the accused person who is charged is fit to undertake to "stand his trial upon the charge. That is the presumption with "which one begins this case. I further direct you . . . as a "matter of law that here, where the accused alleges and it is "asserted on his behalf that he is for some reason or other unfit "to stand his trial, it is for the accused to prove it and not for "the Crown to disprove it. The accused has on the balance of "probabilities to establish that in fact he ought not to stand "his trial now because of his unfitness. He does not have to "establish that matter beyond all reasonable doubt. He has to "establish it; he has to prove it; he has to satisfy you, and each "and every one of you, that, to use the analogy of a pair of scales "(which is so frequently used in these cases) the scales have "gone down in his favour. And, members of the jury, if your "state of mind, having heard the whole of this evidence, is that "on balance it has been shown that this man has lost his memory "in the way that I shall remind you about and as is alleged, you "will say so. On the other hand, if your conclusion is that the "scales remain evenly balanced, or even more, if your view is "that the scales are tipped against the accused, having heard the "whole of the evidence, you will say that the alleged unfitness "of the accused man is not established."

Later, towards the close of the summing-up, the judge (after referring to the views of medical witnesses) said: "Which of the "views is right? Or rather, to put this matter in its correct "way: Has the whole of the evidence in this case, medical and "non-medical, satisfied you that the probability is that this man "is suffering from hysterical amnesia, the loss of memory, which "is claimed? If on balance you think that the answer to the "question is 'Yes, the defence have proved it,' then you will "say so. If on the other hand your view on the whole of it is "that the burden of proof which is upon the defence has not

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"been discharged by the defence, you will answer the question "which is now before you in the negative."

After they had retired for some three and a half hours the jury sought clarification of the judge's closing remarks and asked: "Is the onus on the defence to prove beyond reasonable doubt "that the defendant is suffering from loss of memory for the "period in question?" The judge said: ". . . In criminal "matters where the burden of proof is on the Crown, the Crown "has to prove the essential matters beyond all reasonable doubt. "In criminal matters where a burden is cast upon the defence, "the burden is a lesser burden of proving that on the balance of "probabilities what the defence have to prove has been estab- "lished. In this case, as I have directed you, it is for the "defence to establish the alleged loss of memory. They have to "prove it, accordingly, not beyond all reasonable doubt but on "the balance of probabilities. But, of course, they have to "prove it, and if they have not proved it you say so and you "reject what is alleged. On the other hand, if on the balance "of probabilities they have established it, then you say so."

The jury, having retired again, returned the answer that the appellant was not suffering from genuine loss of memory. The judge directed them that, in view of their answer to the specific question and in the absence of any other evidence of insanity, it was their duty to say that the appellant was fit to stand his trial, and the jury returned a verdict accordingly. The trial on the charge of capital murder then proceeded and the appellant pleaded not guilty but was convicted and sentenced to death.

The appellant did not appeal against his conviction, but a petition was submitted, and the Home Secretary, being of the opinion that a question of law raised by the case, namely, whether the onus of proof on the issue of fitness to plead rested on the prosecution or on the defence, which he understood had been the subject of different rulings by judges of the High Court, ought to be considered by the Court of Criminal Appeal, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.

F. H. Lawton Q.C. and *R. J. S. Harvey* for the appellant.

Maxwell Turner and *J. H. Buzzard* for the Crown.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, and *J. R. Cumming-Bruce* as amicus curiae.

The following cases were cited in argument: *Rex* v. *Jefferson*[3]; *Rex* v. *Larkins*[4]; *Felstead* v. *The King*[5]; *Rex* v. *Johnson*[6]; *Crane* v. *Director of Public Prosecutions*[7]; *Rex* v. *Wakefield*[8];

[3] (1908) 24 T.L.R. 877; 1 Cr. App.R. 95; 72 J.P. 467.
[4] (1911) 27 T.L.R. 438; 6 Cr. App.R. 194.
[5] [1914] A.C. 534; 30 T.L.R. 469.
[6] [1909] 1 K.B. 439; 25 T.L.R. 229.
[7] [1921] 2 A.C. 299; 37 T.L.R. 788 (sub nom. *Rex* v. *Crane*).
[8] [1918] 1 K.B. 216; 34 T.L.R. 210.

Rex v. *Williams* [9]; *Rex* v. *Cronin* [10]; *Rex* v. *Barron* [11]; *Rex* v. *Thomas* [12]; *Reg.* v. *Caborn-Waterfield* [13]; *Rex* v. *Cohen* [14]; *Rex* v. *Haddy* [15]; *Stirland* v. *Director of Public Prosecutions* [16]; *Rex* v. *Rivett* [17]; *Rex* v. *Pritchard* [18]; *Bateman's Case* [19]; *Rex* v. *Dyson* [20]; *Reg.* v. *Davies* [21]; *Reg.* v. *Turton* [22]; *Somerville's Case* [23]; *Reg.* v. *Sharp* [24]; *Ley's Case* [25]; *Rex* v. *Governor of Stafford Prison, Ex parte Emery* [26]; *Reg.* v. *Roberts* [27]; *H.M. Advocate* v. *Brown* [28]; *Russell* v. *H.M. Advocate* [29]; *Reg.* v. *Kemp* [30]; *Reg.* v. *Berry* [31]; *Beverley's Case* [32]; *H.M. Advocate* v. *Robertson*,[33] and *Reg.* v. *Benyon*.[34]

At the conclusion of the argument the court announced that the appeal would be dismissed for reasons which would be put into writing and given at a later date.

Cur. adv. vult.

October 20. LORD PARKER C.J. This is the judgment of the court in the preparation of which we have all collaborated, including Donovan J., who is unable to be present today.

On September 24, 1959, at the Central Criminal Court, one, Gunter Fritz Erwin Podola (hereinafter referred to as the "appellant"), was found guilty of the capital murder of Detective-Sergeant Raymond Purdy and was sentenced to death. He did not appeal against that conviction but on October 5, 1959, the Home Secretary, being of opinion that a question of law raised by the case, namely, whether the onus of proof on the issue of fitness to plead rests on the prosecution or the defence, ought to be considered by this court, referred the whole case to the court for determination under section 19 (*a*) of the Criminal Appeal Act, 1907.

The events leading to the present reference may be shortly stated. On September 10, before the appellant was arraigned, Mr. Lawton, who appeared as counsel on his behalf, informed Edmund Davies J. that he had evidence available which raised a preliminary issue, namely, whether the appellant was fit to plead to the indictment, on the ground that he had completely lost his

[9] (1925) 19 Cr.App.R. 67.
[10] (1940) 56 T.L.R. 457; [1940] 1 All E.R. 618.
[11] [1914] 2 K.B. 570; 30 T.L.R. 422; 10 Cr.App.R. 81.
[12] [1950] 1 K.B. 26; 65 T.L.R. 586; [1949] 2 All E.R. 662.
[13] [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636.
[14] (1909) 3 Cr.App.R. 180.
[15] [1944] K.B. 442; 60 T.L.R. 253; [1944] 1 All E.R. 319.
[16] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13.
[17] (1950) 34 Cr.App.R. 87.
[18] (1836) 7 C. & P. 303.
[19] (1685) 11 State Trials 464.
[20] (1831) 7 C. & P. 305.
[21] (1853) 3 C. & K. 328.
[22] (1854) 6 Cox 385.
[23] Anderson 104 [No. CLIV].
[24] (1958) post, p. 735, note; [1958] 1 All E.R. 62; 41 Cr.App.R. 197.
[25] (1828) Lewin 239.
[26] [1909] 2 K.B. 81.
[27] [1954] 2 Q.B. 329; [1953] 3 W.L.R. 178; [1953] 2 All E.R. 34.
[28] 1907 S.C.(J.) 67.
[29] 1946 S.C.(J.) 37; 1946 S.L.T. 93.
[30] [1957] 1 Q.B. 399; [1956] 3 W.L.R. 724; [1956] 3 All E.R. 249.
[31] (1876) 1 Q.B.D. 81.
[32] (1603) 4 Co.Rep. 123b.
[33] (1891) 3 White 6.
[34] [1957] 2 Q.B. 111; [1957] 2 W.L.R. 956; [1957] 2 All E.R. 513.

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memory for all events before July 17, the day after his arrest. The judge was also informed that this preliminary issue would be contested, and he then heard argument on the question whether the burden of proof in that issue rested upon the defence or upon the prosecution. His decision was given in the following terms: "I rule accordingly upon this preliminary issue that it is for the "defence to establish that the accused man is insane so as to be "unfit to plead to the indictment." He went on to rule: "It is "sufficient for the defence to discharge the burden if they can "show, on the balance of probabilities, that this accused is unfit "to stand his trial."

At the suggestion of counsel on both sides the trial of the preliminary issue was itself taken in two stages. In the first stage the jury empanelled to try the issue were required to answer a specific question: "Is the defendant now suffering from a "genuine loss of memory covering at least all the events with "which he was concerned between July 1, 1959, and the time of "his arrest on July 16?" The trial of this issue lasted for nine days, in the course of which evidence was given by doctors on both sides, and after deliberating for nearly three and a half hours, the jury's answer to the question was that the appellant was not suffering from genuine loss of memory. As a result of that answer the second stage of the preliminary issue, in which the jury were required to find whether the appellant was insane so that he could not be tried, was very short. In our judgment, the judge rightly directed the jury that, in view of their answer to the specific question, and in the absence of any other evidence pointing to the appellant's insanity, it was their duty to say that he was fit to stand his trial. The jury's verdict was in accordance with this direction.

Having regard to the jury's answer to the specific question, the judge was not required to give any ruling or direction upon the issue whether, in the circumstances, the appellant's loss of memory (if established) would have been sufficient in law to bring him within the ambit of section 2 of the Criminal Lunatics Act, 1800.

The trial of the appellant on the charge of capital murder was then begun. He pleaded not guilty but was convicted and sentenced to death. No criticism is made on his behalf as to that trial.

The reference to this court was heard by us on October 14 and 15, 1959. At the outset of the hearing the Attorney-General, as amicus curiae, raised the question of our jurisdiction to hear the reference. Section 19 of the Criminal Appeal Act, 1907 [as amended by the Criminal Justice Act, 1945, s. 79 and Sch. 9], provides as follows: "Nothing in this Act shall affect the prerога-"tive of mercy, but the Secretary of State on the consideration of "any petition for the exercise of His Majesty's mercy, or of any "representation made by any other person, having reference "to the conviction of a person on indictment or to the sentence

" (other than sentence of death) passed on a person so convicted, " may, if he thinks fit, at any time either—(*a*) refer the whole " case to the Court of Criminal Appeal, and the case shall then " be heard and determined by the Court of Criminal Appeal " as in the case of an appeal by the person convicted. . . ." In substance the Attorney-General's contention was that this court's jurisdiction to hear and determine a case referred to it under section 19 (*a*) was limited to cases in which the person convicted would have had a right under the Act to appeal to the court. He pointed out that a possible difficulty in the way of our hearing the reference was created by the decision of this court in *Rex* v. *Jefferson*,[1] which is most fully reported in the Times Law Reports. In that case, the accused man had been found fit to plead and had then been tried for murder and convicted. In his appeal it was contended, inter alia, that on the medical evidence given at the preliminary inquiry he ought not to have been tried on the main charge at all. Darling J. intervened to say[2]: " The Act only " gives leave to appeal against a ' conviction '; how can you say " that a finding that a prisoner is fit to plead is a conviction? " Thereupon counsel for the appellant said that he must withdraw the appeal against the finding that the prisoner was fit to plead. Darling J. then added[2]: " I want to make that clear as a ruling " of this court." What was intended to be covered by that ruling is not altogether clear. It may be that its effect was limited to this: that the Act of 1907 does not enable this court to hear an appeal specifically expressed to be an appeal against a finding on a preliminary issue as to an accused person's fitness to plead, such finding not being a conviction. On the other hand, that ruling has apparently been taken to be a ruling that a person who has been found fit to plead, and thereafter convicted, cannot in any circumstances question the finding on the preliminary issue, or matters which arose in the course of its hearing. If the latter is the true meaning we think that the ruling was wrong. If a convicted person appeals against his conviction on the ground that the hearing of the preliminary issue was open to objection for error in law, so that he should never have been tried on the substantive charge at all, we are of opinion that this court has jurisdiction to entertain the appeal. In such a case it seems to us that the principles laid down in *Crane* v. *Director of Public Prosecutions*[3] are applicable, and that a convicted person is entitled to contend, in the words of Lord Sumner,[4] that he " should not have been given in charge to the jury as he was, or " have been made the subject of any verdict at all, but should " have had the proceedings stopped at the outset."

In our judgment, the appellant in the present case could have appealed against his conviction upon the ground that in the hearing of the preliminary issue the judge misdirected the jury, and therefore that he should never have been tried upon the main

[1] (1908) 24 T.L.R. 877.
[2] Ibid. 878.
[3] [1921] 2 A.C. 299.
[4] Ibid. 332.

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charge at all. It follows that this court has jurisdiction to hear and determine the case referred.

In these circumstances we do not think it necessary to deal with an alternative contention put forward by Mr. Lawton, that on the true construction of section 19 (*a*) of the Act of 1907 this court has jurisdiction to hear and determine a case referred to it, even if the convicted person could not have appealed against the finding complained of. As it seems to us, a situation of that sort is unlikely to arise in practice and we think it undesirable to rule upon it in advance.

In the course of the hearing before us we heard argument, not only on the question specifically mentioned in the reference under section 19 (*a*), but also on the question to what extent (if any) amnesia could in law be regarded as a form of insanity within the meaning of section 2 of the Criminal Lunatics Act, 1800. Before we decided to consider the second of these questions, it was necessary for us to decide whether, in view of the decision of this court in *Reg.* v. *Caborn-Waterfield*,[5] it was open to us to do so. In giving the judgment of the court in that case Lord Goddard C.J. said[6]: "The court thinks that when a matter of "this sort is referred by the Secretary of State and we see at "once the ground on which the Secretary of State has referred "the case to us, the court must confine itself to that ground." In the present case the specific question referred to us related to onus of proof, but, in our view, that question involved by necessary implication the overriding question whether the issue, in respect of which there was doubt as to the onus of proof, was itself a relevant issue to be tried. In other words, the question as to onus of proof could only arise if the alleged amnesia could in law bring the appellant within the scope of section 2 of the Act of 1800. Accordingly, in hearing argument as to the legal effect of amnesia, we were considering a matter necessarily involved in the reference and were not departing in any way from the principle laid down in *Caborn-Waterfield's* case.[6] The decision in that case remains unaffected by the present case.

We deal first with the matter specifically referred to us, namely, the question as to onus of proof. The relevant words in section 2 of the Act of 1800 are as follows: "If any person "indicted for any offence shall be insane, and shall upon arraign-"ment be found so to be by a jury lawfully empanelled for that "purpose, so that such person cannot be tried upon such indict-"ment. . . ." Those words do not indicate how or by whom the question of the accused person's sanity is to be raised, but it is now well established that the question may be raised either by the prosecution or by the defence or by the court itself. Indeed, if a court becomes aware, either before or during a trial, that the accused person's sanity is doubtful, it is the duty of the court to have the doubt resolved before beginning or

[5] [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636.

[6] [1956] 2 Q.B. 379, 385.

continuing the trial. For the purpose of deciding whether a person is "insane . . . so that [he] cannot be tried upon such "indictment" a jury is empanelled, and, as Mr. Lawton emphasised on behalf of the appellant, the procedure before that jury is an inquiry and not a trial. In most cases in which this course is taken, there is no contest between the prosecution and the defence as to the accused person's insanity, and the evidence to that effect is unchallenged. In such cases, although the jury must be satisfied of the accused person's insanity before so finding, the question of onus of proof is not a live issue. But cases have arisen, of which the present one is an example, where either the prosecution or the defence has challenged the alleged insanity, and in a case in Scotland (*Russell* v. *H.M. Advocate* [7] to which more detailed reference will be made later) the court itself refused to give effect to a plea in bar of trial put forward on behalf of the defence and not contested by the prosecution.

It was contended by Mr. Lawton that, inasmuch as the proceedings on the issue of insanity are an inquiry and not a trial, it is wrong to introduce any principle as to onus of proof, derived from proceedings properly regarded as trials. We do not agree with this contention. In our judgment, the right principles may be stated as follows:

1. In all cases in which a preliminary issue as to the accused person's sanity is raised, whether that issue is contested or not, the jury should be directed to consider the whole of the evidence and to answer the question "Are you satisfied upon that evidence "that the accused person is insane so that he cannot be tried "upon the indictment?" If authority were needed for the principle, it is to be found in the very words of the section itself, quoted above.

2. If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is, in our judgment, a burden upon the defence of satisfying the jury of the accused's insanity. In such a case, as in other criminal cases in which the onus of proof rests upon the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out.

3. Conversely, if the prosecution alleges and the defence disputes insanity, there is a burden upon the prosecution of establishing it.

These principles are in accordance with those laid down in a number of the cases to which our attention was called. In *Rex* v. *Dyson* [8] Parke J. told the jury that [9]: "If they were "satisfied that the prisoner had not *then*, from the defect of her "faculties, intelligence enough to understand the nature of the "proceedings against her, they ought to find her not sane." Five years later Alderson B., in *Rex* v. *Pritchard*, [10] expressly followed the course taken in *Dyson's* case [11] and observed that

[7] 1946 S.C.(J.) 37; 1946 S.L.T. 93.
[8] (1831) 7 C. & P. 305.
[9] Ibid. 307.
[10] (1836) 7 C. & P. 303, 304, 305.

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Dyson's case [11] had been considered by several of the judges who had approved of the course adopted by Parke J. In *Reg.* v. *Turton*,[12] Cresswell J., addressing counsel for the defence, said [12]: "Why is a man to be presumed insane when called upon to "plead? The presumption is that he is sane. I do not see any "sufficient reason for deviating from the old practice. If you "suggest that the prisoner is not in such a state of mind as to be "able to plead to the indictment, you must give evidence of the "fact." In *Rex* v. *Rivett*,[13] tried in 1950, Stable J. directed the jury to answer a question worded in similar terms to that contained in the first of the principles set out above, and when the case came before this court on appeal, Lord Goddard C.J. referred [14] to the learned judge's charge as "careful and "accurate." Lastly, in the Scottish case of *Russell* v. *H.M. Advocate* [15] the Lord Justice-Clerk (Lord Cooper), in giving the opinion of the court on appeal by the accused, said [16]: "The onus "is always on the accused to justify a plea in bar of trial, and "to do so not to the satisfaction of expert witnesses but to the "satisfaction of the court."

Decisions conflicting with the principles enunciated above were brought to our notice: *Ley's* case,[17] *Reg.* v. *Davies*,[18] and *Reg.* v. *Sharp*.[19] In our judgment, these cases must be taken to have been wrongly decided, and a statement in Halsbury's Laws of England, 3rd ed., vol. 10 at p. 403, to the effect that when a preliminary issue of this sort is raised "the onus is on the "prosecution to prove the sanity of the defendant" is incorrect.

In our judgment, therefore, the direction of Edmund Davies J. in the present case on the subject of onus of proof was right.

As already indicated we have, however, thought it necessary, in the circumstances of the case, to consider whether the alleged state of mind of the appellant would have brought him within the provisions of section 2 of the Criminal Lunatics Act, 1800, had the jury found that that state of mind was a genuine one.

In considering this problem it is important to stress that the appellant, in the proceedings at the Central Criminal Court, relied solely on hysterical amnesia preventing him from remembering events during the whole of the period material to the question whether he committed the crime alleged. There was no suggestion that his mind in other respects was not a completely normal mind. His case on this point was that this defect of memory rendered him unable properly to instruct his advisers, with the consequence that he could not make "a proper defence." It was urged that the killing may have been accidental, or that there may have been provocation, but the appellant could give no

[11] 7 C. & P. 307.
[12] (1854) 6 Cox 385.
[13] (1950) 34 Cr.App.R. 87.
[14] Ibid. 90.
[15] 1946 S.C.(J.) 37.
[16] Ibid. 44.
[17] (1828) 1 Lewin 239.
[18] (1853) 3 C. & K. 328.
[19] Post, p. 735, note; [1958] 3 All E.R. 62.

instructions thereon. This defect, it was argued, rendered the appellant insane within the meaning of the Act of 1800.

Mr. Lawton, in the course of his careful and at first attractive argument, pointed out that the Act of 1800 was an Act declaratory of the common law, and invited us to go back and trace historically the meaning of the word "insane" which appears in the Act. He referred to the expressions "non sana memoria," "non sane memory," and "not of sound memory," which are to be found in the books. He relied mainly on the following passages in Hale's Pleas of the Crown, vol. 1, pp. 34–35: "If a man in his sound memory commits a capital offence, and before his arraignment becomes absolutely mad, he ought not by law to be arraigned during such his frenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment," and "if such person after his plea, and before his trial, become of non sane memory, he shall not be tried."

Mr. Lawton urged that these expressions must apply where all memory of the events surrounding the alleged crime has disappeared owing to hysterical amnesia. It is to be observed, however, that the above passages occur in Chapter IV where Sir Matthew Hale is considering "the defect of idiocy, madness and lunacy" in reference to criminal offences. It will also be seen that in the first passage quoted, "sound memory" is contrasted with "absolutely mad" and with "frenzy." Accordingly, in our judgment, the word "memory" there used does not relate to recollection but to a state of mind. We think that this meaning is to be attached to the word "memory" not only in the passages in Hale but also in the passage in Coke's Notes on *Beverley's* case,[20] and in other authorities previous to the Act of 1800 to which we were referred.

The words "If any person . . . shall be insane . . . so that such person cannot be tried upon such indictment" contained in section 2 of the Act of 1800 have in many cases since 1800 been construed as including persons who are not insane within the M'Naughten rules, but who by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings. A well-known illustration is that of a deaf mute who is also unable to write or to use and understand sign language.

It was in the case of a deaf mute that Alderson B., in *Rex* v. *Pritchard*,[21] laid down the tests which ought to be applied when juries are considering whether a prisoner ought not to be tried by reason of his mental condition. These tests have been followed so often that they may be said to be firmly embodied in our law (see, for example, *Reg.* v. *Berry*,[22] and *Rex* v. *Governor of Stafford Prison, Ex parte Emery*[23]).

In his address to the jury on the preliminary issue as to

[20] (1603) 4 Co.Rep. 123b.
[21] 7 C. & P. 303.
[22] (1876) 1 Q.B.D. 447.
[23] [1909] 2 K.B. 81.

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whether the prisoner was sane or not, Alderson B. said [24]: "There are three points to be inquired into: First, whether the "prisoner is mute of malice or not; secondly, whether he can "plead to the indictment or not; thirdly, whether he is of "sufficient intellect to comprehend the course of proceedings on "the trial, so as to make a proper defence—to know that he "might challenge any of you to whom he may object—and to "comprehend the details of the evidence, which in a case of this "nature must constitute a minute investigation. Upon this "issue, therefore, if you think that there is no certain mode of "communicating the details of the trial to the prisoner, so that "he can clearly understand them, and be able properly to make "his defence to the charge, you ought to find that he is not of "sane mind. It is not enough, that he may have a general "capacity of communicating on ordinary matters."

It is not suggested in this case that the appellant could not plead to the indictment, or that he did not know he had the right of challenge, or that he could not follow the evidence given, but Mr. Lawton submitted strongly that where there was the partial obliteration of memory alleged in this case, a prisoner could not make a proper defence and could not "comprehend" the details of the evidence within the meaning of the words used in *Pritchard's* case.[25]

So far as "make a proper defence" is concerned, it is important to note that the words do not stand alone, but form part of a sentence the whole of which is [25] "whether he is of "sufficient intellect to comprehend the course of proceedings on "the trial, so as to make a proper defence." In other words, this passage itself defines what Alderson B. meant by "make a "proper defence." As to the word "comprehend," we do not think that this word goes further in meaning than the word "understand." In our judgment the direction given by Alderson B. is not intended to cover and does not cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds.

This case is the first attempt in England to assert that hysterical amnesia covering the period of the events which are the subject of the indictment renders a man insane so that he cannot be tried. The matter has, however, come before the courts in Scotland. In 1907 there was the case of *H.M. Advocate* v. *Brown* [26] in the Court of Justiciary. In the course of summing up, the Lord Justice-General (Lord Dunedin) said [27]: "It "[insanity] means insanity which prevents a man from doing "what a truly sane man would do and is entitled to do—maintain "in sober sanity his plea of innocence, and instruct those who "defend him as a truly sane man would do. . . . But that is "not enough. There is something which is not generally asked

[24] 7 C. & P. 303, 304.
[25] Ibid.
[26] 1907 S.C.(J.) 67.
[27] Ibid. 77.

"about, and that is that the person who is giving these instructions should not only intelligently, but without obliteration of memory as to what has happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed."

These are strong words, but it is important to realise that the medical evidence was that Brown was of unsound mind and not capable of pleading to the indictment, quite apart from any loss of memory.

In 1946 the case of *Russell* v. *H.M. Advocate* [28] came before the Court of Justiciary. In that case Lord Sorn, before proceeding with the case on its merits, held a preliminary inquiry into the facts upon which the prisoner based her plea in bar of trial. That plea was that she was suffering from hysterical amnesia and on that account was unable to plead to the charge or give instructions for her defence. That case, therefore, was a case very similar to the one before us. In his opinion upon this preliminary matter (which he tried without a jury) Lord Sorn said [29] that he was quite satisfied that the accused had in fact suffered a loss of memory. He went on to say [29]: "The next question, and the difficult question, for me is—'Does this loss of memory render her unfit to plead?'" He continued [30]: "I have felt that the court in dealing with a plea in bar of trial is primarily concerned with the condition of the accused now at the time of trial and no other time. She is able to instruct, in my opinion, a defence, even though that defence has the peculiarity of including in its features that the accused has forgotten the period of the events dealt with in the charge. . . . I am unable to see that unfairness should follow from this situation. The Crown must prove their case, and must prove it to the satisfaction of the jury, and the accused can tell the jury that she has no recollection of these events."

This decision of Lord Sorn came by way of appeal before the Lord Justice-Clerk (Lord Cooper), Lord Mackay and Lord Stevenson.

In the judgment of the court the Lord Justice-Clerk supported Lord Sorn, and in the course of his judgment said [31]: "The only grounds associated with the abnormal personal condition of the accused which our law and practice have ever recognised as the basis of a plea in bar are (*a*) insanity (either in the ordinary sense, or in the special sense of the Lunacy (Scotland) Act, 1857, s. 87)," where the words are similar to the words of the Act of 1800, "and (*b*) the condition of a deaf mute. There is no trace in either Scotland or England of a plea in bar founded upon loss of memory by a sane and otherwise normal accused person." Later he said [32]: "I do not consider that they," that is, the dicta which are found in *Brown's* case,[33] "were intended

[28] 1946 S.C.(J.) 37.
[29] Ibid. 39.
[30] Ibid. 40.
[31] Ibid. 46.
[32] Ibid. 47.
[33] 1907 S.C.(J.) 67.

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"to be understood, or are capable of being understood, literally "as applying to the case of a sane prisoner . . . for so to read "them would come near to paralysing the administration of "criminal justice." Still later he said [34]: "The conclusions "which I feel bound to draw are that loss of memory may be an "important element in leading to the conclusion that a panel is "insane. . . . But if it falls short of that, loss of memory in a "person otherwise normal and sane plays its full part, if it is "sufficiently proved, in increasing the onus on the Crown, and "in raising doubts to which it may be the duty of the jury to "give effect in a verdict of acquittal after investigation of the "whole case. But as our law stands, it can have no further or "other effect." As we understand it, the words "in increasing "the onus on the Crown" do not mean that strictly the onus is any greater, but that a judge should point out to a jury that they must take into consideration carefully the fact that the accused cannot remember the events.

We agree with the opinions stated and the conclusions arrived at in the case of *Russell*.[34] The word used in the Act of 1800 is the word "insane." It is true that in the case of a deaf mute the word "insane" does not strictly apply, but as was pointed out by Lord Alverstone C.J. in *Rex* v. *Governor of Stafford Prison, Ex parte Emery*,[35] the practice of including as coming within that word the case of persons who, from mental or physical infirmity, cannot follow what is happening in a case is in accordance with reason and common sense. We cannot see that it is in accordance either with reason or common sense to extend the meaning of the word to include persons who are mentally normal at the time of the hearing of the proceedings against them, and are perfectly capable of instructing their solicitors as to what submission their counsel is to put forward with regard to the commission of the crime.

To sum up the matter before us: (1) In our judgment there was a right of appeal by the appellant to this court. (2) There is no criticism to be made of the summing-up of the judge on the preliminary issue. (3) Even if the loss of memory had been a genuine loss of memory, that did not of itself render the appellant insane so that he could not be tried on the indictment, and no other ground for alleging insanity was put forward.

Accordingly, as the court stated earlier, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions; Treasury Solicitor.*

J. F. L.

[34] 1946 S.C.(J.) 37, 48.

[35] [1909] 2 K.B. 81, 84, 85.

NOTE.

[BIRMINGHAM ASSIZES.]

REGINA *v.* SHARPE.

1958
July 10, 11.

Salmon J.

Criminal Law—Plea—Fitness to plead—Burden of proof—Accused mute on arraignment—Whether onus of proof on prosecution to show mute of malice—Standard of proof—Accused found mute by visitation of God—Whether fit to plead.

TRIAL ON INDICTMENT.

The defendant, George Myhill Sharpe, was charged on an indictment containing a number of counts alleging serious offences against young girls. On arraignment he stood mute, and a jury was empanelled to try the issue whether he was mute of malice or by the visitation of God. The trial of that issue proceeded; the prosecution opened their case and evidence was called on both sides. At the close of the evidence counsel for the prosecution sought a ruling as to who should first address the jury.

SALMON J. expressed the provisional view that the onus was on the prosecution to show that the defendant was mute of malice.

Bernard Gillis Q.C. and *W. A. L. Allardice,* for the defendant, referred to *Reg.* v. *Turton.*[1] The onus is on the prosecution to show that the defendant is mute of malice, and the degree of proof is that normally required in criminal cases. No lower degree of proof should be accepted: an allegation that a defendant is mute of malice is an allegation of fraud upon the court and an endeavour to pervert the course of justice, and it would be contrary to the traditions of the common law and to the principles upon which justice is administered in Her Majesty's courts if an accused person were found to be mute of malice unless the proof was such that it enabled the jury to say that they were sure, or that it was proved to their satisfaction or, to use the older language, that they had no reasonable doubt.

M. A. B. King-Hamilton Q.C. and *H. J. Garrard* for the prosecution. There is no direct authority one way or the other as to the burden of proof, and if the view of the court is that it rests on the prosecution, that would not be dissented from. It is not a criminal offence to be mute of malice, and it is submitted, therefore, that the standard of proof required is not the high standard required in criminal cases where the burden rests on the Crown but that it is no higher than that required in a case depending on the balance of probabilities.

SALMON J. I think that the balance of probabilities is one of the matters to be taken into account. I should be disposed to direct the jury that before they can find that the defendant is mute of malice they must be quite satisfied that that is the fact. The onus being on the prosecution, it is for counsel for the defendant to address the jury first.

Counsel addressed the jury accordingly.

SALMON J. Members of the jury, as counsel rightly told you, this question which you have to decide is one of great importance. On the one hand, if a prisoner called upon by the Clerk of Assize fails to answer, and if it be the fact that that is through no fault of his, it would be manifestly most unfair that he should be found to be mute of malice. On the other hand, if the muteness is assumed for the purpose

[1] (1854) 6 Cox 385.

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of avoiding or postponing the trial, it is equally important from the public point of view that he should not get away with it, because, when trials are postponed, witnesses who perhaps might be called are not available when the trial comes on, and witnesses, particularly when they are young witnesses, as they are here, may have forgotten; so it is very important that you should not find him mute of malice unless he is, and very important, on the other hand, that you should not find him mute by the visitation of God unless he is mute by the visitation of God. In cases where a man is mute (and they are not very common) sometimes he is mute because he has had a stroke or some injury to his larynx or there is some physical cause of that sort, and in such cases it is comparatively easy for a jury to decide whether he is genuine or whether he is not; but in this case, which is a rare one, it is not suggested that there is anything physically wrong with him at all. It is suggested that the inability to speak is due to some emotional or psychological cause, and obviously this question which you have to consider is difficult and is a question which has caused differences amongst the doctors.

Members of the jury, you must not do what I suppose we may be sometimes tempted to do when faced with a problem of this sort: throw up our hands and say: it is difficult, I cannot decide it. You have to do your best to decide it and consider the whole of the evidence. If when you really have considered the whole of the evidence you are completely satisfied that this man is shamming, to put it in homely language, you will find that he is mute of malice; but, if the evidence does not satisfy you, then you will find he is mute by visitation of God.

Just let us consider together what the evidence is.

[His Lordship then reviewed the evidence, reminding the jury, inter alia, that it was conceded that there was nothing wrong with the defendant and that he was a highly intelligent man who understood what was going on, but that it was suggested that his inability to speak was due to an emotional or psychological cause, and continued:] Those are all matters, members of the jury, which you will have to consider. As I have said before, this is of its very nature an extremely difficult problem. Quite naturally in a case of this sort distinguished medical gentlemen differ in their views, but it is perhaps the sort of question, even although in a sense it is a medical one, on which a jury can use their own common sense. If, when you have heard all this evidence and have considered everything, you say to yourselves: we are satisfied that this man is faking, because he does not want to come to trial and is hoping to postpone and, if possible, avoid trial, if you are satisfied about that, then you will find that he is mute of malice; but, if having weighed it all up, you are not satisfied that he is faking, if having heard it all you say: well, there is no more here than a faint suspicion and we are not satisfied, if your minds are left in that state, then you will find he is mute by visitation of God. Members of the jury, will you be good enough to consider your verdict.

The jury returned a verdict of mute by visitation of God.

King-Hamilton Q.C. contended that the next issue was whether the defendant was fit to plead, and then, if he was fit to plead, whether he was fit to stand his trial. [Reference was also made to *Rex* v. *Pritchard*,[2] *Rex* v. *Dyson*,[3] *Reg.* v. *Berry*[4] and *Rex* v. *Governor of Stafford Prison, Ex parte Emery*.[5]] It is urged, particularly in the circumstances of this case, that those are two separate questions and that they

[2] (1836) 7 C. & P. 303.
[3] (1831) 7 C. & P. 305.
[4] (1876) 1 Q.B.D. 81.
[5] [1909] 2 K.B. 81.

should be tried separately. That course would seem to be in accordance with the authorities.

Gillis Q.C. for the defendant.

SALMON J. I think that there is only one issue. The difficulty is that the two questions are to some extent bound up with each other, because, if the defendant is not capable of communicating with others he could not get the advice he would be entitled to get before he decided whether to plead guilty or not guilty. The real question here is: Is he capable of standing his trial? I am going to leave the matter to the jury in this form: Is the defendant capable of pleading to the indictment and of standing his trial?

The jury was sworn in the following form: "I swear by Almighty "God that I will faithfully try whether George Myhill Sharpe, the "prisoner at the Bar, who stands indicted with felony and mis-"demeanour, is capable of pleading to and of taking his trial on the "indictment, and give a true verdict according to the evidence."

Gillis Q.C. submitted that the burden of proof on the issue of fitness to plead rested on the prosecution. Where a defendant is arraigned in ordinary circumstances and the defence desire to raise that issue it is conceded that it is for the defence to accept the burden of proof because a person is presumed to be in possession of all his faculties until the contrary is shown. Where the issue is raised by the Crown, then the burden is upon the Crown. But where, as here, the defendant has been found to be mute by the visitation of God it is submitted that there is a presumption that he is not fit to plead. [Reference was also made to *Reg.* v. *Roberts*,[6] *Reg.* v. *Benyon*[7] and *Reg.* v. *Davies*.[8]] If any case in which this issue is raised comes to the notice of the court, no matter in what way it is raised, it is the duty of the court to satisfy itself that the defendant is fit to plead; it is not an issue joined, but the court has a duty to inquire.

King-Hamilton Q.C. The jury have found that the defendant is mute by the visitation of God and therefore, if no further issue were raised, it would be the duty of the court to enter a plea of not guilty. The normal presumption is that a defendant is fit to plead, and the court would enter that plea simply because the defendant cannot speak. If the defence wish to raise the further issue that he is unfit to plead, it is for them to establish it. There is no difference between this case and the ordinary case where there is an issue whether the defendant is fit to plead on the ground of insanity, when the onus is on the defence.

[SALMON J. Is there any authority for the proposition that when a preliminary issue is raised as to whether the defendant is fit to plead and stand his trial the onus is on the defence?]

There does not appear to be any clear authority but the normal practice is that if, as usually happens, the prosecution agree that the defendant is unfit to plead on the ground of insanity, the court is informed and the prosecution hand their witnesses over to the defence so that the defence can avail themselves of the medical evidence in the hands of the prosecution.

[SALMON J. I do not believe very much will turn on the onus of proof in this case. Inasmuch as it is the duty of the court to satisfy itself that the defendant is fit to plead and stand his trial, I think that it would be right for the prosecution to put its evidence before the court and to begin.]

[6] [1954] 2 Q.B. 329; [1953] 3 W.L.R. 178; [1953] 3 All E.R. 34.

[7] [1957] 2 Q.B. 111; [1957] 2 W.L.R. 956; [1957] 2 All E.R. 513.

[8] (1853) 3 C. & K. 328.

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If that is the view of the court, the prosecution would not dissent from it.

[SALMON J. Yes.]

Counsel for the prosecution then opened the case; evidence was called for the prosecution and defence, and counsel for the defence and the prosecution addressed the jury.

SALMON J. summed up to the jury as follows: Members of the jury, when it appears that there is some question as to whether a prisoner is capable of pleading to the indictment and standing his trial, it is the duty of the court to make sure that he is capable of doing so before the trial is allowed to proceed, because it is repugnant to our sense of justice and fair play that a man who is really unable to plead and unable properly to stand his trial should be put upon his trial. Therefore, you have got to decide, and it is entirely a matter for you, whether in your judgment you are satisfied that the defendant is fit to plead and fit to stand his trial.

You tried another issue yesterday, namely, whether he was mute of malice or mute by the visitation of God, and you have decided on the evidence that was called before you that he was mute by visitation of God. If you came to the conclusion today that the defendant cannot communicate with his advisers and could not communicate with you, the jury, if he were called to give evidence, he would not be fit to plead and he would not be fit to stand his trial. It really comes to this, members of the jury, that one of the most important questions about which you have got to be satisfied is: is he fit to communicate with his advisers and would he be fit to communicate whatever he wanted to communicate to the court if he were called to give evidence? The fact that he may be mute is not conclusive, because, if he could by sign and by writing communicate sufficiently with his advisers so as to make his meaning plain and give them proper instructions, and, if when he was called upon to give evidence, although he could not speak, he could nevertheless write down his answers, then you ought to find as answer to the question you pose yourself "Is he capable of communicating with "his advisers or with the court?" "Yes"; he may not be able to communicate by word of mouth, but, if you are satisfied he could communicate in writing, that is quite enough. You have heard all the evidence and it is for you to decide. In addition to that important point about whether he can communicate, you would have to consider the question also: Are you satisfied that he can understand? A man may be able to communicate, but if he cannot understand he is not capable of standing his trial. A man may be able to understand but not be able to communicate, and he is still not capable of taking his trial.

[His Lordship referred to the evidence and continued:] You have heard the medical evidence on the one side and on the other. I am not going to go through that again with you, because you have heard it twice already in the course of the last two days, and I am sure that it is fresh in your memory. You have got to bring your knowledge of the world and common sense to bear here. You have to remember that it would be most wrong that a man who is not really fit to take his trial should be put on his trial. You have to remember, on the other hand, that it would be most wrong that a man who is shamming, if he is shamming, should thereby be able to postpone and possibly avoid his trial. You have to consider all these matters, and, bringing the best judgment you can to bear, you must say whether today you are satisfied or not that this man is fit to stand his trial and capable of pleading. If you are not satisfied that he is fit to stand his trial, you will say so; but, if you are satisfied he is fit to stand his trial, you will equally say so. Will you please consider your verdict.

[The jury returned a verdict that the defendant was capable of pleading and of taking his trial on the indictment. The trial then proceeded and the defendant was found guilty and convicted.]

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Solicitors: *Director of Public Prosecutions; Hawley & Phoenix, Loughton.*

J. F. L.

[COURT OF APPEAL.]

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Judicial Precedent—Scottish decision—Statute applicable to Scotland and England—Revenue statute—No peculiarity of Scots law involved—Decision not per incuriam—Whether Court of Appeal bound by Court of Session.

Revenue—Income tax—Employment—Perquisite—Option to purchase shares—Purchase of option to subscribe for shares in employing company—Whether perquisite—Whether emolument—Whether taxable in the year of purchase or the year of exercise—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In October 1954, the taxpayer, who was at all material times secretary of a company, was granted an option to purchase 2,000 ordinary shares in the company at the price of 68s. 6d. per share. The price of the option was £20, and it was expressed to be non-transferable and to expire after 10 years or on the earlier death or retirement of the appellant. In March 1956, when the market price of the shares was 82s. per share, the taxpayer exercised the option in respect of 250 shares. The taxpayer was assessed to income tax under Schedule E of the Income Tax Act, 1952,[1] in the year 1955–56 on the difference between the option price and the market price of the shares (with a deduction of a proportionate part of the cost of the option), as being an emolument received by him by virtue of his employment. Roxburgh J. allowed the taxpayer's appeal against the assessment being made in the year 1955–56 and *held* that it should have been made in the year 1954–55:—

Held, allowing the appeal, that the taxpayer should be assessed under Schedule E in respect of the year 1955–56 when the option was exercised; as the Court of Session had held in *Forbes' Executors* v. *Inland Revenue Commissioners*, 1958 S.C. 177; 38 T.C. 12, that an option, in all relevant respects the same as that of the taxpayer, could not be turned to pecuniary account at the date of its grant and therefore, whether or not it might otherwise be a perquisite, it could not be taxed at that date and in respect of the year of its grant under Schedule E, but was taxable only and not before the option was exercised.

[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall "be annually charged on every per- "son having or exercising an office "or employment of profit mentioned "in Schedule E, . . . in respect of all "salaries, fees, wages, perquisites or "profits whatsoever therefrom for the "year of assessment."

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Although the Court of Appeal is not bound to follow decisions of the Court of Session, since (1) there were no propositions peculiar to Scots law which formed the basis of their decision; (2) the relevant revenue statutes applied indifferently in England and Scotland; (3) that case was argued on all the points taken before the Court of Appeal, for reasons of policy it would not be right that this court should express a diametrically opposite view (post, pp. 755, 756, 757 and 758).

Forbes' Executors v. *Inland Revenue Commissioners* (*supra*) followed.

Bridges v. *Bearsley* [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; 37 T.C. 289 considered.

Decision of Roxburgh J. [1959] 1 W.L.R. 667; [1959] 2 All E.R. 270 reversed.

APPEAL from Roxburgh J.[2]

The taxpayer, Edward Cranfield Abbott, appealed to the special commissioners against an assessment for the year 1955–56 made upon him under Schedule E of the Income Tax Act, 1952, in respect of emoluments from his employment. The question for the decision of the commissioners being whether the taxpayer was assessable for the year 1955–56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in the year 1955–56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which the option was purchased by him.

The following facts were proved or admitted before the commissioners: The taxpayer was at all material times the secretary of a company, E. S. & A. Robinson Ltd., which carried on business as wholesale stationers. At the annual general meeting of the company held on June 28, 1954, the following resolution was passed: "That 250,000 of the 290,319 unclassified shares of "£1 each in the capital of the company be and they are hereby "classified as ordinary shares and that the directors be and that "they are hereby authorised to grant options over such 250,000 "ordinary shares or any of them to executives of the company "or its subsidiaries (including managing and other directors who "may for the time being hold office in the management of the "business of the company or any of its subsidiary companies for "the time being) at such times and generally on such terms and "subject to such conditions as they think proper."

Pursuant to that resolution the directors at a board meeting held on October 6, 1954, considered the terms under which options were to be granted. The relevant minute of that board meeting stated that "The secretary produced a list of executives "of the company and its subsidiaries whom the managing direc- "tors had nominated as grantees of share options showing against "the name of each individual the number of shares over which "his option would extend. It was noted that the total number "of shares affected was 243,000 and that the middle price ruling "on the Bristol Stock Exchange today was 68s. 6d. per share

[2] [1959] 1 W.L.R. 667; [1959] 2 All E.R. 270.

"It was resolved that pursuant to the resolution of the company passed at the annual general meeting held on June 28, 1954, options in accordance with the said list to subscribe for ordinary shares of the company at 68s. 6d. per share be and they are hereby granted upon the terms and subject to the conditions set out in a letter to be addressed to each grantee, a copy of such letter having been produced to the meeting approved and signed by the chairman for the purpose of identification.

"The secretary was instructed to dispatch today to each grantee letters in the said form."

The salient conditions of the letter, a copy of which was annexed to the case stated, were that the employee was granted, at the price of £1 for every 100 shares involved, an option to purchase a specified number of shares at the price of 68s. 6d. per share, such option to be exercisable at any time within 10 years from the date of the grant of the option. The option was expressed to be not transferable and was to expire upon the death or retirement of the employee prior to the 10 years. If the employee desired to purchase the option, he was required to send in a form of application which accompanied the letter (together with his cheque for the amount specified being the price of the option), whereupon an option certificate would be issued to him. Option certificates were not in fact issued until May 6, 1955, by which time the company had obtained, in response to its application on March 4, 1955, the consent of H.M. Treasury to the issue of shares in response to the exercise of options, and by letter dated May 9, 1955, option holders were so advised.

The taxpayer was included in the selected list of executives in respect of 2,000 shares in the company, and, on October 7, 1954, he sent in an application to the company to purchase an option in respect of such 2,000 shares on the terms of the letter, forwarding with the application his cheque for £20, which was duly cashed by the company. Owing to the circumstances mentioned above he was not given a certificate until May 6, 1955. The terms and conditions applicable to the option were endorsed on the certificate. The option was expressed to be not transferable and to expire on the holder's death or retirement, or on the tenth anniversary of the date of the grant of the option.

Under the terms of the option any number of shares up to the number of 2,000 could be applied for by the taxpayer, and on March 28, 1956, the price of the company's shares having then risen to 82s., he applied to the company for 250 ordinary shares at the option price of 68s. 6d. per share, sending with such application the sum of £856 5s., and he was duly allotted the 250 shares.

The taxpayer was assessed to tax under Schedule E for the year 1955–56 in the sum of £7,086, which included the sum of £166 in respect of the share transaction, that sum of £166 being made up as follows:

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	£	s.	d.	£	s.	d.
250 shares taken up on March 28, 1956, when the middle market price was 82s.				1,025	0	0
Deduct: option price 68s. 6d.	856	5	0			
cost of option at £1 per 100 shares	2	10	0			
				858	15	0
				£166	0	0

Such assessment charged the taxpayer to tax under Schedule E for the year 1955–56 in respect of the benefit received by him by virtue of his employment of being able to purchase shares worth 82s. at a cost of 68s. 6d. (plus a proportionate part of the price of the option).

It was contended on behalf of the taxpayer that the contract of option vested a right of property in him forthwith; that such right represented money's worth and was inherently capable of realisation; that such right was, to the extent of any excess in value over the price paid therefor, an emolument of his employment assessable under Schedule E in the year of assessment 1954–55 and not otherwise; that the shares issued to him in the year 1956 were issued in virtue only of the right of property acquired by him in the previous year of assessment; and that any excess in value of the shares, when issued, over the price paid therefor represented an appreciation in the value of an item of property owned by him, and was not an emolument of his employment.

It was contended on behalf of the inspector of taxes that when the shares were issued to the taxpayer there arose or accrued to him a profit from his employment assessable to tax for the year 1955–56; that the profit so assessable amounted to £166; and that the appeal should therefore be dismissed and the assessment confirmed.

The commissioners gave their decision in writing on April 9, 1958. They considered that the case was indistinguishable from that of *Forbes' Executors* v. *Inland Revenue Commissioners*,[3] and that the decision of the Court of Session in that case given on January 16, 1958, was binding upon them, that, although the taxpayer in the present case had paid a small sum for his option, whereas Mr. Forbes was given his option, that difference was not material, since in each case it was common ground that a benefit accrued to the taxpayer as part of his remuneration, and in each case the rights granted were personal to him. They stated that it was suggested on behalf of the taxpayer that the decision in *Forbes'* case[3] may have turned on some peculiarity of Scots law, but that they could find no support for such a suggestion in the judgment of the Court of Session, and considered that case

[3] (1958) 38 T.C. 12.

decisive of the present one. Accordingly, they held that the appeal failed. Figures were subsequently agreed in accordance with their decision and the assessment was confirmed on May 22, 1958.

The taxpayer appealed. The commissioners further stated that in making suggestions in the usual course on the draft case, the solicitors to the taxpayer stated (in effect) that the suggestion that the decision in *Forbes'* case [3] might have turned on some peculiarity of Scots law did not represent one of the taxpayer's contentions; and the commissioners agreed that the suggestion arose incidentally during the course of argument.

Roxburgh J. allowed the appeal from the commissioners and held that the option contract was a chose in action which the taxpayer was enabled to purchase on beneficial terms because of his employment and which could have been turned to pecuniary account soon after its grant and its value should be capitalised and assessed to income tax in the year of assessment 1954–55.

The Crown appealed.

R. E. Borneman Q.C. and *Alan S. Orr* for the Crown.
Heyworth Talbot Q.C. and *Desmond Miller* for the taxpayer.

The cases cited in argument are referred to in the judgments.

LORD EVERSHED M.R. This appeal is concerned with the question whether the respondent in this court, Mr. Abbott, is, in respect of the tax year 1955–56, liable for a certain sum under Schedule E of the Income Tax Act, 1952. As may happen in these cases, Mr. Abbott was the appellant in the case stated; he is now the respondent and, for avoiding confusion, I shall refer to him as "the taxpayer," and to the other party as "the Crown."

For the year of assessment in question the relevant statutory provisions are contained in the Income Tax Act, 1952. Section 156 of that Act imposed (under the heading "Schedule E") a charge for tax in respect of every employment of profit and made applicable thereto the provisions of the Ninth Schedule to the Act. So far as relevant, that Schedule provides: "Tax under "Schedule E shall be annually charged on every person having "... an ... employment of profit mentioned in Schedule E ... "in respect of all salaries, fees, wages, perquisites or profits "whatsoever therefrom for the year of assessment," after making the deduction indicated.

In the course of the argument, both in this court and below, the subject-matter alleged to be taxable for the year I have named in the taxpayer's case has been called a perquisite, and I will, as Roxburgh J. did, use that convenient description. But in order that a "perquisite therefrom," that is, from the employment, for the year of assessment should be taxable, it must have

[3] 38 T.C. 12.

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also an additional quality. That quality has been stated in the House of Lords by both Lord Halsbury L.C. and Lord Watson in the case of *Tennant* v. *Smith*.[1] Lord Halsbury L.C. said, in reference to the corresponding tax provision: "I come to the "conclusion that the Act refers to money payments made to the "person who receives them, though, of course, I do not deny "that if substantial things of money value were capable of "being turned into money they might for that purpose represent "money's worth and be therefore taxable." Lord Watson's language was not much different, and as it has been, perhaps, more often cited, I will read it. It is as follows[2]: "That word" —that is, "profits"—"in its ordinary acceptation appears to "me to denote something acquired which the acquirer becomes "possessed of, and can dispose of to his advantage, in other words "money, or that which can be turned to pecuniary account."

I can, therefore, restate the problem in this case as follows: it is whether during the year 1955–56 the taxpayer was rightly charged in his assessment in respect of what was for that year said to be a perquisite arising from his employment, being something which was capable of being turned to pecuniary account. The advantage which he reaped in that year or, at any rate, put himself in a position to reap, had its origin 18 months further back, and a great deal of the argument, very rightly, has turned on this: assuming there was here a perquisite, whether that perquisite arose to the taxpayer not in the year in which he has been assessed but 18 months earlier when he acquired a right from which sprang the later advantage. That sufficiently, perhaps, introduces the necessary recital of facts.

The taxpayer is (at least, I assume he still is—he certainly at all material times was and had been for some time) the secretary of E. S. & A. Robinson Ltd. In the year 1954 the directors of that company came to the conclusion that it would be to the advantage of the company, and I daresay of those they employed in responsible positions, if they gave to them certain options to take up shares. There were available not less than 250,000 unissued shares in the company, and the scheme was that the taxpayer and other responsible officers should get options to take up at any time during the next 10 years, provided they remained in the service of the company, a certain number of those unissued shares which for the purpose were created ordinary shares. The number of shares any individual servant was entitled to have depended upon his status in the company. In the taxpayer's case the number of shares, if he wished to take them up, was 2,000.

I have used, and incorrectly used, the word "gave" when I earlier described the directors' scheme. In actual fact, the option offered to the taxpayer was offered for a pecuniary consideration, namely, £20, and we were informed that that figure

[1] [1892] A.C. 150, 156; 3 T.C. 158, 164.
[2] [1892] A.C. 150, 159.

represented £1 per 100 shares; and the corresponding sums paid, I assume, by other officers of the company were similarly calculated. If it were necessary to reach any precise conclusion upon the matter, it might be relevant to consider at some length the actual documents which came into existence and to arrive at a conclusion when the contract of option exactly was made, in what documents its terms were contained, and what is its date. The argument in this case has relieved me of any necessity of that kind. The relevant date for the purpose of the option contract may be taken as being October 7, 1954.

Owing to the necessity of obtaining Treasury sanction, there was delay before a certificate certifying that the taxpayer had this option could be given to him, but October 7 I take as the date, because that was the date of the form which the taxpayer signed accepting the suggestion of taking up this option contained in the company's letter of the previous day, and which he accompanied by sending £20 to the company. The letter of October 6 contained at some length the terms of the option, but for convenience I will refer to the terms and conditions as they appear on the back of the certificate when it was later issued. There were certain other qualifications, but for present purposes they can be ignored. The important condition or conditions are contained in the first clause in the terms: "The option is not transferable "and to the extent not previously exercised will expire upon the "holder's death or retirement, upon his service with the company "and/or its subsidiaries ending, or on the tenth anniversary of "the date of grant of the option, whichever first occurs."

The taxpayer took advantage of the company's suggestion. He paid £20 to the company, and from October 7 he became entitled to take up 2,000 of the unissued shares in Robinson's at any time within the period indicated in clause 1 endorsed on the certificate, and to do so at the market price at which those shares stood on October 7, 1954, which was 68s. 6d. The taxpayer did not immediately take up any shares, but in March, 1956, the shares having risen on the Bristol Stock Exchange to the market price of 82s., or 13s. 6d. above the option price, he took advantage of his rights. He filled in an application form in respect of 250 out of his 2,000, and he accompanied that application form by his cheque for £856 5s., which is 68s. 6d. multiplied by 250, and he had issued to him 250 of these shares worth then 82s. per share. It is that event which has brought down upon him the charge of the Inland Revenue, for it has been their case that when the taxpayer exercised that contractual right under the option, and when, as a consequence, he obtained for £856 5s. a number of shares which were worth £1,025, he then and in respect of that year got from his employment a perquisite, as that word is expanded by Lord Halsbury L.C. and Lord Watson, a perquisite worth the difference between £856 5s. and £1,025, with a slight further deduction which was, rightly or wrongly, permitted in respect of a proportionate amount of the option price

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of £20. Put in simple terms, he was for his income tax liability for that year charged in respect of £166 as being the monetary value of the perquisite which was said and is said he in that year obtained.

Relating my original statement of the question to the facts—is the Crown's claim to tax the taxpayer under Schedule E in the sum of £166 justifiable or not justifiable in accordance with the relevant language of the Income Tax Act?

The facts of the case are, of course, fully narrated in the case stated, but I have thought it convenient and useful to make a short summary of them as a foundation to what immediately follows, for it seems to me right that I should at this stage briefly state what I conceive to be the nature of the rights in the eye of the law and their source both in October, 1954, when the taxpayer got his option, and in March, 1956, when he applied for and obtained his 250 shares. The option was a right founded in contract and, as Roxburgh J. observed, of a proprietary nature; it was a right which the taxpayer obtained, no doubt, because he was the secretary of the company. Subject to the conditions which were attached to its exercise he became thereafter as a matter of right entitled, within the limit of time stipulated, to apply for any number up to 2,000 of this block of unissued shares, and to pay for them the price of 68s. 6d. at which they stood when the option came into existence. It is quite true that the option was expressed to be non-assignable, though there was no limitation upon what dealings the taxpayer might make with any shares which he acquired by virtue of the option. But though it was non-assignable, it was said, and said with some force, that none the less the option when it was granted and immediately it was granted was capable of being turned into money—turned to money account. What, if anything, the taxpayer might have obtained in any dealings that he entered into is a matter on which there is no evidence and might be purely speculative. I should assume, although again there is no evidence about it, that the grant of these options had an attraction to those to whom they were granted on the footing that there was, at any rate, a fair prospect that the shares in the Robinson company would appreciate in the future. As a matter of common sense, it was not likely that the taxpayer would pay £20 unless he had at any rate some hope that thereafter he would reap some reward. The legal rights in the option were not transferable. He could not transfer the right to apply to anybody else. But, as has been pointed out in the argument, and what is plain enough, the taxpayer might have been able to find someone who was prepared to pay to him some monetary consideration on the terms that the taxpayer would thenceforth wholly or in part exercise the option as the third person required and when he required. To that extent, therefore, the option, if it had any inherent value, was capable of being turned to money account.

The grant of the option to the taxpayer no doubt depended

upon the fact that he was, and was a reward for the fact that he was, secretary of the company; and so Mr. Heyworth Talbot has throughout conceded that the grant of this option did constitute a " perquisite " of the taxpayer's office; and if, but, of course, only if, the option was of a value when it was granted greater than the price the taxpayer paid, greater than £20, and if, as I am assuming, it could have been turned to money account one way or other for a sum in excess of £20, then, as Mr. Talbot concedes, the perquisite would have had the necessary quality to make it then assessable under Schedule E for income tax. But it was Mr. Heyworth Talbot's argument, on that footing, that no subsequent appreciation in the value of the option or of any rights that could be acquired by its exercise could thereafter constitute some other taxable subject-matter.

That brings me to the second question: what was the nature of the rights the taxpayer obtained in March, 1956, and whence were they derived? The former question is not, I think, difficult to answer. He obtained for £856 5s. the issue of shares worth £1,025. That advantage, that valuable asset, the taxpayer was able to obtain because he had by virtue of the contract of option a right to get it so long as he complied with the conditions and paid the 68s. 6d. per share. The company was bound to issue those shares notwithstanding that their then present value was in excess of the price the taxpayer paid. Whence, then, did that benefit or advantage arise? I have already said that prima facie, as it seems to me, it arose because the taxpayer had an already existing contractual right to get it; but, no doubt, it is equally true to say, looking further back, that that contractual right was related to the origin in 1954 of its grant, namely, to the circumstance that the taxpayer was then and still remained secretary of the company.

That I conceive to be the nature of the rights which on those two dates the taxpayer obtained.

If Mr. Heyworth Talbot's submission is correct, then the perquisite once and for all was obtained by the taxpayer in October, 1954. Anything that happened after is irrelevant for tax considerations. On the other side, the argument of the Crown has been that the option, particularly having regard to its non-transferability, was something not capable of being called a perquisite, or at least not a perquisite within the meaning of Schedule E, in October, 1954; it was something incomplete and imperfect. But, the Crown says, when the option and to the extent to which the option 18 months later was exercised, then, and then for the first time, the taxpayer did get in truth a perquisite which can and should be related to his employment as secretary, and it is on that footing that liability in the year 1955–56 was alleged.

The case, on the face of it, would appear not very difficult; the point may, at least, be simply stated; but quite properly we have had our attention drawn to certain cases, to the third of

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which, a Scottish case, I shall have to refer at greater length because, in the view I take, that case ought to be decisive in this court. But we were first of all referred to *Weight* v. *Salmon*.[3] I shall indeed refer to it very briefly because it serves rather as illustration of the kind of point that arises than as any direct authority in the present case. The substance of the matter was this, that a certain company at an appropriate directors' meeting of each year, feeling a debt to those who managed its affairs, resolved that certain of its officers, if they like to apply, should then be entitled to have allotted to them at par a certain number of shares in the company. The officers in many cases took advantage of that suggestion, applied for shares, had them allotted to them, and obtained in the event shares which were worth at the date of allotment considerably more than par value. It was there held that the officers did then get a perquisite, namely, the excess in value of the shares which they got attributable to and arising from their office, and were taxable accordingly. I observe that in that case there is no grant of any precedent right. The offer is made, it is accepted, it all occurs within the scope of a short period and certainly within a single tax year.

A little more important but, again, as I think, not conclusive in the present case, is a case in this court of *Bridges* v. *Bearsley*.[4] The facts of that case were somewhat unusual. The respondent, Bearsley, and another gentleman (for there were two cases tried at the same time) had been for many years managers or directors of a certain company, the control of which belonged to one Hornby. When Hornby died, he left his controlling shares in trust for his widow for life and thereafter to his two sons. There was no gift to either Bearsley or his colleague of shares, nor any grant to them of an opportunity of acquiring them. They obviously took the view—Bearsley and his colleague—that if they were going to continue to serve this company they wanted, at any rate, some proper security in the way of further shareholding, and the end of it all was that in December, 1945, the two Hornby sons entered into deeds of covenant with Bearsley and his colleague. The arrangement, as recorded in the deeds (and it was somewhat loosely framed), was that if Bearsley and his colleague continued to serve the company for another four years, then at a short interval after the death of Mrs. Hornby the two Hornby sons would transfer free of any consideration to Bearsley and his colleague certain shares. Time passed, because Mrs. Hornby lived to a considerable age; and eventually before in fact she died, and to that extent in advance of any covenanted obligation, the two Messrs. Hornby did transfer to Bearsley and his colleague the requisite shares. A charge was made against both Bearsley and his colleague on the footing that the value of the shares, which they had got for nothing, should be taxed as perquisites of their offices as directors for the year when they

[3] (1935) 51 T.L.R. 333; 19 T.C. 174.

[4] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; 37 T.C. 289.

received them. It was claimed, among other things on their behalf, that that was the wrong approach, that one should look to the date of the covenant, and if they were chargeable at all Bearsley and his colleague should be charged at that date, for it was from that covenant that sprang the later transfers.

I have dealt a little at length with the facts because much reliance has been placed upon the way in which Danckwerts J. at first instance, and Jenkins and Sellers L.JJ. in this court, dealt with the point I have last mentioned. It was Danckwerts J.'s view that these gentlemen were taxable under the Schedule for the year in which the transfers were made and in respect of the value of the shares. As regards the suggested alternative basis of taxation, namely, that they should be charged, if at all, at the date when the covenants were entered into, Danckwerts J., as I understand his argument, said in effect[5]: "No, the covenants "were really a promise that if they served four more years at £X, "then at the end of that period, and as additional remuneration "for the next period, they would get this added benefit," as though, to take a simple example, you are employed at £1,000 a year for four years and £6,000 for the fifth year.

This court by a majority, Jenkins L.J. dissenting, decided that Bearsley and his colleague were not taxable at all, on the ground that one could not really relate these gift shares to the contract of service. In truth, it was nothing other than generous bounty on the part of the two Hornby sons, and as such not liable to income tax assessment. But Jenkins L.J. affirmed the view which Danckwerts J. had taken in regard to the alternative suggested assessment, namely, an assessment at the time of and on the basis of the value then existing, if any, of the deeds of covenant in December, 1945. In other words, he followed Danckwerts J. in thinking that the deeds constituted merely a promise of future additional remuneration, and one could not treat the covenants themselves as a distinct item, a separate perquisite capable of being turned to pecuniary account and taxable as such in the year 1945–46. Sellers L.J. dealt with it more briefly by the phrase[6]: "It is not, in my view, in harmony "with the tax provisions that if the transactions fell within the "terms of Schedule E the income was the value of the rights "acquired by the appellants when the deeds were entered into," and he, too, expresses concurrence with Danckwerts J. The third member of the court, Morris L.J., was silent upon this point.

That case upon those facts is plainly different in many ways from the present. This is admittedly not a case merely of bounty. The option is a contractual proprietary right which was obtained in 1954. It was not a mere promise of future remuneration, as were the deeds in *Bearsley's* case[7] in 1945. But the idea of future additional remuneration is one that emerges in Roxburgh J.'s judgment in the present case, when he deals with the third

[5] 37 T.C. 289, 305, 306.
[6] [1957] 1 W.L.R. 674, 703.
[7] [1957] 1 W.L.R. 674.

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and most important of the three cases, namely, the Scottish case of *Forbes' Executors* v. *Inland Revenue Commissioners*.[8] I have already indicated that my view is that we should, in this court, follow the decision in *Forbes'* case,[8] and Mr. Heyworth Talbot conceded clearly in his argument before us that on the essential facts this case is not distinguishable from *Forbes'* case.[8]

That being so, I shall not deal at too great length with the facts in *Forbes'* case.[8] It is sufficient to say that, as in the present case, there was first granted an option, and then at a later date the option was exercised. As in this case, the question arose, was the grantee of the option liable to be charged in respect of a previous year for the value of the shares which the taxpayer had got when he had exercised the option? The option again is in essential respects similar to that in the present case. It was limited in time, it was subject to the taxpayer continuing as a director of the named companies, it was non-transferable. One other distinction may be made, a distinction to which Roxburgh J., I think, attached importance, but to which (if I may say so, rightly) Mr. Heyworth Talbot did not himself attach significance. In the present case the taxpayer paid £20 for his option. In the case of *Forbes*[8] the taxpayer paid nothing. There is, perhaps, just this further point to be made, though for present purposes I conceive it to be irrelevant: in the taxpayer's case there was no sort of limitation or restriction on what he might choose to do with any shares he took out. It was, I assume, contemplated that if, as has happened, they increased in value, he might wish to realise the profit. There was no restriction in terms in *Forbes'* case,[8] but as the general purpose of the transaction was in order to enable Forbes to acquire a share control, it was obviously not in fact contemplated that he, Forbes, would sell, or would, at any rate, sell to any appreciable extent. In considering the rights and the legal consequences I cannot think that that matter is relevant, and it has not been suggested in argument that it is.

Those being the essential facts indistinguishable, as I think and have said, from those in the present case, what was the conclusion of the Scottish court? The conclusion was twofold. The Court of Session held that because of the restrictions on dealing with the option, its non-transferability and so forth, the option when granted to Forbes did not fall within the scope of Schedule E, because it had not the necessary quality expressed in the passages from Lord Halsbury L.C.'s speech and Lord Watson's speech[9] that it could be turned to pecuniary account. Having arrived at that conclusion, the opinion of the Lord President (Clyde) proceeded as follows[10]: "From this it would "follow that it is only in 1946, when Mr. Forbes applied for "allotment, paid the par value and received shares which he "could have sold at a profit in the market, that tax under the "rules becomes exigible." He then deals with a suggestion that

[8] 1958 S.C. 177; 38 T.C. 12.
[9] [1892] A.C. 150, 156, 159.
[10] 1958 S.C. 177; 38 T.C. 12, 18

it was at the date of the option that the legal right had vested in Forbes in respect of which, if at all, he was liable to assessment. " The argument for the appellants was that in 1944 a " legally enforceable right had vested in Mr. Forbes when he " signed the agreement, which he could have converted into cash " forthwith by securing an allotment of shares which he could " sell in the market." As to that, he says there are two fallacies. " In the first place, the right which Mr. Forbes got under the " agreement was not a right to shares which sounded in money " but a mere right to apply for shares which he never exercised " that year and which in itself had no market value at all. But " in the second place the right which he obtained under the " agreement was not an unconditional one. He could not " effectively exercise it unless he complied with its conditions, " one of which was the payment to the companies of the par " value of the shares applied for. These two considerations " appear to me to point necessarily to the year 1946 when the " right was effectively exercised as the year in which the profit " accrued."

I need not read further passages, except perhaps to refer briefly to an earlier part of the Lord President's opinion where he says,[11] among other things: " Moreover—and this appears to " me to be fatal to the appellants' contention—there was no " pecuniary value in the mere right which he got by virtue of " the agreement. For it was not a right to any shares and " could not be disposed of or sold by him."

The opinions of Lord Carmont and Lord Russell were to the same effect. I read only a passage from Lord Russell.[12] He states the appellants' contention and says: " In my opinion, " whatever may be the rights vested in the holder of an option " in the abstract, it is essential to have regard to the nature " and the quality of the right created in Mr. Forbes' favour " in 1944. As previously stated, that right was personal and " unassignable and was qualified by the condition that he must " render cash in payment, while still remaining managing " director, before being in a position to enforce compliance by " the companies with their conditional obligation to allot. It " appears to me that the latter contingency coupled with the " personal and unassignable nature of the right prevents it from " being something which could be 'turned to pecuniary " 'account' "—words which appear in quotes and which are, of course, taken from Lord Watson's formula—" unless and until " the right was exercised and the condition purified." It follows, therefore, that in *Forbes* [13] the Scottish Court of Session decided two things: They first decided that an option having the essential characteristics of the taxpayer's option had not itself the necessary quality at the date of its grant to make it a perquisite within Schedule E liable to tax. They went on to hold, and from the

[11] 1958 S.C. 177.
[12] Ibid. 21.
[13] 1958 S.C. 177.

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language of Lord President Clyde it may be said that they held as a consequence, that the option-holder was liable to be charged for the profit, the gain, the advantage he got, when he turned to account, as he did, this option by getting by its exercise something worth a good deal more than he paid.

The basis of that reasoning has been severely and, if I may say so, by no means ineffectively impugned both in the court below and in this court. It is said that the Scottish judges took altogether too narrow a view of the nature of the rights which the option gave to Forbes. More particularly it is said that the judges omitted to notice the fact (obvious enough, as Mr. Heyworth Talbot said) that the holder of such an option could turn it to account, not by assigning the option itself (which he could not do) but by covenanting for a money consideration that he would exercise the option in a particular way and at a particular time as the covenantee required, and that had that fact been present to the judges' minds they might well have concluded differently on the first point, and, if so, the second point would have fallen down. Mr. Heyworth Talbot has obtained for us copies of the report of the case in the Session Cases, and the argument of the appellants before the Inner House certainly does not make it plain that the point was taken by the appellants that in the way I have indicated Forbes could have turned to money account his option, albeit it was non-transferable. But, for my part, I think it difficult to say that the terms of the report of the argument are such as to exclude that argument, nor do I think really in the end of all it greatly matters. Apart from that form of transaction it is quite plain—and I cannot think that the Lords of Session could have failed to observe it—that the option-holder could have sold the shares before and not after he had exercised the option. But the fact is that the Inner House in the clearest terms have decided that an option in terms in all material respects identical with the taxpayer's option cannot be at the date of its grant brought into charge under Schedule E.

I am conscious, having attended to the arguments, of the difficulties which seem to me to present themselves upon that view of it. With the emphasis laid, as the Scottish judges laid it, on the point of non-transferability, one may ask what would be the right answer if an option of this kind were granted which was transferable. Mr. Borneman, not unnaturally, was unwilling to commit himself to what would happen if such a case arose for consideration. But if the truth is that an option, which was assignable, would attract tax at the date of its grant (assuming that it had a bonus value which was calculable), then it would seem to follow, as the night the day, that the Crown could not afterwards seek to tax the benefit or the further gain which was achieved by the exercise of the option, and one would get a somewhat strange anomaly where the option was expressed to be

assignable and where the option was expressed to be non-assignable. Other somewhat similar cases might arise. Supposing, for example, a man acquires an option of this kind at a price in the market, being, if you like, a servant of the company, but acquiring it in the ordinary course of commercial dealing. Nobody could then suggest, of course, that he was taxable at all either in respect of any value of the option when he bought it or, still less (at any rate, as things now are), in respect of any capital gain which he got on the exercise of it wholly or partly thereafter; and, as Mr. Heyworth Talbot pointed out, what in its essence is the difference? Here the taxpayer got for £20 a right, and he later exercised that right and obtained a valuable asset. The answer, right or wrong, of course, is that in the taxpayer's case he only got the right because, being one of the valued servants of the company, the directors resolved that he should have it, and he would not otherwise have got it. But that still leaves unanswered the problem that if in truth it could be turned to pecuniary account and if so turned it was worth more than £20, then one should assess him in respect of the perquisite. If at that time it could not be turned to pecuniary account at more than £20, then that is the end of it, because thereafter it is merely a matter of capital gain.

My difficulties, I confess, do not end there, for I am troubled, with all possible respect to the Scottish judges, by the line of reasoning which seems inherent in the passage I have read from the Lord President's opinion, that because the option when granted could not be turned to money account and for that reason is not taxable, therefore[14] "it would follow that it is only in "1946, when Mr. Forbes applied for allotment . . . that tax "under the rules becomes exigible." With all respect, I am not, I confess, satisfied of the logic of that statement. It may be—and I so put it because the Scottish court has so held—that when the taxpayer got his advantage in 1956 it ought to be treated as attributable to something granted to him qua servant and therefore treated as a perquisite. But I find difficulty in thinking that the liability arises because the option when granted could not be turned then to pecuniary account. I also ask myself the question upon the footing of the Crown's case, what is it for which the taxpayer is being taxed? According to the case stated, there is included in his assessment the sum of £166 in respect of the share transaction, such sum being made up as follows: 250 shares taken up on March 28 when the actual market price was 82s., £1,025. Deduct option price, so much, net £166. The alleged perquisite, therefore, appears ex facie to be a share transaction entered into in March, 1956. The perquisite, in other words, is the gain represented by the fact that the taxpayer then got for £859 shares worth £1,025, and gained the balance of £166. I have said, and it is no doubt true to say, that the

[14] 1958 S.C. 177, 184.

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taxpayer's advantage which he got in 1956 was attributable, in a fair sense of words, to the fact that, having been a faithful servant, he had in October, 1954, been given an option contract which entitled him to do what he did, and to get the advantage he got in 1956. But I find nowhere in any contract or elsewhere any provision that (as a perquisite for that year) the taxpayer was entitled to get £166 or the difference between the value of any specified number of shares at their then market price of 82s. and the option price of 68s. 6d.

Those are my doubts, and if my doubts are well founded they reinforce, at any rate, the view that what the taxpayer got in 1956 was a valuable piece of property, which he got because then he had, and had had for eighteen months, an absolute contractual right to get it—qualified, no doubt, to the extent that he had still to be a servant of the company in order to enjoy it, but still attributable to a legal right granted to him eighteen months earlier.

I have mentioned these doubts because I have thought that if this matter were to go further it might be of some assistance if I were to state them. I have also mentioned them because it is now right that I should say something about the judgment of Roxburgh J. The judge in the end came to the conclusion that the taxpayer was not taxable in respect of this year 1955–56 for this sum of £166. He came to that conclusion, as I follow it, because, and largely because, he, the taxpayer, had paid £20 for the option contract. I will read a passage from the judgment. After referring to Lord Russell's opinion and saying that he cannot accept as a proposition in English law what Lord Russell formulated, he said [15]: "My view of the benefit of this "option contract is that it is not to be assimilated and is not "additional remuneration. It is a chose in action which the "employee was enabled to purchase, because of his employment, "on beneficial terms, and that is why it is a perquisite. None "the less, it is not in any sense remuneration for his services. "I have never heard of any employee having to pay for his own "remuneration, and that is why I think this £20 is so important. "It is not the amount, it is the effect. That feature is absent "from every case which has hitherto been decided on this topic. "The option contract might have been a dead loss, the opposite "of additional remuneration. The figure here was £20 and the "shares went up. Therefore, of course, it did enable a profit to be "made. However, the shares might have gone down until the "company went into liquidation, and then the £20 which had been "spent, so far from being additional remuneration, would have "been a dead loss. In my view, it was a perquisite, and it was "a perquisite which could be turned to pecuniary account."

What that, if I have followed it correctly, led to was this, that the judge thought that when the option was granted (and in

[15] [1959] 1 W.L.R. 667, 682; [1959] 2 All E.R. 270.

this he followed Mr. Heyworth Talbot's argument) then there was a perquisite granted to the taxpayer, but seeing that he had paid £20 for it, and that there was no evidence that it was worth more, and had never been turned to account for anything more at that date, it had therefore attracted no tax, and that was then the end of it. So far as what later occurred, the benefit of the shares, that, Roxburgh J. said, cannot be regarded as additional remuneration, as Danckwerts J. and Jenkins L.J. thought in *Bridges* v. *Bearsley*,[16] because the taxpayer paid £20 for what he got, or for the source of what he got, and, as Roxburgh J. said, he might have paid £20,000 for it. At any rate, having paid for it, it cannot be treated as additional remuneration.

The consequence, or one particular consequence, was that in the judge's opinion the *Forbes* case[17] was rightly decided but on the wrong grounds, or, at any rate, on grounds which he, as an English judge, could not accept. He, Roxburgh J., took the view that Forbes or his executors were liable to the tax they were charged because in his case, he having paid nothing for the option, it was a matter merely of additional, albeit postponed, remuneration, as was suggested in the *Bearsley* case.[18] He said he would have so decided *Forbes*[19] himself had the matter come before him in England. But he felt that the grounds upon which the Lord President, Lord Carmont and Lord Russell decided it, though they might well be good grounds in Scots law, were not sustainable in English law.

As to that I am bound to say, with all respect to Roxburgh J., that I cannot agree that the *Forbes* case could be supported on the ground that the shares when issued were additional remuneration comparable to the additional remuneration suggested to have been promised and granted in, for example, the *Bearsley* case.[20] I am unable to agree with that. I think that what Forbes got was not additional remuneration which had been promised, but something which he became entitled to get as a result of a valid and effective right, namely, the option. But I am also, with all respect, unable to agree with Roxburgh J. that the judges in Scotland applied propositions of Scots law which have no application in England and which, therefore, leave us to decide this case without regard to the *Forbes* decision.[21] I cannot see that there are any propositions of Scots law which form the basis of the decision and which are distinct from anything which we have to apply here. The question before the Scottish court is the same as the question before us: Was the sum of money for which Forbes was charged and for which here the taxpayer is charged representing the value of what he got, was that a perquisite within the meaning of the Schedule E provision; and as a prelude to that question, was the option granted to Forbes, as the option granted to the taxpayer, a perquisite liable to be charged within

[16] [1957] 1 W.L.R. 674.
[17] 1958 S.C. 177.
[18] [1957] 1 W.L.R. 674.
[19] 1958 S.C. 177.
[20] [1957] 1 W.L.R. 674.
[21] 1958 S.C. 177.

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the meaning of the Schedule E provision? The Scottish court purported to answer this latter question by applying the test which had been laid down in the House of Lords by Lord Halsbury L.C. and Lord Watson. There was nothing esoteric in the bargains made. They were straightforward commercial bargains. That being their nature, it seems to me incontrovertible that what the Scottish court decided was that an option in all relevant respects the same as the taxpayer's option cannot be turned to pecuniary account at the date of its grant and, therefore, whether or not it might otherwise be a perquisite, cannot be taxed at that date and in respect of that year, the year of its grant, under Schedule E.

They further decided, whether consequentially or not, that when the rights given were exercised and brought, so to speak, to fruition, or to the extent that they were exercised and brought to fruition, then and in that year there did arise a perquisite which was capable of being turned to pecuniary account in the year when the exercise was made.

Those two things the Scottish court has, I think, plainly decided. I ask myself, therefore, having expressed such doubts as I have, with all respect to the judges in Scotland, ought this court now to answer those two questions in a precisely opposite sense? It is, of course, quite true that we in this court are not bound to follow the decisions of the Court of Session, but the Income Tax Act and the relevant Finance Acts apply indifferently both north and south of the border, and if we were to decide those questions in a sense diametrically opposite to the sense which appealed to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which was completely opposite to the law which was being applied on exactly the same statutory provisions north of the border. I cannot think that that is right. In a case of a revenue statute of this kind it is the duty of this court, unless there are compelling reasons to the contrary, to say, expressing such doubts as we feel we ought to do, that we should follow the Scottish decision.

Mr. Heyworth Talbot put forward an argument that we could treat the case as having been decided per incuriam mainly, if not entirely, on the ground that it was never brought to the attention of the Scottish judges that, after all, this option, if it was worth anything, could have been turned to pecuniary account by the simple device of the option-holder's saying to whoever was interested: "For a consideration of £X I will exercise this option "as and when you require and on your behalf." But I have not been satisfied that we could or should properly dissent and depart from the Scottish decision on that ground.

It comes, therefore, in the end to this, I think, that we ought to treat the Scottish case as governing our decision, and taking that view and disagreeing, with all respect, with Roxburgh J.'s view that the Scottish decision depended upon some special peculiarities of Scots law, I would allow the appeal.

SELLERS L.J. I agree, for the reasons which my Lord has just given, that *Forbes' Executors* v. *Inland Revenue Commissioners* [22] ought to be held by us to be decisive of the point raised before us in this present case. The question there for decision, in the words of Lord Russell in the course of his judgment, was "whether that perquisite accrued to and was acquired "by Mr. Forbes at the date of the agreement, viz., September, "1944, or whether it accrued to and was acquired by him only "when—and not before—he exercised his right and received an "allotment of the shares in 1946." The issue in that case seems to me to be indistinguishable from the issue in this case, and the relevant and material facts likewise have no different effect.

Secondly, with respect to Roxburgh J., it seems to me that it is not shown that there is any difference in the law which the Inner Court of Session invoked to decide that case from the law of our own country.

Thirdly, the case was argued on all the points which were taken here and it would appear were all in the mind of the court.

In these circumstances, I feel that we ought to accept that decision and follow it, and I may say that I do so with more satisfaction perhaps than my Lord because I take a more favourable view of the decision at which that court arrived and do not share, at any rate not with the same emphasis, many of the doubts which my Lord has expressed. I do not wish to speak with finality because I apprehend that, having regard to the impact of this case, the *Forbes' Executors* case,[23] upon our decision, we discouraged Mr. Heyworth Talbot from pursuing the whole of his argument, but as far as it had gone I have not been persuaded that the judgments in that case were wrong. Indeed, as at present advised, agreeing with the judgments as a whole, I might particularly say I should have been prepared to follow the way in which the matter is put by Lord Russell.[24] If the option was never exercised it seems axiomatic that there would be no profit and no accrued benefit. The contractual right given by the company, and it was by the company to the servant, the taxpayer, in this case could not be transferred, and the view I should be inclined to take of the case, which, I think, is in harmony with the *Forbes' Executors* case,[25] is that that merely set up the machinery for creating a benefit—that was its intention—which benefit ultimately accrued. It is an ingenious device to avoid the incidence of taxation. In my view it does not achieve it, or, at any rate, it is doubtful whether it has achieved it.

On the date of the option there was no money payment which was a gain. The £20 paid by the taxpayer was an expenditure. A notional use of the option or a use unintended and undesired by the company, unrealised and unvalued, does not seem to me to have the quality required by the accepted standard set by Lord Halsbury L.C. and Lord Watson, already quoted by my Lord, to

[22] 1958 S.C. 177, 186.
[23] 1958 S.C. 177.
[24] Ibid. 186.
[25] 1958 S.C. 177.

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make it a taxable perquisite, if, indeed, it was a perquisite at all at that date.

Not only have we the authority of the *Forbes' Executors* v. *Inland Revenue Commissioners* case, but the observations in this court of Jenkins L.J.[26] agreeing with Danckwerts J., as I did myself, I believe, have been rightly assessed in the *Forbes* case by the Lord President when he says[27]: "These observations "confirm the conclusion to which I have come in the present "case," or in the words of Lord Russell: "Those opinions are "clearly adverse to the appellants' submission in this case." It may be said in the particular circumstances that they were obiter dicta, but, in effect, I think they support the point on behalf of the Crown in their argument in this case.

For those reasons, and without going into the matter in greater detail, I agree that this appeal should be allowed on the basis of the decision of *Forbes' Executors* v. *Inland Revenue Commissioners*.

HARMAN L.J. I agree in the result which my brothers have announced. I confess to sharing the doubt expressed with such circumspection, if I may say so, by the Master of the Rolls. The Lords of Session decided *Forbes'* case, as I see it, on a construction they put upon the option document there existing. No doubt that option, like the option in the instant case, was hedged about by a number of conditions; but I cannot see that the number of the conditions alters the nature of the right, nor understand why some options appear to their Lordships to come within Lord Watson's formula and others not. They all seem to me to be rights of property more or less valuable according as the conditions are more or less onerous. The Crown's contention here and the decision of the Lords of Session ignore altogether the option and treat the case as being in line with *Weight* v. *Salmon*,[28] already mentioned by my Lord, where there was no antecedent agreement at all (see the observations of Lord Atkin). I find this hard to accept. On the other hand, I cannot justify to my mind Roxburgh J.'s suggestion that the Lords of Session decided *Forbes'* case[29] on some unknown principle peculiar to Scottish jurisprudence. That court, as I see it, construed a document of option indistinguishable from that in the instant case and, therefore, for reasons of policy it would not be right that this court should express a diametrically opposite view.

Appeal allowed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Allen & Overy; Solicitor of Inland Revenue.*

B. A. B.

[26] [1957] 1 W.L.R. 674.
[27] 1958 S.C. 177, 185, 189.
[28] 19 T.C. 174, 193.
[29] 1958 S.C. 177.

[HOUSE OF LORDS.]

GREY AND ANOTHER . . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

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1959

July 23, 27; *Nov.* 2.

Revenue—Stamp duty—Gifts inter vivos—Oral settlement—Settlements in favour of grandchildren—Transfer of company shares to trustees as nominees—Oral direction to trustees to hold shares on trusts of settlements—Subsequent declarations of trust by trustees—Whether voluntary dispositions liable to ad valorem duty—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 8), *s.* 74—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

Assignment—Equitable—"Disposition" of equitable interest required to be in writing—Meaning of "disposition"—Oral declaration by cestui que trust directing trustees to hold his interest on new trusts —Law of Property Act, 1925, *s.* 53 (1) (*c*).

Statute—Construction—Consolidating Act—Amending Acts consolidated —Principles of construction—Law of Property Act, 1925, *s.* 53 (1) (*c*).

By section 53 (1) (*c*) of the Law of Property Act, 1925: "a "disposition of an equitable interest or trust subsisting at the time "of the disposition, must be in writing signed by the person dis- "posing of the same, or by his agent thereunto lawfully authorised "in writing or by will."

In 1949 H. made five settlements, one in favour of each of his five grandchildren, and in 1950 he made a sixth settlement on his then existing and possible after-born grandchildren. The appellants were the trustees of each of these settlements. On February 1, 1955, H. transferred to the appellants, as his nominees, 18,000 ordinary £1 shares in a company. On February 18, 1955, H. orally and irrevocably directed the appellants thenceforth to hold the shares transferred to them on February 1, as to five blocks of 3,000 shares each on the trusts respectively of the five settlements executed in 1949 and as to 3,000 shares on the trusts of the settlement of 1950, to the intent that such direction should result in the entire exclusion of H. from all future right, title and benefit to or in the shares and the income thereof. On March 25, 1955, the appellants executed six declarations of trust which H., although not expressed to be a party thereto, executed. They were all in similar form and each recited that the appellants were the holders of 3,000 shares in the company, H.'s oral direction of February 18, the acceptance of the trust reposed in them by that oral direction and that the giving of the direction and its nature were testified by the execution by H. of the deed. The operative part of each deed declared that the appellants acknowledged and declared that they were holding the shares on the trusts of the settlement to the intent that the shares should form part of the trust fund. The six declarations of trust were assessed to ad valorem stamp duty as voluntary dispositions within section 74 of the Finance (1909–10) Act, 1910:—

Held, that the directions given by H. were dispositions by him of his equitable interest in the shares within the meaning of section 53 (1) (*c*) of the Act of 1925 and, because they were not

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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made in writing, as required by that provision, they were ineffective. The word "disposition" in that provision must be given its wider meaning in normal usage.

Accordingly the declarations were rightly assessed to ad valorem stamp duty.

The Law of Property Act, 1922, and the Law of Property (Amendment) Act, 1924, profoundly altered a large part of the law of real and personal property and the Act of 1925, though a consolidating Act, in fact consolidated Acts which were themselves amending Acts. Accordingly, no principle of construction imposed on these Acts an interpretation appropriate to a consolidating Act, and each word must be given the meaning proper to it in the context.

Decision of the Court of Appeal [1958] Ch. 690; [1958] 3 W.L.R. 45; [1958] 2 All E.R. 428 affirmed.

APPEAL from the Court of Appeal (Morris and Ormerod L.JJ., Lord Evershed M.R. dissenting).

This was an appeal from an order of the Court of Appeal dated May 15, 1958, allowing an appeal by the respondents, the Commissioners of Inland Revenue, from an order of the Chancery Division (Queen's Remembrancer) of the High Court of Justice (Upjohn J.) dated December 3, 1957, whereby there was allowed an appeal by the appellants, Arthur William Grey and Leslie Richard Randolph, from assessments of stamp duty by the respondents on six instruments presented to them on behalf of the appellants under section 12 of the Stamp Act, 1891, for the opinion of the respondents as to the stamp duty with which they were chargeable.

The facts are fully set out in the opinion of Viscount Simonds.

John Pennycuick Q.C. and *W. T. Elverston* for the appellants.

Richard Wilberforce Q.C. and *E. B. Stamp* for the respondents.

The following authorities, besides those referred to by Viscount Simonds, were cited in argument: *Cohen and Moore* v. *Inland Revenue Commissioners* [1]; *M'Fadden* v. *Jenkyns* [2]; *Timpson's Executors* v. *Yerbury* [3]; *Tierney* v. *Wood* [4]; *In re Chrimes* [5]; *Martin* v. *Inland Revenue Commissioners* [6]; *In re Eichholz* [7]; *Inland Revenue Commissioners* v. *Buchanan* [8]; *Strangforth* v. *Inland Revenue Commissioners* [9]; *Fuller* v. *Inland Revenue Commissioners* [10]; *Richards* v. *Delbridge* [11]; *Milroy* v. *Lord* [12]; *Rycroft* v. *Christy* [13]; *Lambe* v. *Orton* [14];

[1] [1933] 2 K.B. 126.
[2] (1842) 1 Hare 458; 1 Ph. 153, 157.
[3] [1936] 1 K.B. 645, 664; [1936] 1 All E.R. 186.
[4] (1854) 19 Beav. 334, 337–338.
[5] [1917] 1 Ch. 3.
[6] (1930) 15 A.T.C. 631.
[7] [1959] 2 W.L.R. 200, 210–212; [1959] 1 All E.R. 166.
[8] [1958] Ch. 289, 296; [1957] 3 W.L.R. 68; [1957] 2 All E.R. 400.
[9] [1930] A.C. 339; 46 T.L.R. 288.
[10] [1950] 2 All E.R. 976; 29 A.T.C. 278.
[11] (1874) L.R. 18 Eq. 11, 14.
[12] (1862) 4 De G.F. & J. 264.
[13] (1840) 3 Beav. 238, 241.
[14] (1860) 1 Dr. & Sm. 125, 127.

Bentley v. *Mackay* [15]; *In re Wale* [16]; Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. I, p. 321; Snell on Equity, 24th ed., pp. 107 et seq.; and Lewin on Trusts, 4th ed. (1861), p. 451, to 12th ed. (1911), p. 890.

Their Lordships took time for consideration.

November 2. VISCOUNT SIMONDS. My Lords, this appeal raises a question upon which there has been a difference of opinion in the courts below. It is whether certain instruments which were presented for adjudication to stamp duty under section 13 of the Stamp Act, 1891, are or are not chargeable with ad valorem duty. The Court of Appeal (Morris and Ormerod L.JJ., Lord Evershed M.R. dissenting) held that they are so chargeable. Upjohn J. had decided to the contrary.

The facts as stated in the case stated by the Commissioners of Inland Revenue may be summarised as follows:

(A) The appellants are trustees of six settlements each of which was made between a Mr. Hunter as settlor of the one part and the appellants as trustees of the other part. Four of these settlements were respectively dated July 22, 1949, and a fifth was dated August 9, 1949, and each settlement directed the appellants to stand possessed of the property comprised therein upon the trusts thereby declared for the benefit of a named grandchild of Mr. Hunter and such other trusts as therein appearing. All the said five settlements are in similar form. The sixth settlement was dated May 1, 1950, and the appellants were thereby directed to stand possessed of the property comprised therein upon the trusts thereby declared for the benefit of the then existing and future grandchildren therein specified of Mr. Hunter.

(B) By an instrument of transfer dated February 1, 1955, Mr. Hunter transferred to the appellants 18,000 ordinary shares of £1 each in Sun Engraving Co. Ltd. (hereinafter called "the com- "pany"), to be held by the appellants as nominees for and to the order of Mr. Hunter.

(C) At a meeting held on February 18, 1955, at the offices of the company at which there were present Mr. Hunter and the appellants and Mr. Graham Wyatt Williams, solicitor, Mr. Hunter orally and irrevocably directed the appellants to divide the said 18,000 shares in the company into six equal parcels of 3,000 shares each and to hold one of such parcels upon the trusts and with and subject to the powers and provisions respectively declared and contained in each of the said six settlements to the intent that such directions should result in the entire exclusion of Mr. Hunter from all further right, title and benefit to or in the said shares or any of them and the income thereof.

(D) By six deeds of declaration of trust each dated March 25,

[15] (1851) 15 Beav. 12, 20–21.

[16] [1956] 1 W.L.R. 1346; [1956] 3 All E.R. 280.

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1955, and executed by the appellants and Mr. Hunter after reciting in each such deed that the appellants were the holders of 3,000 ordinary shares in the company and that on February 18, 1955, Mr. Hunter orally and irrevocably directed the appellants to hold the said shares upon the trusts and subject to the powers and provisions in such one of the said settlements as was therein mentioned and that the appellants had thereupon assented to and accepted the trusts reposed in them by the said direction and that the giving of the said direction on the said February 18, 1955, and in manner aforesaid and the nature thereof were testified by the execution by Mr. Hunter of that deed it was witnessed and the appellants thereby acknowledged and declared (in each of the said deeds) that they had been since February 18, 1955, and were then holding 3,000 shares therein mentioned and the income thereof upon such trusts and with and subject to such powers and provisions as were in the relevant settlement declared and contained concerning the trust fund as therein defined to the intent that the said shares should since the said February 18, 1955, form an addition to and be one fund with the said trust fund for all purposes.

These facts give rise to the plain question whether the oral directions given by Mr. Hunter, which are recited in each of the instruments, were effective or were, having regard to section 53 (1) (*c*) of the Law of Property Act, 1925, wholly ineffective. In the former event the instruments would not, and in the latter would, be chargeable with ad valorem duty.

Section 53 (1) of the Act is as follows: "Subject to the "provisions hereinafter contained with respect to the creation of "interest in land by parol, . . . (*c*) a disposition of an equitable "interest or trust subsisting at the time of the disposition, must "be in writing signed by the person disposing of the same, or by "his agent thereunto lawfully authorised in writing or by will."

Briefly, then, were the several oral directions given by Mr. Hunter dispositions by him of the equitable interest in the shares held by the appellants as nominees for him?

If the word "disposition" is given its natural meaning, it cannot, I think, be denied that a direction given by Mr. Hunter, whereby the beneficial interest in the shares theretofore vested in him became vested in another or others, is a disposition. But it is contended by the appellants that the word "disposition" is to be given a narrower meaning and (so far as relates to inter vivos transactions) be read as if it were synonymous with "grants and assignments" and that, given this meaning, it does not cover such a direction as was given in this case. As I am clearly of the opinion, which I understand to be shared by your Lordships, that there is no justification for giving the word "disposition" a narrower meaning than it ordinarily bears, it will be unnecessary to discuss the interesting problem that would otherwise arise. It was for this reason that your Lordships did

not think it necessary to hear learned counsel for the appellants in reply on this part of the case.

My Lords, the argument for narrowing the meaning of "disposition" was that the Law of Property Act, 1925, was a consolidating Act, that among the Acts which it consolidated was the Statute of Frauds (29 Car. 2, c. 3), s. 9, that that section enacted that "all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same or by such last wish or devise, or else shall likewise be utterly void and of none effect," and that therefore the word "disposition" in section 53 (1) (*c*) of the Act of 1925 is to be given the same meaning as would be given to "grants and assignments" in section 9 of the Statute of Frauds.

My Lords, the principles applicable to the construction of a consolidating Act are not in doubt. The presumption is that such an Act is not intended to alter the law, but this prima facie view must yield to plain words to the contrary: see *Gilbert* v. *Gilbert*,[1] *per* Scrutton L.J. If the Law of Property Act, 1925, was a typical consolidating Act, the question would be whether the alteration from "grants and assignments" to "disposition" changed the law by enlarging the area of void transactions—a question that might not be easy to answer. But the Act of 1925 cannot be thus regarded. It was, it is true, a consolidating Act, but it was, with a number of other Acts, the culmination of a body of legislation by which a large part of the law of real and personal estate was profoundly altered. The story opens with the Law of Property Act, 1922, the title of which begins with the words: "An Act to assimilate and amend the law of Real and Personal Estate." It in fact effected comprehensive changes in the law. Section 191 (2) enacted that it should come into operation on January 1, 1925. But it did not, and was never intended to, come into operation at all. In 1924 a second Act was passed. It was entitled: "An Act to amend the Law of Property Act, 1922, and the enactments thereby affected and to facilitate the consolidation of the law relating to conveyancing and property" and other matters. This Act, which was the result of a prolonged examination of the Law of Property Act, 1922, by a committee presided over by the late Lord Romer, paved the way for the Act of 1925. It was, as has already appeared, an Act amending an Act which had itself radically changed the law. Section 3 is for our present purpose the only relevant section. It provided that "the amendments and provisions, for facilitating the consolidation of the statute law relating to conveyancing and property, contained in Schedule III shall have effect." This Schedule was in two parts, Part I being entitled "Amendment" and Part II "Provisions facilitating consolidation of the law of property and conveyancing." Paragraph 15 of Part II is, so far as is material, as follows: "Sections 1 to 3 and 7 to 9 of the Statute of Frauds shall take

[1] [1928] P. 1, 8; 43 T.L.R. 589.

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" effect as if inserted in the principal Act and be read as follows ": there then follow the provisions which are exactly reproduced in section 53 of the Act of 1925. It was provided by section 12 (3) that the Act should come into operation on January 1, 1926. In the meantime the Law of Property Act, 1925, was drafted embodying the alterations in the law relating to conveyancing and property made by the Acts of 1922 and 1924. It repealed section 3 of and Schedule III to the Act of 1924 and itself came into force on January 1, 1926. I have only dealt in rough outline with the complicated scheme of legislation which transformed the law of real and personal property. But I have said enough to show that the Act of 1925, though in a sense a consolidating Act, in fact consolidated Acts which themselves were amending Acts. While, therefore, as Lord Romer (then Romer L.J.) indicated in *In re Turner's Will Trusts* [2] in the comparable case of the Trustee Act, 1925, it is incredible that the legislature intended in the Act of 1925 to make further and radical changes in the law as enacted in preceding Acts, the question is what changes had been effected in those Acts. And since they purported to be and were amending Acts, there is no principle of construction which should impose upon them an interpretation appropriate to a consolidating Act. They must, and therefore so must the Act of 1925, be construed so as to give each word the meaning proper to it in its context. So construed the word " disposition " in section 53 (1) (*c*) has the natural meaning which I attributed to it at the opening of this opinion.

I have not, my Lords, forgotten the contention that, as the relevant provision substituting what became section 53 of the Act of 1925 for certain sections of the Statute of Frauds are to be found in Part II of Schedule III to the Act of 1924, whereas Part I was headed " Amendment," the provisions in Part II ought not to be read as amending the existing statutory law if any other reasonable interpretation is possible. But I cannot give any weight to this argument, for the most cursory glance reveals that the provisions in Part II, even those in paragraph 15 itself, contain what are undeniably amendments of the law. Accordingly, I cannot allow this argument to prevail and must read section 53 of the Act of 1925 as I read paragraph 15 of Schedule III to the Act of 1924 in the sense which I have already indicated.

I think it right to add that the argument for the Crown which has brought me to this conclusion does not appear to have been put before Upjohn J. or the Court of Appeal.

The appeal must, in my opinion, be dismissed with costs.

My noble and learned friend, LORD REID, who is unable to be here today, has intimated to me that he agrees with this opinion.

LORD RADCLIFFE. My Lords, if there is nothing more in this appeal than the short question whether the oral direction that

[2] [1937] Ch. 15, 26; 52 T.L.R. 713; [1936] 2 All E.R. 1435.

Mr. Hunter gave to his trustees on February 18, 1955, amounted in any ordinary sense of the words to a "disposition of an "equitable interest or trust subsisting at the time of the "disposition," I do not feel any doubt as to my answer. I think that it did. Whether we describe what happened in technical or in more general terms the full equitable interest in the 18,000 shares concerned, which at that time was his, was (subject to any statutory invalidity) diverted by his direction from his ownership into the beneficial ownership of the various equitable owners, present and future, entitled under his six existing settlements.

But that is not the question which has led to difference of opinion in the courts below. Where opinions have differed is on the point whether his direction was a "disposition" within the meaning of section 53 (1) (*c*) of the Law of Property Act, 1925, the argument for giving it a more restricted meaning in that context being that section 53 is to be construed as no more than a consolidation of three sections of the Statute of Frauds, sections 3, 7 and 9. So treated, "disposition," it is said, is merely the equivalent of the former words of section 9, "grants "and assignments," except that testamentary disposition has to be covered as well, and a direction to a trustee by the equitable owner of the property prescribing new trusts upon which it is to be held is a declaration of trust but not a grant or assignment. The argument, concludes, therefore, that neither before January 1, 1926, nor since did such a direction require to be in writing signed by the disponor or his agent in order to be effective.

In my opinion, it is a very nice question whether a parol declaration of trust of this kind was or was not within the mischief of section 9 of the Statute of Frauds. The point has never, I believe, been decided and perhaps it never will be. Certainly it was long established as law that while a declaration of trust respecting land or any interest therein required writing to be effective, a declaration of trust respecting personalty did not. Moreover, there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust. But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or pro tanto the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 9 and therefore required writing for its validity. Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction: and it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee.

I do not think, however, that that question has to be answered for the purposes of this appeal. It can only be relevant if section 53 (1) of the Law of Property Act, 1925, is treated as a true

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consolidation of the three sections of the Statute of Frauds concerned and as governed therefore by the general principle, with which I am entirely in agreement, that a consolidating Act is not to be read as effecting changes in the existing law unless the words it employs are too clear in their effect to admit of any other construction. If there is anything in the judgments of the majority of the Court of Appeal which is inconsistent with this principle I must express my disagreement with them. But, in my opinion, it is impossible to regard section 53 of the Law of Property Act, 1925, as a consolidating enactment in this sense. It is here that the premises upon which Upjohn J. and the Master of the Rolls founded their conclusions are, I believe, unsound.

The Law of Property Act, 1925, itself was, no doubt, strictly a consolidating statute. But what it consolidated was not merely the Law of Property Act, 1922, a statute which had itself effected massive changes in the law relating to real property and conveyancing, but also the later Law of Property (Amendment) Act, 1924. The Statute of Frauds sections had not been touched by the Act of 1922; but they were in effect repealed and re-enacted in altered form by the operation of section 3 of the Act of 1924 and the provisions of Schedule III to that Act. The Schedule is divided into two Parts, the contents of Part I being described simply as "Amendments" and the contents of Part II being headed by the description "Provisions facilitating the con- "solidation. . . ." I suppose that the authors of the Act of 1924 understood what was the significance of the division of Schedule III into these two Parts under their different headings. I cannot say that I do. Each Part, when examined, is seen to contain numerous amendments of various previous statutes relating to real property and conveyancing, apart from the Act of 1922 itself, and in this sort of matter I cannot see how one can satisfactorily measure the degrees of substance involved in the various changes. The point is that they were avowedly changes. It is paragraph 15 of Part II of Schedule III which deals with the Statute of Frauds: and though the introductory words do seem to suggest that the sections concerned are only being re-enacted in different words, it is apparent, when they are read through, that this is not so and that alterations of more or less moment are in fact being made. This new wording is what is carried into section 53 of the Act of 1925.

For these reasons I think that there is no direct link between section 53 (1) (*c*) of the Act of 1925 and section 9 of the Statute of Frauds. The link was broken by the changes introduced by the amending Act of 1924, and it was those changes, not the original statute, that section 53 must be taken as consolidating. If so, it is inadmissible to allow the construction of the word "disposi- "tion" in the new Act to be limited or controlled by any meaning

attributed to the words "grant" or "assignment" in section 9 of the old Act.

I agree that the appeal should be dismissed.

LORD COHEN: My Lords, I also agree.

LORD KEITH OF AVONHOLM. My Lords, I agree.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Soames; Solicitor of Inland Revenue.*

F. C.

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[COURT OF APPEAL.]

Ex parte MWENYA.

C. A.

1959 *July* 24, 27, 28, 29; *Oct.* 13, 26.

Lord Evershed M.R., Romer and Sellers L.JJ.

Habeas Corpus — Protectorate — Jurisdiction — Whether Northern Rhodesia "foreign dominion" of Crown—Whether foreign territory —Jurisdiction of court to issue writ overseas—Habeas Corpus Act, 1862 (25 *&* 26 *Vict. c.* 20), *s.* 1.

In June and October, 1957, the Governor of Northern Rhodesia made restriction orders pursuant to powers stemming from the Emergency Powers Regulations, 1956, of Northern Rhodesia, requiring M., a native of Northern Rhodesia, to remain in the district of the Chief Mporokoso. At all material times Northern Rhodesia was a protectorate, and, according to an affidavit by the Secretary of State for the Colonies, was "a foreign country within which Her "Majesty has power and jurisdiction by treaty, grant, usage, "sufferance and other lawful means within the meaning of the "Foreign Jurisdiction Act, 1890, but not recognised by Her "Majesty as, nor is it, part of Her dominions, but She has power "and jurisdiction within the same." M. applied for a writ of habeas corpus directed to the Governor of Northern Rhodesia, the District Commissioner of the Mporokoso District and the Secretary of State for the Colonies, on the ground that he was unlawfully detained, in that the Order in Council under which the Emergency Powers Regulations were made was invalid, and that, consequently, the restriction orders were invalid. Under the Constitution of and legislation in regard to Northern Rhodesia the Secretary of State had powers which extended beyond mere advice, but his approval or consent to the restriction orders was not required and he took no part in the detention. On preliminary objections taken by the respondents to the jurisdiction of the court to issue the writ in the circumstances, and on the assumptions (which were not admitted) (a) that M. was a British subject, (b) that, inter alia, the Order in Council was invalid, and (c) that M.'s confinement was of such a nature as to enable him, had he been confined in this country, to apply for the writ:—

Held, that the jurisdiction to issue the writ of habeas corpus of the Court of Queen's Bench was not limited to territories outside England which were strictly called "colonies or foreign "dominions," but extended to territories which, having regard to the extent of the dominion in fact exercised, could be said to be

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"under the subjection of the Crown," and in which the issue of a writ would be regarded "as proper and efficient," and that if upon a proper investigation of the facts it appeared that the internal governance of Northern Rhodesia was in legal effect indistinguishable from that of a British colony or country acvquired by conquest, then in conformity with the nature of the writ, there was no reason for denying the jurisdiction of the court to issue it (post, pp. 781, 783, 786 and 790).

Dicta of Lord Mansfield C.J. in *Rex* v. *Cowle* (1759) 2 Burr. 834, 853, 854 applied.

Ex parte Anderson (1861) 3 E. & E. 487; *Rex* v. *Earl of Crewe, Ex parte Sekgome* [1910] 2 K.B. 576; 26 T.L.R. 439; *In re Ning Yi-Ching* (1939) 56 T.L.R. 3; and *Nyali Ltd.* v. *Attorney-General* [1956] 1 Q.B. 1; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646 considered.

Decision of the Divisional Court (Lord Parker C.J., Slade and Winn JJ.) [1959] 3 W.L.R. 509 reversed.

APPEAL from the Divisional Court.[1]

The applicant, Andrew Mwenya, a native of Northern Rhodesia, was the subject of two restriction orders made on June 15 and October 5, 1957, by the Governor of Northern Rhodesia under which he was required to remain in the Mporokoso District of Northern Rhodesia. On November 28 and 29, 1956, restriction orders had been made against Mwenya under regulation 18 of the Emergency Powers Regulations, 1956, of Northern Rhodesia, and the orders in question of June 15 and October 5, 1957, were made under section 8 and other provisions of the Emergency (Transitional Provisions) Ordinance, 1956, of Northern Rhodesia [No. 38 of 1956] for the making of restriction orders against persons in respect of whom orders had been made under the Emergency Powers Regulations, 1956. The Emergency Powers Regulations, 1956, were made pursuant to powers conferred upon the Governor by the Emergency Powers Order in Council, 1939 (as amended by the Emergency Powers Orders in Council of 1952 and 1956), which Order in Council was made under the powers contained in the Foreign Jurisdiction Act, 1890.[2]

Mwenya applied for leave to issue a writ of habeas corpus directed to the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District on the ground that he was unlawfully detained, it being alleged that the Emergency Powers Order in Council, 1939, being made under the Foreign Jurisdiction Act, 1890, was a statutory Order in Council so far as Northern Rhodesia was concerned to which the Rules Publications Act, 1893, section 1 (1)

[1] [1959] 3 W.L.R. 509.

[2] Foreign Jurisdiction Act, 1890: "Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of Her Dominions: 1. It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

of which required that a notice of intention to make such an order must be published in the London Gazette at least 40 days before the order was made, applied, and that, as no such notice had been published, the order, in so far as it applied to Northern Rhodesia, was void, and that, on the basis that the parent Order in Council of 1939 was void, so were the Emergency Powers Regulations, 1956, and the Ordinance of 1956 void, and that, accordingly, the restriction orders were also void.

On May 12, 1959, the court adjourned the hearing for notice of the application to be served upon the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District. The following are the material parts of an affidavit sworn by the Secretary of State for the Colonies: "2. The Northern Rhodesia Protectorate is a foreign "country within which Her Majesty has power and jurisdiction "by treaty, grant, usage, sufferance and other lawful means "within the meaning of the Foreign Jurisdiction Act, 1890. "The territory of the said Protectorate is foregn territory under "Her Majesty's protection. It has never been acquired by settle- "ment or ceded to or conquered or annexed by Her Majesty or "any of Her Royal Predecessors nor has Her Majesty or any of "Her Royal Predecessors recognised the same as, nor is it, part "of Her Dominions, but She has power and jurisdiction within "the same. The aforesaid Northern Rhodesia continues to exist "as a Protectorate as aforesaid since the enactment of the "Rhodesia and Nyasaland Federation Act, 1953. 3. I have not "the custody of Andrew Mwenya, nor have I control over his "custody, nor have I ordered Andrew Mwenya to remain in the "Mporokoso District or given any instruction to that effect. As "Her Majesty's Secretary of State for the Colonies I can only "advise Her Majesty with regard to the exercise of Her power "and jurisdiction in Northern Rhodesia and communicate Her "Majesty's orders and instructions to His Excellency the "Governor. Save in the sense that I am not prepared to advise "Her Majesty to approve the policy of instructing His Excellency "the Governor to revoke the restriction order made by His "Excellency in regard to Andrew Mwenya or any Order in "Council or Ordinance empowering His Excellency the Governor "to make such orders, I have not detained Andrew Mwenya or "ordered him to remain in any area, nor do I detain him nor is he "ordered by me to remain in any area, and I have not and have "not had the custody of Andrew Mwenya."

According to an affidavit sworn by the Attorney-General for the Federation of Nigeria, formerly Attorney-General for Northern Rhodesia from 1951 to 1956, the present Constitution of Northern Rhodesia was created by the Northern Rhodesia Orders in Council, 1924 to 1927, and the Northern Rhodesia (Legislative Council) Order in Council, 1959, and "3. The Governor of Northern "Rhodesia is appointed by Her Majesty and is authorised to

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" exercise on Her Majesty's behalf all such powers and jurisdic-
" tion as Her Majesty possesses within the territory and do and
" execute all things as may fall within the terms of Orders in
" Council relating to the territory or by instructions as may from
" time to time be given to him (inter alia) by Her Majesty acting
" through one of Her Principal Secretaries of State. The Gover-
" nor must in performing his office observe such laws as are now
" or shall hereafter be in force in the territory. . . . 4. The Order
" in Council of 1924 provided that there should be a Court of
" Record called the High Court of Northern Rhodesia with full
" jurisdiction, civil and criminal, over all persons and all matters
" within Northern Rhodesia. . . . The civil and criminal jurisdic-
" tion of this court is and was so far as circumstances admit to be
" exercised upon the principles of and in conformity with the
" substance of the law for the time being in force in and for
" England and with the powers vested in and according to the
" course of procedure and practice observed by and before Courts
" of Justice in England except so far as such law may be
" inapplicable or may be modified by Order in Council, Regula-
" tions or Proclamations or Ordinances of the Legislature of
" Northern Rhodesia. . . . 6. I am of the opinion that the High
" Court of Northern Rhodesia has authority to grant and issue
" writs of habeas corpus ad subjiciendum and other prerogative
" writs and to ensure the due execution thereof in Northern
" Rhodesia by virtue of the constitutional provisions hereinbefore
" referred to and sections 10 to 12 inclusive of the High Court
" Ordinance of Northern Rhodesia."

On the resumed hearing preliminary objections were taken by the respondents to the jurisdiction of the court to issue the writ.

The Divisional Court held first that the court had no jurisdiction to issue the writ of habeas corpus to custodians in a protectorate such as Northern Rhodesia in respect of a detention in that protectorate; and, secondly, that the Secretary of State for the Colonies had not a sufficient degree of control to constitute him a custodian of the body to whom the writ could issue.

Mwenya appealed. The grounds of his appeal were that the court was wrong in law in holding (1) that he had not made out a prima facie case against the Secretary of State for the Colonies showing that he had sufficient control over the appellant for the writ to issue, and (2) that there was no jurisdiction to give leave to issue the writ against the Governor of Northern Rhodesia and the District Commissioner.

The second ground of appeal alone was argued before the Court of Appeal.

John Foster Q.C., *Neil Lawson Q.C.* and *Bryan Anns* for Mwenya.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, and *J. R. Cumming-Bruce* for the Secretary of State for the Colonies.

B. J. M. MacKenna Q.C. and *J. G. Le Quesne* for the

Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District.

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The following cases were referred to in argument which are not mentioned in the judgments: *The Northern Charter Land Exploration Co. (1910) Ltd.* v. *The King* [3]; *Ex parte Wyatt* [4]; *In re Pinckney* [5]; *Ex parte Brown* [6]; *In re Mansergh* [7]; *Secretary of State for Home Affairs* v. *O'Brien.* [8]

Cur. adv. vult.

October 13. The following judgments were read:

LORD EVERSHED M.R. This was an application to the Divisional Court of the Queen's Bench Division for an order of habeas corpus on the part of one Andrew Mwenya, a native inhabitant of Northern Rhodesia.

The respondents to the application are the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner for the district in which Mwenya (as he alleges) is "detained." The facts of the case (which are somewhat limited in the evidence so far before us) and the allegations on both sides are fully set out in the judgment of the Divisional Court. As appears therefrom Mwenya is restricted by certain orders from moving out of an area said to be 1,500 square miles in extent, but which we were informed might be considerably greater. Within that area it seems that Mwenya is not subject to anything in the nature of detention or limitation of his movements.

In substance Mwenya complains that he is a British subject, and has by certain orders referred to, purporting to have been made by the Governor of Northern Rhodesia, been unlawfully "detained" in the district in question, and that he is, accordingly, entitled to invoke the jurisdiction of the Queen's Court here to make an order of habeas corpus directed to one or more of the respondents to his application.

For reasons stated in the judgment of the Divisional Court, which I do not find it necessary to repeat, Mwenya alleges that the orders mentioned were invalidly made: he also alleges that the Order in Council establishing competent courts in Northern Rhodesia (to which application for habeas corpus could or might otherwise have been made) is also for similar reasons invalid.

The respondents by way of answer (we understand) deny the invalidity of any of the orders impugned (including the orders for Mwenya's detention or restriction). They also do not admit: (1) that Mwenya is a British subject, or (2) that Mwenya's "confinement" was detention of such a nature as would, in any

[3] [1931] 1 Ch. 169; 46 T.L.R. 446.
[4] (1836) 5 Dowl. 389.
[5] [1904] 2 K.B. 84; 20 T.L.R. 363.
[6] (1864) 5 B. & S. 280.
[7] (1861) 1 B. & S. 400.
[8] [1923] A.C. 603.

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event, entitle him to apply for an order of habeas corpus. The Secretary of State also contends that, in any case, his "control" over Mwenya (if any) is not such as makes him a custodian of his body for the purpose of habeas corpus.

But in addition to the above answers, the respondents submitted before the Divisional Court that no writ or order of habeas corpus could be directed to, or in relation to detention in, a British "protectorate" (as distinct from territory which is a colony or part of Her Majesty's "foreign dominions" properly so called). It is conceded on all hands—and proved by the Secretary of State's affidavit—that Northern Rhodesia is a "protectorate" and not either a colony or a "foreign "dominion" of Her Majesty as that last-mentioned phrase is strictly understood.

Before the Divisional Court this last submission was treated as a preliminary objection to Mwenya's application, and that court decided it adversely to the applicant. The Divisional Court also held that Mwenya was not, in any event, in the "custody" of the Secretary of State. The reserved judgment of the Divisional Court is dated July 3. The court expressed no view upon any of the other questions above mentioned—i.e., upon what might be called particular facts or "merits" of the case—but proceeded on certain "assumptions" which were expressed in the judgment as follows[1]: (1) that the applicant was a British "subject; (2) that the said Orders in Council were invalid and "that so, too, were other Orders in Council in regard to Northern "Rhodesia, including that setting up a High Court having the "power to issue the writ of habeas corpus; and (3) that the "applicant's confinement was of such a nature as to enable him, "if he had been confined in this country, to apply for the writ."

From that decision Mwenya has appealed, and, as a result of the application before us on July 20, we expedited the hearing (since it related to the liberty of the subject or assumed subject). We heard arguments on July 24, 27, 28 and 29.

The argument before us was confined to the preliminary point above mentioned: I do not therefore in this judgment go into the further question whether the Secretary of State has such a control over the alleged detention of Mwenya as would, in any case, justify an order being made against him.

In the course of the argument on the first three days I expressed uneasiness at dealing with a matter of this kind on the basis of a number of hypotheses set forth in the passage of the judgment of the Divisional Court above set out. I must not be taken to be criticising the Divisional Court or the parties who invited the Divisional Court to deal separately with the "pre-"liminary objection." As things have turned out, I confess my uneasiness has remained. This is a case affecting the liberty of one who alleges that he is a British subject illegally detained.

[1] [1959] 3 W.L.R. 509, 515.

The "preliminary point" turns out to be one involving a constitutional question of very considerable difficulty on which (like the Divisional Court) we have found it necessary to reserve judgment, so that it was impossible for us to express our view before the long vacation. No doubt if we shared the view of the Divisional Court, it would be the end of the matter (subject to an appeal to the House of Lords). But if we take a different view, it is by no means the end of the case, since there then remain many vital questions to be determined, including particularly: (1) Do the orders of which he complains constitute such a "detention" as would entitle Mwenya in any event to apply for an order of habeas corpus? In other words, is there in any relevant sense anyone who can be called a "jailer" of Mwenya, or who is otherwise controlling or detaining his body? (2) Are there courts established in Northern Rhodesia competent to make orders of habeas corpus and, if so, is the effect of the Rhodesia and Nyasaland Federation Act, 1953, and the Emergency (Transitional Provisional Ordinance, 1956, the Order in Council made thereunder, and particularly section 13 (2) of that order, to exclude any right or power of the Queen's Bench Court here to make the order asked? Upon all these questions an answer favourable to Mwenya has been assumed for the purposes of arguing the preliminary point. Yet they are questions essential to the application, and the Divisional Court has expressed no view upon them, as it has also expressed no finding on the nature and extent of the power, jurisdiction or sovereignty (whichever be the right word) exercised by the Crown in regard to Northern Rhodesia as a so-called "protectorate." Nor have we had our attention directed to any evidence upon any of these matters.

As I shall later observe, there is in the evidence before us no detail whatever as to the nature of the Northern Rhodesia Protectorate, in the sense that it does not appear at all what were the treaties or other arrangements made or with whom, nor does it appear what is, in fact, the extent of the power or jurisdiction internally exercised in Northern Rhodesia by or on behalf of the Crown, or the Crown and Parliament.

The Attorney-General repudiated the suggestion that he was inviting the court to deal with the application on a basis of hypotheses. His point was and is the simple one, that is to say, that the Court of Queen's Bench in England has, in any case, no power or jurisdiction to direct a writ or order of habeas corpus to a protectorate, and he submitted that such submission was a proper and legitimate one to take by way of preliminary objection.

I repeat that I am not to be taken as criticising anyone, but repeat also that I am uneasy about the consequence; and in case the matter goes to the House of Lords, I have felt it right to give expression to my uneasiness. It may be that no one can complain of any injustice founded on delay. But the fact is that

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the question raised by the preliminary point is one of considerable difficulty and complexity. Further, the difficulty is much enhanced by the circumstance that (as appears from cases) the word "protectorate" is not one of recognised or precise meaning. It follows that since we have not gone into, or been invited to go into (and have, of course, no decision upon), the constitutional relationship between Northern Rhodesia and the Crown, or upon the extent of the exercise by the Crown—or of the Crown and Parliament—of "power," "jurisdiction," "dominion" or "sovereignty" (whichever be the appropriate word) in Northern Rhodesia, we are left to decide what, in some degree at least, must be a general and academic question, namely: Has the court here any jurisdiction to make an order of habeas corpus directed to any territory other than territories strictly described as colonies or foreign dominions (as that phrase is understood, for example, in the Habeas Corpus Act, 1862)? And the Attorney-General, in the course of his argument, seemed to me to concede that he wished to avail himself of the present case to get a decision upon this important but general question.

Having said so much, for reasons which I hope will be self-evident, and which may (I also hope) explain and excuse any delay that may occur before the present case is finally determined, I turn to the question as formulated by the Attorney-General.

The history of the prerogative writ of habeas corpus is traced in Sir William Holdsworth's History of the English Law, vol. 9, pp. 108–125. Whatever its origin, it appears to have served procedural uses in the Court of King's Bench from the time of King Edward I, but was eventually extended and developed so that it came "to be the most efficient protection ever invented "for the liberty of the subject." During the time of Sir Edward Coke and the ensuing struggle between Parliament and the common law on the one hand, and the sovereign on the other, its use was proclaimed to be in conformity with the principle of Magna Carta, and its purpose to prevent or redress the use of arbitrary power. No doubt its scope was ordinarily exercised within the realm; but it seems clear that at this time it was not regarded as limited to England. So much, indeed, was not doubted in the argument, and is shown by the judgment of the Divisional Court and the extensive citations made in that judgment.[2] I do not repeat in full those citations; it is clearly stated in the quotation from Bacon's Abridgement and the Commentaries of Sir William Blackstone (and in almost identical language) that the writ (of habeas corpus) runs into all parts of the King's dominions: "for the King is at all times entitled to have "an account why the liberty of any of his subjects is restrained "wherever that restraint be inflicted" (Blackstone, vol. 3, p. 131) The Divisional Court proceeded to refer also to the passages from Lord Mansfield C.J. in *Rex* v. *Cowle*,[3] on which Mwenya much

[2] [1959] 2 W.L.R. 509, 516.

[3] (1759) 2 Burr. 834, 853, 854, 855, 856.

relied, including particularly the sentence: "There is no doubt "as to the power of the court; where the place is under the "subjection of the Crown of England." To these citations I add also the cited passage from Sir Edward Coke's report in *Calvin's* case,[4] also much relied upon by Mwenya: "But the "other kind of writs that are mandatory and not remedial, are "not tied to any place, but do follow subjection and ligeance in "what country or nation soever the subject is. . . ."

These passages from Bacon, Blackstone, Lord Mansfield and Sir Edward Coke were the basis of the decision of Cockburn C.J. in *Ex parte Anderson*[5] that the writ of habeas corpus might be issued to "all parts of the dominions of the Crown of "England"; though it was particularly the judgment of Lord Mansfield, in a passage immediately following that already quoted, which laid it down that it was otherwise in the case of[6] "foreign dominions which belong to a prince who succeeds to "the throne of England"—for example, the electorate of Hanover.

The judgment in *Ex parte Anderson*[7] is, to my mind, historically at any rate, of considerable importance, and it was cited by both Vaughan Williams L.J. and Kennedy L.J. in this court in *Ex parte Sekgome*.[8] In the circumstances, I think it right to repeat in this judgment the passage from Cockburn C.J.'s judgment (being substantially the whole of it) cited in the Divisional Court. It is as follows[9]: "Nevertheless, it is to be "observed that, in establishing a local judicature in Canada, our "Legislature has not gone so far as expressly to abrogate the "right of the superior courts at Westminster to issue the "writ of habeas corpus to that province; which writ, in the "absence of any prohibitive enactment, goes to all parts of "the Queen's dominions. Lord Coke, Lord Mansfield, Black-"stone and Bacon's Abridgement all agree that writs of habeas "corpus have been and may be issued into all parts of the "dominions of the Crown of England, wherever a subject of "the Crown is illegally imprisoned or kept in custody. In addition "to these dicta of eminent authorities, we have actual precedents "of the issue of the writ, in very modern times, into the Islands "of Man, Jersey and St. Helena. Inasmuch, therefore, as the "power of this court thus to issue the writ has been not merely "asserted as matter of doctrine, but carried into effect in practice; "and as the writ has issued even into dominions of the Crown "in which there is an independent local judicature; we think that "nothing short of legislative enactment would justify us in refus-"ing to exercise the jurisdiction, when called upon to do so for "the protection of the personal liberty of the subject."

It is, no doubt, true that none of those very learned men, not

[4] (1609) 7 Co.Rep. 20a.
[5] (1861) 3 E. & E. 487.
[6] 2 Burr. 834, 856.
[7] 3 E. & E. 487.
[8] [1910] 2 K.B. 576; 26 T.L.R. 439.
[9] 3 E. & E. 487, 494.

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Bacon nor Blackstone nor Sir Edward Coke nor Lord Mansfield, was addressing his mind to the problem which is now raised before us. It is also true, as pointed out in the judgment of the Divisional Court, that the decision in *Ex parte Anderson* [9] may be said to have been subjected later to some measure of qualification. Yet it must, in my judgment, be taken as clear that at least from the date of *Ex parte Anderson* [9] the writ of habeas corpus was (apart from any statutory restriction) treated as running in any part of the colonies or dominions of the Crown property and strictly so called. It is so stated in Holdsworth (vol. 9, p. 124): "It was a well established principle that "though the writ could not issue into the foreign dominion of a "prince who succeeded to the throne of England and therefore "not to Scotland or Hanover, it could issue into any other part "of the King's dominions. It was held, therefore, in 1861 in "*Ex parte Anderson* [9] that it could issue into Canada. . . ." Moreover, the terms of the Habeas Corpus Act, 1862, appear to be a statutory acknowledgment of that principle.

So far, I do not think that I am expressing any view different from that entertained by the Divisional Court; for that court, if it indicated some doubt as to the validity and basis of Cockburn C.J.'s decison, acknowledged, as I understand it, that (apart from the effect of the Act of 1862) the writ would issue to any part of the Queen's dominions properly so called. The question remains, is its scope limited at most to those territories? And it was the view of the Divisional Court that the terms of the Act of 1862 carried at least an implication (by reason of the Act's limitation to the Queen's dominions properly so called) that the scope of the writ was so conscribed and would not extend to a "protectorate."

There is no authority binding on this court which covers the question. In *Ex parte Sekgome* [10] the issue of a writ of habeas corpus to the Protectorate of Bechuanaland was sought but, as the Divisional Court observed, the broad proposition in this case of the Attorney-General and his co-respondents does not appear to have been raised; on the contrary, the last part of the report of Mr. Rowlatt's argument for the Secretary of State seems to me rather to concede the opposite view. "Thirdly," he is reported as contending,[11] "although the Bechuanaland "Protectorate is, it is contended, a foreign country within the "meaning of the Foreign Jurisdiction Act, 1890, that does not "necessarily prevent the application of the Habeas Corpus Act, "1862. Prima facie the writ of habeas corpus runs in the "Crown's dominions. For the purpose of habeas corpus dominion "cannot be judged by the same test as it is in the Foreign "Jurisdiction Act, 1890. Any territory in which the Crown's "writ of habeas corpus runs is part of the Crown's dominions "for that purpose, and if there were no court in the particular

[9] 3 E. & E. 487, 494.
[10] [1910] 2 K.B. 576.
[11] Ibid. 587.

" place competent to issue the writ the old jurisdiction of the " King's Bench to do so possibly still exists." However that may be, there is no doubt that Kennedy L.J. was of opinion that the writ would not run in the Bechuanaland Protectorate as not being part of His Majesty's dominions; and Kennedy L.J.'s view was adopted by Cassels J. in the case of *In re Ning Yi-Ching*.[12] It is nonetheless clear that the other two members of this court took a different view upon this matter from Kennedy L.J. I do not repeat in this judgment the citations made by the Divisional Court from the judgments. I add, however, a further passage from that of Vaughan Williams L.J.[13]: " In *Ex parte* " *Anderson*[14] no doubt seems to have been entertained as to " the power of the court at Westminster to issue a writ of habeas " to go to any place under the subjection of the Crown of England " whenever it is suggested to the court that a subject of the " Crown is illegally imprisoned. The only doubt seems to have " been as to the propriety of the issuing of such a writ to Canada, " a colony where separate jurisdiction has been established. The " statute of 1862 seems to have been passed merely for the " purpose of abrogating the jurisdiction of the courts at West- " minster in favour of colonial independence by declaring " that no writ of habeas shall issue out of England into a " colony or foreign dominion where the Crown has a court of " justice having authority to grant and issue such writ and to " ensure throughout such colony or dominion due execution " thereof. I cannot, therefore, agree that the rule for a habeas " should be discharged on this ground." I add also the following further passage from Kennedy L.J.'s judgment.[15] I apologise for the length of the citation. " But I see no reason to assign " to the phrase," that is, " His Majesty's dominions," " less " than its ordinary force when it occurs in the Habeas Corpus " Act, 1862 (25 & 26 Victoria, chapter 20), in the preamble of the " Foreign Jurisdiction Act, 1890, and in the judgment of the " Court of Queen's Bench dealing with the question of the issue " of the writ from the common law standpoint in the case of " *Ex parte Anderson*,[16] which was decided shortly before the " Habeas Corpus Act, 1862, and which was, I believe, the cause " of the passing of that statute. If this view is correct, the " protectorate of a foreign country in which His Majesty has " and exercises power and jurisdiction as a protecting and not as " a ruling sovereign, and which he has never annexed to the " possessions of the British Crown, certainly cannot properly be " treated as part of His Majesty's dominions. The one and only " fact, upon the evidence in the present case, which has presented " to my mind any difficulty in so regarding the whole of this " Bechuanaland Protectorate has been this. It appears in the " evidence, and is not disputed, that in regard to a portion of

[12] (1939) 56 T.L.R. 3.
[13] [1910] 2 K.B. 516, 592.
[14] 3 E. & E. 487.
[15] [1910] 2 K.B. 576, 622, 624.
[16] 3 E. & E. 487.

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" that protectorate, as established in March, 1885, and dealt " with by the Order in Council of May 9, 1891, and in the sub- " sequent proclamations made under that Order, the chiefs of " the local tribes in 1904 (see the Order in Council of May 16, " 1904) ' abandoned all rights and jurisdiction in and over ' such " portion, and the last-mentioned Order defined the lands of " which such portion consisted to be ' Crown lands ' and vested " them in the High Commissioner, and that Gaberones, where " Sekgome is confined, lies within this area. Further, by pro- " clamations dated respectively February 7, 1905, June 7, 1905, " and June 30, 1905, the High Commissioner, acting under the " powers conferred upon him by the Order in Council of May 16, " 1904, has in fact made grants of certain tracts of these ' Crown " ' lands ' whilst retaining the district of and about Gaberones " as ' the Gaberones Crown Reserve.' Now I must frankly say " that I find it difficult to discern a clear line of practical distinc- " tion between such dealing with the lands in and over which the " local chiefs have abandoned all rights and jurisdiction and an " annexation of those lands by the Crown. But, as Lord " Halsbury L.C. observed in the course of the argument of " counsel in *Staples* v. *The Queen*,[17] ' I never heard that you " ' can force a sovereign to take territory '; and not only does " the Order in Council of May 16, 1904, itself (clause 4) state " ' This Order may be cited as " The Bechuanaland Protectorate " ' " (Lands) Order in Council, 1904," ' but the subsequent " proclamations relating to these ' Crown lands,' to which I have " referred, designate them in their preambles as certain lands " ' situate within the Bechuanaland Protectorate ' which have " been vested in the High Commissioner by the above-mentioned " Order in Council. The clear inference from such language is " that these Crown lands (which, as I have said, include " Gaberones) have not been annexed to His Majesty's dominions, " but are treated by the sovereign as still integral portions of " the protectorate."

I have added this last citation because it seems to me to indicate that there was present to the mind of Kennedy L.J. the point which I think should be decisive of any case of this kind—namely, that the question should not be determined by reference merely to the fact that the country in question bears the label " protectorate," but must, or at least may, depend on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or other effective, jurisdiction.

I therefore agree so far with the Divisional Court that, in the existing state of the authorities, the matter must be resolved by reference to principle. But it is, I regret, at this point that I have felt compelled respectfully to a different conclusion from

[17] [1896] 2 Q.B. 425.

that stated by Lord Parker C.J. The matter of principle is there stated in the judgment[18]: "The writ of habeas corpus is a "prerogative writ, namely, as this court conceives it, a mani- "festation of the sovereignty of the Crown and an instrument by "which that sovereignty is exercised. It follows that there can "be no power to issue this writ which is not derived from, or "which is more extensive than, such sovereignty. The Crown "is not sovereign over the common law but retains only such "part of that unqualified plenitude of absolute power which "constitutes sovereignty as the common law accords to the "Crown. At the same time the prerogative is part of the "common law of this country and exists by force and virtue of "the law. Therefore the writ of habeas corpus may lawfully be "issued only in cases where the common law or some statute "permits or requires the sovereign to issue it. The sovereign "herself cannot issue the writ otherwise than through this court, "which derives any jurisdiction it has from her, and in which in "contemplation of law she is always present.

"The concept of sovereignty of any ruler or State is in its "aspect of power essentially related to the area throughout "which the sovereign power is lawfully exercisable, that is, is "exercisable without restraint or hindrance by any competing "sovereignty. It is self-evident, in the opinion of the court, "that throughout the territorial dominions of the Crown—that "is all territory belonging to the Crown, as distinct from territory "belonging to any person who is for the time being King or "Queen (which if abroad would remain for this purpose "'foreign')—the Crown possesses full sovereignty provided "that, or to the extent that, the common law has not imposed "limitations upon that sovereignty. Thus by the Coronation "Oath the British sovereign undertakes to 'govern the people "'of the United Kingdom of Great Britain and Northern Ireland "'and the dominions thereto belonging, according to the "'Statutes in Parliament agreed on and the laws and customs "'of the Realm.'

"Looked at in this way, the undoubted duty of the sovereign "to protect her subjects, and the undoubted right of the subject "to protection, are limited to protection in the sovereign's "dominions."

No arguments were in fact addressed to us upon this statement of principle by the Divisional Court. As I understand it, however (and I hope I do not misinterpret it), the statement (and particularly its second paragraph) seems to proceed to some extent at least upon the basis of the theory of the indivisibility of sovereignty, particularly associated with the name of Austin. But if this theory was accepted in England 100 years ago (and influenced, as I shall show, the prevalent English view of those days as regards protectorates) it is not, as I believe, accepted

[18] [1959] 2 W.L.R. 509, 523, 524.

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now. Equally it is, I think, clear that if 100 years ago the notion of a protectorate was exemplified by the case of the Ionian Islands, as regards which the power and jurisdiction of this country were limited to matters of external relations, in modern times the nature of protectorates may vary enormously, and may extend to cases where the protecting power assumes in regard to the protected country a jurisdiction over its internal affairs (as well as external relations) which is exclusive of other jurisdictions and is for practical purposes indistinguishable from the power or jurisdiction exercised over colonies or conquered countries. In the recent case in this court of *Nyali Ltd.* v. *Attorney-General* [19] Morris L.J. cited the judgment of the Privy Council in *Sobhuza II* v. *Miller*,[20] delivered by Lord Haldane: "The question which at once presents itself is, what is the "meaning of a protectorate? In the general case of a British "Protectorate, although the protected country is not a British "dominion, its foreign relations are under the exclusive control "of the Crown, so that its Government cannot hold direct com- "munication with any other foreign power, nor a foreign power "with its Government. This is the substance of the definition "given by Sir Henry Jenkyns at page 165 of his book on British "Rule and Jurisdiction Beyond the Seas. Their Lordships think "that it is accurate, and that it carries with it certain conse- "quences. The protected State becomes only semi-sovereign, "for the protector may have to interfere, at least to a limited "extent, with its administration in order to fulfil the obligations "which international law imposes on him to protect within it "the subjects of foreign powers. A restricted form of extra- "territorial sovereignty may have its exercise called for, really "involving division of sovereignty in the hands of protector and "protected. But beyond this, it may happen that the protecting "power thinks itself called on to interfere to an extent which "may render it difficult to draw the line between a protectorate "and a possession," and: "The Foreign Jurisdiction Act thus "appears to make the jurisdiction, acquired by the Crown in a "protected country, indistinguishable in legal effect from what "might be acquired by conquest. It is a statute that appears to "be concerned with definitions and secondary consequences "rather than with new principles." Having referred to *Rex* v. *Earl of Crewe* [21] and *In re Southern Rhodesia*,[22] Lord Haldane said [23]: "Both of these cases imply that what is done may be "unchallengeable on the footing that the Order in Council, or "the proclamation made under it, is an act of State. This "method of peacefully extending British dominion may well be, "as little generally understood as it is, where it can operate, in "law unquestionable."

[19] [1956] 1 Q.B. 23; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646.
[20] [1926] A.C. 518, 522; 42 T.L.R. 446.
[21] [1910] 2 K.B. 576.
[22] [1919] A.C. 211.
[23] [1926] A.C. 518, 525.

It is at this point that I venture to revert to the state of the evidence and the assumptions that we have to make in the present case. The Secretary of State for the Colonies in his affidavit—following closely the similar affidavit of Lord Crewe in *Sekgome's* case [24]—says: "The Northern Rhodesia Protectorate "is a foreign country within which Her Majesty has power and "jurisdiction by treaty, grant, usage, sufferance and other lawful "means within the meaning of the Foreign Jurisdiction Act, "1890. The territory of the said protectorate is foreign territory "under Her Majesty's protection. It has never been acquired "by settlement or ceded to or conquered or annexed by Her "Majesty or any of Her Royal predecessors, nor has Her "Majesty or any of Her Royal predecessors recognised the same "as, nor is it, part of Her dominions, but She has power and "jurisdiction within the same." But one may ask, what in the end of all is the extent of the power and jurisdiction? With whom were the "treaties" (if any) made and what was their nature? What other power, jurisdiction or "sovereignty" exists in the country and in whom is it vested? One thing seems plain enough, namely, that the terms of the Rhodesia and Nyasaland Federation Act, 1953, contain no hint of any power or jurisdiction vested elsewhere than in the Crown or in the Crown and Parliament, and no hint of any distinction in jurisdiction between Northern Rhodesia and the other components of the federation. Finally, the applicant, Mwenya, a native of the country, is, or is for present purposes conceded to be, a British citizen.

If, then, the nature and extent of the "power," "dominion," "jurisdiction" or "sovereignty" (whichever word you choose to use) as regards the internal affairs and governance of Northern Rhodesia is "indistinguishable in legal effect" from what might be acquired by conquest, then, I ask myself, upon what principle is it to be said that the writ of habeas corpus, this "most "efficient protection ever invented for the liberty of the "subject," will not run? On the assumption that I am making, upon what principle can the Court of Queen's Bench be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained? For my part—and always on the assumption that I am making—I can see no good answer to the question. Put otherwise, the answer must, as I think, be (and as Kennedy L.J. thought): because the country concerned is a "foreign "dominion" from which the jurisdiction, so far as relevant, of the Crown or the Crown and Parliament, is excluded or has never been assumed or exercised.

I have found support for the view that I have formed, and particularly for the infinite variety which the relevant characteristics of protectorates may assume, in the chapter entitled "Protectorates, Spheres of Influence and Barbarous Countries" (Chapter 3) in Mr. W. E. Hall's book (1894) on The Foreign

[24] [1910] 2 K.B. 576.

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Jurisdiction of the British Crown. After stating at the beginning of his chapter that the meaning of the term "protectorate" is indefinite and variable, having only the common characteristic that the protected community has parted with freedom of action in foreign affairs, Mr. Hall proceeds to show that as regards the extent of jurisdiction exercised within a protected country the view and practice of Great Britain were, for some time at least, far more limited than those of Germany and France. "It is "more probable," he says (p. 206), "that the Austinian theory "of the indivisibility of sovereignty furnished the influence under "which [English statesmen and lawyers] long pesisted in "regarding protected States or communities as independent, "and which induced them, arguing logically from their premises, "to repudiate all possession of power within the territory, whether "by way of privilege or obligation, except over British subjects." Thus, the author states (p. 207) his belief that all States represented at the Berlin Conference of 1884–85, except Great Britain, maintained that a protectorate included the right of administering justice over the subjects of other civilised States. Mr. Hall then shows how the British view changed, citing by way of example the Pacific Protectorates. "In this case," he wrote (p. 215), "authority over foreign subjects is appropriated independently "of consent on the part of other European states. It rests upon "the implied assertion that exercise of jurisdiction on all persons "within a protected territory is so necessary, or at least so "natural, a consequence of the protectorate, where native "administration and judicial organisation is inadequate, that "foreign powers may be expected to acquiesce in its enforce-"ment in the same manner as they acquiesce in the effects of "complete sovereignty": and later (p. 225): "If the foregoing "statement of the position held by Great Britain within a "protected territory is accurate, it may be expected that the "English courts will consider that, in assuming a protectorate, "the Crown takes to itself powers which, so far as they go, are "identical with those that it would have in a conquered country. "It can prescribe laws until Parliament chooses to legislate; "and it can subject to its administration all persons upon the "protected soil. This is done in those protectorates where "general jurisdiction is claimed. The Crown, in the exercise "of its prerogative rights, legislates by applying English law, so "far as it is suitable to a rough state of society; and it applies "the law indifferently to all persons whom it finds within the "territory over which, by agreement or assumption, it has "obtained a limited territorial jurisdiction." Finally, he deals with the question, Are natives of the protceted country to be treated as foreigners or as subjects of the protecting State? "If, "however, the views expressed (p. 227) in the foregoing sections "are well founded, it becomes logically necessary that the "amount of protection shall be afforded to the members of a "protected community, when within the territory of a foreign

" state, which is implied in the political connection between " Great Britain and their country, and which is correlative to " the security offered by Great Britain to persons who enter its " protectorates under the wing of a foreign power. In other " words, they share the right of subjects to enjoy the advantages " of such good order as, in different degrees, is maintained within " the civilised possessions of a European state and in its " protected territories." It is in reference to this last question that the fact or assumed fact may be relevant that Mwenya is a British subject.

For these reasons I am, for my part, and with all respect to the contrary view of the Divisional Court, unable to accept the contention that because Northern Rhodesia is a " protectorate," therefore, and as a matter of course and of principle, it follows that the Court of Queen's Bench has no power or jurisdiction to make an order of habeas corpus in the case of a British subject in that country who is unlawfully or arbitrarily detained there. I need not say that I do not intend by any means to assert a contrary general proposition—namely, that the writ of habeas corpus will run in any protectorate—still less that it will run in any foreign country. But, as it seems to me, if upon a proper investigation of the facts it appears that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British colony or a country acquired by conquest, then in conformity with the nature of the writ as expounded by the learned authors to whom I have referred, Bacon, Blackstone, Coke, Mansfield, I see for my part no reason for denying jurisdiction to the court.

It is true that the result will be (if I am right) that the question in any given case will or may involve inquiry as to the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown. But to this I suggest there is a twofold answer, namely: (1) As a matter of history and logic, the availability of the " most efficient protection ever invented for the " liberty of the subject " should not depend upon a mere label or on matters of convenience. (2) It is inconsistent with the general principles of our law to try to decide broad general questions without regard to the facts of particular cases. If the fact is that the power and jurisdiction of the Crown vis-à-vis Northern Rhodesia is (as the Act of 1953 seems ex facie clearly to suggest) in no whit different from that exercised in a " colony " or " dominion," then in my view there is nothing, historically or logically, which bars the making of an order of habeas corpus directed thereto—and, indeed, that the balance of opinion in the authorities is plainly the other way. What may be the result in other cases is a matter which will depend on the facts of those cases when they come before the court.

In conclusion, then, I do not attempt anything in the way of definition which would or might provide the answer to other cases, beyond saying that the jurisdiction ought not to be limited

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to territories, outside England, which are strictly labelled "colonies or foreign dominions," but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be "under the subjection of the Crown" and in which the issue of a writ will be regarded (in Lord Mansfield's words) as "proper and efficient." In other words, I would hold that we ought not in this case to lay it down, in disregard (as it seems to me) of what has been said by the highest authorities, that the jurisdiction is limited to colonies and foreign dominions strictly so called; and, disagreeing accordingly with the Divisional Court, should refer the matter back to them, in the light of what is said above, to determine the other issues raised in the present case.

ROMER L.J. The essential contention of the Crown on the preliminary issue which was argued before us may be expressed syllogistically as follows: The writ of habeas corpus will in no circumstances issue into any British Protectorate; Northern Rhodesia is a British Protectorate; therefore the writ will not issue into Northern Rhodesia. There is no difficulty with regard to the second premise of this syllogism, for it is sufficiently established by the affidavit of Mr. Lennox-Boyd. The difficulty, in my judgment, lies in the first premise. In the argument which counsel for the Crown addressed to us with a view to establishing it, they were content, it appeared, that almost every material assumption should be made against them. But they contended (inter alia) that it is irrelevant—and, indeed, not permissible—to inquire into the nature and extent of the control which the Crown and Parliament have imposed on a protectorate; and that it is equally irrelevant to inquire whether courts have been established there with jurisdiction to issue writs of habeas corpus themselves. The reason why it is suggested that none of such matters as these is of relevance on the present issue is that a British Protectorate, no matter what features it possesses, remains foreign territory and there is no jurisdiction to investigate by habeas corpus machinery the validity of the detention of any person, even a British subject, within such territory.

I entertain a suspicion, amounting almost to a certainty, that this broad and basic proposition of the Crown will be found, when the facts have been explored, not to arise for decision at all in the present case. It is, accordingly, a matter of some regret, in my opinion, that this court has been asked to pronounce upon it in the present appeal; and I share the feeling of uneasiness to which the Master of the Rolls has referred in his judgment. Inasmuch, however, as the Divisional Court have accepted the Crown's proposition, and we are asked to decide whether they were right in doing so, we are bound as it seems to me to express our views upon the matter.

I am not prepared to accede to the submission of the Crown in the general and unqualified way in which it has been presented.

No authority was cited to us which compels us to accept it; and in the absence of such authority I can see no satisfactory principle upon which the Crown's proposition should be supported. The degree of sovereignty assumed and exercised by the Crown, at the instance of Parliament, when a protectorate is established varies in every individual case. It may be confined to the control of the protectorate's foreign relations, in which case all matters of an internal and domestic character are left wholly in the hands of the native sovereignty or power. On the other hand "it may happen that the protecting power thinks "itself called on to interfere to an extent which may render "it difficult to draw the line between a protectorate and a "possession" (*per* Lord Haldane in delivering the judgment of the Privy Council in *Sobhuza II* v. *Miller*[25]). A similar view is expressed in Jenkyns' British Rule and Jurisdiction Beyond the Seas (p. 192). It is quite clear from the language of the Habeas Corpus Act, 1862, that Parliament recognised the jurisdiction of the High Court in England to issue writs of habeas corpus into the colonies or foreign dominions of the Crown unless courts of justice had been lawfully established there having authority to grant and issue such writs themselves. If so, it would seem to be an illogical anomaly that the writ could not issue into protectorates of the kind envisaged by Lord Haldane in which no courts had been established capable themselves of issuing such writs. As is stated in the passages from Blackstone's Commentaries and Bacon's Abridgement cited in the judgment of the Divisional Court, the object, for relevant purposes, of the writ of habeas corpus is that the sovereign should be informed why any of her subjects are imprisoned and be satisfied as to the validity of their detention. The machinery provided by the writ for obtaining this information would obviously be ineffective in relation to any territory in which the Crown had to no extent displaced the sovereign power; and because of this, and also because of the comity of nations, the writ would not issue into, for example, the United States of America for the purpose of inquiring into the detention of a British subject who is imprisoned there. But in territory in which the Crown, on the advice of Parliament, has assumed such a degree of power and control that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results, it is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory. The contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate which was in substance a colony but which had no effective courts of its own. I think that counsel for the Crown were disposed to agree that hardship such as this might arise if the full width of their submission were to be accepted; but they said that it was a matter

[25] [1926] A.C. 518, 523.

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for Parliament to deal with if they thought it proper to do so and that however closely a protectorate may have become assimilated to a colony it nevertheless remains foreign territory and habeas corpus cannot therefore issue into it. For myself I do not believe that the right of the sovereign to inquire into the liberty of her subjects depends on the narrow distinction between territory which is part of Her Majesty's dominions in substance and territory which has become part of her dominions in fact by a formal Act of annexation. The question whether the writ can issue does not, in my judgment, depend upon such a distinction as that but on the propriety and effectiveness of issuing it. The propriety and effectiveness of issuing it into Northern Rhodesia may have to be decided hereafter; but for the purpose of considering the validity of the Crown's submission it must be assumed that in the case of some protectorates the issue of the writ would be both proper and effective.

As I have already indicated, there is no authority, so far as I am aware, compelling this court to hold that the writ of habeas corpus will not issue into any British Protectorate. The decisions and judicial utterances relevant to the question have been exhaustively reviewed and considered in the judgment of the Divisional Court and by the Master of the Rolls, and I do not propose to consider them again. In *Cowle's* case [26] Lord Mansfield used language which, if taken at its face value, is inconsistent with the Crown's contention. Vaughan Williams L.J., in *Sekgome's* case,[27] clearly took the view that the writ could in a proper case issue into a protectorate, and I agree with that view notwithstanding the contrary opinion entertained by Kennedy L.J. on the question.

I accordingly agree with the Master of the Rolls in rejecting the broad proposition which the Crown advanced before us. I agree also with him in thinking that the matter will have to be referred back to the Divisional Court for inquiry into the further matters which arise upon the view we have taken and to which he has referred in his judgment. Mr. Cumming-Bruce urged on us that the courts cannot inquire into the degree of sovereignty which has been achieved in Northern Rhodesia or in any other British Protectorate. He cited no authority, however, in support of that proposition and I can find no foundation for it in principle. Moreover, the proposition is difficult to reconcile with Lord Haldane's observations in *Sobhuza II* v. *Miller*,[28] and with Denning L.J.'s judgment in *Nyali Ltd.* v. *Attorney-General*,[29] in which the Lord Justice said [30] that in regard to a protectorate one must look to the acts of the Crown to see what jurisdiction it has exercised. I am therefore unable to accept Mr. Cumming-Bruce's submission on this point. I agree that the appeal should be allowed.

[26] Burr. 834.
[27] [1910] 2 K.B. 576.
[28] [1926] A.C. 518, 523.
[29] [1956] 1 K.B. 1.
[30] Ibid. 15.

SELLERS L.J. There may be, and without prejudging them there would appear to be on the face of the matters raised, good reasons why the writ of habeas corpus sought in this application would not be granted if the matters involved were heard and determined.

But those issues do not call for our consideration. They can, it is said by the Crown, all be treated as answerable in favour of the applicant. The present and, it is submitted, the conclusive answer to the application is that the English courts have no jurisdiction to issue a writ of habeas corpus ad subjiciendum in respect of a British subject detained wrongfully and illegally in a British Protected Territory. The British subject in such a territory, whether resident or temporarily on business or on holiday, cannot, it is said, look to this country's courts to restore him to freedom of which he has been deprived without justification, notwithstanding that if a court of this country were to inquire into the circumstances, to declare the detention unjustified and to order his release, the order could be carried out by reason of the power and force of the internal governmental control which this country might exercise over the territory in question.

If the judgment of the Divisional Court from which this appeal comes is right, then the power of the historic writ of habeas corpus is a more limited and qualified safeguard to the liberty of the subject than would appear to be necessary. The subject in Southern Rhodesia within Her Majesty's dominion may claim this "most famous" of English writs but not the subject in Northern Rhodesia, even though the rights of the Crown in the two territories may be "indistinguishable in legal effect," to use Lord Haldane's words already quoted by the Master of the Rolls.

There would be much force in an argument which set up and established the impossibility of enforcing an ensuing order of a court of this country, as in the case of a detention in a foreign country which was sovereign and independent, and over which our country had no jurisdiction or control, or in which our powers and activities were so limited and restricted that there would be conflict and confusion, if not open hostility, with the internal government of the territory in question if the order were sought to be enforced.

But that is not the argument and there is no submission that an order of a court in this country to release one of Her Majesty's subjects wrongly detained in Northern Rhodesia could not be enforced.

The affidavit of Her Majesty's Secretary of State for the Colonies sworn on June 12, 1959, states that the Northern Rhodesia Protectorate is a foreign country within which Her Majesty has power and jurisdiction.

If, as for the present purposes of this case must be assumed, the power and jurisdiction of this country to enforce an order of an English court in Northern Rhodesia is as great and as extensive, or even merely as effective as it would be in any part

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of territories which had in fact been acquired by settlement or ceded to or conquered or annexed by Her Majesty or any of Her Royal predecessors, and which is accepted or recognised as part of Her Majesty's dominions, why, one would inquire, should this great bulwark of freedom stop short at a territorial boundary?

It can well be recognised, as development of internal government and independence within Her Majesty's territories and dominions take place or have taken place, within the vast confines of the British Commonwealth of Nations, that the enforcement of a writ of habeas corpus issued from our courts might prove more difficult and be more resented within Her Majesty's territories than in a protectorate and, no doubt, the Habeas Corpus Act, 1862, was a wise and timely provision.

There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce.

Ex parte Anderson [31] is perhaps the most striking of the cases where the writ of habeas corpus has issued from an English court in respect of a detention outside the territorial boundaries of England but within Her Majesty's dominions—in that case—Canada. The case was only argued on one side, and at least two of the judges later tended to minimise its effect, but it brought about the Habeas Corpus Act, 1862, which provided that no writ should issue out of England into any colony or foreign dominion of the Crown having a court competent to grant and issue the said writ and to enforce it. In addition to the authority of *Ex parte Anderson* [31] this statute would impliedly indicate that the writ would lie within Her Majesty's colonies and foreign dominions if no such court existed, and I do not understand the Crown to have submitted otherwise. The submission of the Attorney-General and Mr. Cumming-Bruce was that there was a strict territorial boundary which was conclusive as to the scope of the writ.

If this restriction had throughout history always been the confines of England and the normal territorial boundaries of the court, the argument would have been compelling. But once the writ has gone beyond our shores, as it has, and outside the normal jurisdiction of the court, why should the writ be limited by territorial boundaries? The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it.

If that, as I would hold, is the principle to be applied an

[31] 3 E. & E. 487.

elementary principle of justice, as I see it, having its roots in Lord Birkenhead's words "deep in the genius of our common "law"—then there would be no question of this court extending its own jurisdiction, as the Attorney-General alleged and as he contended rightly, we had no power to do, but only an application of one of the greatest powers of our law to the changing circumstances of a developing society.

It has been accepted at the Bar that the point has not been authoritatively decided, but I do not regard the main trend of opinion to be against the view I have expressed. Many passages in judgments in several cases have been referred to and relied on, one way or the other, to advance or refute the argument. They do not reveal unanimity of opinion, and there is perhaps uncertainty of meaning and intention in some of the expressions used.

The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them (until as late as Kennedy L.J. in *Sekgome*,[32] a refutation of the powers of the English court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make.

The judgment of the Lord Chief Justice in this case cites Blackstone. The reason for his view that the writ would run "into all parts of the King's dominions" is that "for the King "is at all times entitled to have an account, why the liberty of "any of his subjects is restrained, wherever that restraint may be "inflicted."

Bacon's Abridgement is to the same effect. With great respect to the view of the Divisional Court, I would have felt that the substance, if not the precise words, of Lord Mansfield's judgment in *Rex* v. *Cowle*,[33] tended to support the argument for the applicant here on the issue of jurisdiction. Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. "There is no doubt "as to the power of this court; where the place is under the "subjection of the Crown of England; the only question is as to "the propriety." "Subjection" is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned.

Both Lord Mansfield and Cockburn C.J. later in *Ex parte Anderson*[34] drew attention to the fact that in the constitution given to Berwick and Canada respectively, there was no clause restraining or expressly abrogating the right of the superior courts (then at Westminster) to issue the writ of habeas corpus to those territories. On the other hand, the establishment in a protectorate of courts with a comparable jurisdiction might well

[32] [1910] 2 K.B. 576.
[33] 2 Burr. 834.
[34] 3 E. & E. 487.

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be said impliedly to abrogate the right of the courts here to issue a writ of habeas corpus and so, with the same effect as the Habeas Corpus Act, 1862, might be sufficient to defeat an application to these courts.

In this court in 1910 Vaughan Williams L.J. and Farwell L.J. in *Rex* v. *The Earl of Crewe, Ex parte Sekgome*,[35] expressed opinions on the precise question of a writ of habeas corpus issuing from this country into protected territory, but I accept that these views of these judges do not form the basis of their decision in that case.

I would join Vaughan Williams L.J. in this part of his judgment[36]: "I ask myself why, if the writ of habeas corpus "can be issued to the King's territorial dominions, the writ should "not be ordered to go to any country or place under the "subjection of the Crown whenever it is suggested to the court "in England that a subject of the Crown is illegally imprisoned," and I would concurringly join the the judge in the answer he gave. It does not seem to me, also, that the mere fact of absence of annexation and theoretical possession should deprive the Crown and those who are under the law from the benefits and power of the writ of habeas corpus.

The writ of habeas corpus ad subjiciendum is to be treasured and preserved, and should be available and so used that it may ever continue to deserve undiminished the high praise which so often, and from so many sources, it has received. I waited in vain in the course of the argument on behalf of the Crown to hear an endeavour to support the widest application of the writ, and an expression of regret or reluctance that it was felt to be incumbent to point out to the court such obstacles as may be thought to be in the way of its unfettered use.

It may well be that it would be against propriety for the writ to issue in this particular case. There appear to be courts in Northern Rhodesia set up by Her Majesty in Parliament which could give any redress the applicant deserves and do it more conveniently and expeditiously than here, but I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate, however extensive our jurisdiction there, or however powerful our control. It is desirable, as the Crown submitted, that proceedings for a writ of habeas corpus should be swift and a subject's rights in the matter should be clear, but I see no inherent difficulty or undue delay in an English court inquiring into the extent of the jurisdiction, power and control exercised by this country in any protectorate and in any event, in agreement with my Lords, I would not hold in the absence of compelling authority, that our courts ought to be precluded from considering, if it became necessary, the extent of the Crown's jurisdiction.

[35] [1910] 2 K.B. 576. [36] Ibid. 605.

I would allow the appeal on this preliminary question and would let the case be heard on its merits.

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After their Lordships' judgments had been delivered the case was adjourned to allow the parties to consider the effect of the judgments, and whether there should be argument on the second point raised on the appeal, namely, whether the writ could issue to the Secretary of State for the Colonies.

October 24. On the resumed hearing their Lordships were informed that the Governor of Northern Rhodesia had, on October 20, made an order revoking the restriction order in respect of Mwenya on the ground that it was no longer necessary in the interests of public security that Mwenya should remain subject to the order. In those circumstances, counsel were agreed that there was no ground for continuing the proceedings.

Appeal allowed.

Order that all further proceedings in this matter be stayed save so far as may be necessary to enforce the order for costs. Mwenya to get his costs as against the Governor of Rhodesia and the District Commissioner in the Court of Appeal and below, and his costs as against the Secretary of State for the Colonies in the Court of Appeal and below, so far as such costs related to the matter decided in the Court of Appeal.

Solicitors: *Potel, Tattersall & Lake; Treasury Solicitor; Charles Russell & Co.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

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Oct. 9.
McNair J.

Legal Aid—Costs—Taxation—Review of taxation—Summons in solicitor's name—Jurisdiction to consider summons—Legal Aid and Advice Act, 1949 (12 & 13 *Geo.* 6, *c.* 51), *s.* 1 (7)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359) (*as amended*), *reg.* 18 (3) (*b*)—*R.S.C., Ord.* 65, *r.* 27 (41).

At the conclusion of an action the costs of a legally aided plaintiff were ordered to be taxed as between solicitor and client, in accordance with the provisions of the Legal Aid and Advice Act, 1949, and the Legal Aid (General) Regulations, 1950 (as amended). In the course of taxation, substantial reductions were made in the

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[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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fees allowable to counsel and solicitors, and after objections by the plaintiff had been disallowed the taxing master issued his allocatur. The plaintiff's solicitor thereupon took out a summons for review, which was adjourned for service on the Law Society. It was contended on behalf of both the Law Society and the solicitor that the judge in chambers had jurisdiction to undertake the review:—

Held, (1) that the reasons which justified a review of taxation by the judge in cases in which the party concerned was not legally aided applied equally to legal aid cases, and that the order for taxation under regulation 18 (3) (*b*) of the Legal Aid (General) Regulations, 1950, necessarily involved that the master and the judge should have jurisdiction to ensure that the taxation was in order; and, accordingly, that R.S.C., Ord. 65, r. 27 (41), should be construed as providing for a review in such cases.

Hammond v. *Hammond* [1957] P. 349; [1957] 3 W.L.R. 395; [1957] 3 All E.R. 16, and dictum of Devlin J. in *Rolph* v. *Marston Valley Brick Co. Ltd.* [1956] 2 Q.B. 18, 27; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50 not followed.

(2) That the solicitor's right to call for a review of taxation under R.S.C., Ord. 65, r. 27 (41), was a right arising out of his relationship with his client, which was expressly preserved by section 1 (7) of the Legal Aid and Advice Act, 1949, and, accordingly, the right might be exercised in a legal aid case.

Per curiam. There is much to be said for the view that, in the absence of statutory provision to the contrary, the court has inherent jurisdiction to secure that a solicitor as an officer of the court is remunerated properly and no more for his work as a solicitor.

SUMMONS for review of taxation of bill of costs delivered by the solicitor to a legally aided plaintiff, adjourned into open court for judgment.

The following statement of facts is taken in substance from the judgment. On September 16, 1953, a civil aid certificate was issued in favour of a plaintiff, Arthur Richard Sutton, certifying that he was entitled to legal aid "as plaintiff to take proceedings "in the High Court of Justice, Queen's Bench Division, against "William Arthur Sears for damages for fraudulent misrepre-"sentation and to enforce any order for costs." The certificate further stated that the National Assistance Board had determined the plaintiff's maximum contribution as nil, and that the local committee had also assessed his contribution as nil.

On May 19, 1954, the plaintiff issued a writ against the defendant, claiming to have a conveyance entered into between the parties rescinded, and claiming damages for fraudulent misrepresentation on the sale of certain property known as 55–57, Stonecot Hill, Sutton. This writ was subsequently amended to include claims for damages for breach of contract and other relief. The action was tried before Havers J. over a period of 16 days between April 4 and June 4, 1957. His Lordship directed that judgment should be entered for the defendant with costs not exceeding certain limits, and further directed the plaintiff's costs to be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, 1949.

The plaintiff's solicitor delivered his bill of costs as between solicitor and client, and it was taxed by Master Cullis. In the course of this taxation, substantial reductions were made in the fees allowable to counsel and solicitors. Objections were lodged to the taxation, stated to be "Objections taken by the "plaintiff to the taxation." These objections were considered by the taxing master and disallowed. Master Cullis then issued his allocatur, setting out his taxation of the plaintiff's costs as between solicitor and client in accordance with the Third Schedule to the Legal Aid and Advice Act, 1949. A summons was taken out by the plaintiff's solicitor in his own name, calling upon all parties concerned to attend upon the judge in chambers on the hearing of an application for an order that the taxation of costs by Master Cullis be reviewed, and that the objections made by the plaintiff's solicitor be allowed. In accordance with the usual practice the summons was not served on the plaintiff or any other person. The summons came before McNair J. and was adjourned for service upon the Law Society, who, in his Lordship's opinion, as the administrators of the legal aid fund were primarily interested. When the summons was restored counsel for the Law Society and for the plaintiff's solicitor both submitted that his Lordship had jurisdiction to undertake the review.

It was contended on behalf of the solicitor (1) that the review of taxation was an integral part of taxation and the mandatory requirement contained in regulation 18 (3) of the Legal Aid (General) Regulations, 1950, as amended, that, where the court gave judgment or made a final order in proceedings to which a legally assisted person was a party, the judgment or order should include a direction that the costs of any assisted person should be taxed in accordance with the provisions of the Third Schedule to the Act, necessarily involved that the proper authorities, namely, the taxing master and, on review, the judge, should have jurisdiction to ensure that the taxation was in order and completed; (2) that the solicitor's right to carry in objections to disallowances from his bill and, if the objections were overruled, to call for review by the judge, was a right arising out of the relationship of solicitor and client which was expressly preserved by section 1 (7) (*a*) of the Act; and (3) that in any event, there being no express provision to the contrary contained in the Act or regulations, the court by virtue of its inherent jurisdiction over its officers, including solicitors, had jurisdiction to entertain a review.

The case is reported solely upon the question whether there was jurisdiction to entertain the summons. No order for costs was requested on behalf of the solicitor and it was not suggested that the court had jurisdiction to make such an order.

J. H. Hames for the plaintiff's solicitor.

Colin Duncan for the Law Society.

Cur. adv. vult.

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McNAIR J., reading his judgment: In this judgment I propose to confine myself to the question whether, when a direction has been given on the trial of an action, in which one or more of the parties is a legally assisted person, that the legally assisted person's costs be taxed as between solicitor and client in accordance with the provisions of the Third Schedule to the Legal Aid and Advice Act, 1949, and taxation has taken place, I, sitting as judge in chambers, have jurisdiction to review that taxation.

Devlin J., in *Rolph* v. *Marston Valley Brick Co. Ltd.*,[1] expressed obiter his doubts whether on the facts of the case before him he had such jurisdiction, though he in fact embarked on such a review and upheld the taxing master's allocatur. In *Hammond* v. *Hammond*[2] Karminski J., forming the view that Devlin J.'s reasoning in support of his doubts was unanswerable, held on the facts of the case before him that he had no jurisdiction to entertain a review. It appears that up to the decision of Devlin J. in *Rolph's* case[3] the normal practice in such cases was for the judge to entertain the review.

[His Lordship stated the facts and continued:] Neither the Legal Aid and Advice Act itself nor the regulations made thereunder make any express reference to the review of taxation. The right to claim a review of taxation is conferred by R.S.C., Ord. 65, r. 27, and the regulations thereunder. Rule 27 provides as follows: "The following special allowances and general regulations shall apply to all proceedings and all taxations in the "Supreme Court of Judicature."

An order for taxation in accordance with the Third Schedule to the Act is without doubt an order for taxation in the Supreme Court of Judicature. The particular form of taxation provided for by paragraph 4 of that Schedule, namely, a taxation as between solicitor and client, where the costs are to be paid out of a common fund in which the client and others are interested, is a particular method of taxation applicable to cases outside the Act. See *per* Buckley L.J. in *Giles* v. *Randall*.[4] By paragraph 4 of the Third Schedule this form of taxation is applied to taxation of the costs of legally assisted persons under the Act. By regulation 39 of the regulations in Order 65, r. 27, provision is made by which the solicitor may before the allocatur or certificate is signed carry in objections to the taxing master's certificate. By regulation 40 the taxing master is required, on such objections being made, to reconsider and review the taxation, and may tax the costs of such objections and add them to, or deduct them from, any sum payable by or to any party to the taxation. Up to this stage there cannot, as it seems to me, be any doubt at all that the whole of this procedure is applicable to a legal aid taxation, though no express provision seems to be made in the

[1] [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50.
[2] [1957] P. 349; [1957] 3 W.L.R. 395; [1957] 3 All E.R. 16.
[3] [1956] 2 Q.B. 18.
[4] [1915] 1 K.B. 290, 295.

Legal Aid Regulations or in the Act for enabling the legally assisted person, who may, as in *Rolph's* case,[5] be financially interested, to obtain legal assistance to help him to resist the application or for enabling the interests of the legal aid fund, out of which the costs, when taxed, are to be paid, to be protected. Finally, by regulation 41 it is provided that "Any party who "may be dissatisfied with the certificate or allocatur of the "taxing officer . . . may . . . apply to a judge at chambers for "an order to review the taxation . . . and the judge may there-"upon make such order as the judge may think just."

Prima facie, accordingly, it would seem that there is no reason why regulation 41 should not apply to the taxation of the costs in a legally aided case to the same extent as without question regulations 39 and 40 apply. The reasons that justify a review by a judge in appropriate cases, in a case in which the party is not a legally assisted person, seem equally applicable to a case where the costs arise in the case of a legally assisted person. In each case a review by the judge is desirable in order to secure that the taxation is properly carried out and is part of the machinery by which that object is achieved. Accordingly, unless there is authority to the contrary which I ought to follow, I am prepared to accept Mr. Hames' first main submission, and to hold that the order for taxation made at the trial of the action, as required by regulation 18 of the Legal Aid (General) Regulations, 1950, that the plaintiff's costs be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, conferred jurisdiction upon me to entertain the review as part of the normal machinery of taxation.

Subject to the same reservation I would, though with less feeling of certainty, reach the same conclusion by a somewhat different process of reasoning, namely, that summarised in Mr. Hames' second main submission. By section 1 (5) of the Act it is provided that "Legal aid shall consist of representation, on "the terms provided for by this Part of this Act, by a solicitor "and so far as necessary by counsel . . . " The assisted person has the right, subject to certain limitations, to select his solicitor and counsel from the panels of solicitors and counsel willing to act—see section 6 (2)—and when appointed the solicitor is in truth the assisted person's solicitor though he is paid not by the client but out of the legal aid fund (section 6 (5)). But, as the result of section 6 (6) and paragraph 2 of the Third Schedule, the sums allowed to the solicitor in connection with the proceedings in the Supreme Court are stated to be the full amount allowed on taxation of the costs on account of disbursements and 85 per cent. of the amount so allowed on profit costs. As I have mentioned earlier no provision is made either in the Act or in the regulations made thereunder in relation to the solicitor's right to carry in objections to the taxing master before the allocatur is

[5] [1956] 2 Q.B. 18.

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made or to the procedure for review. It seems to me to be a necessary incident of these statutory provisions that the solicitor should have a right to attend the taxation of his own costs, and to carry in objections to the taxing master, and that this right arises out of the relationship between him and his client. If this be correct, it would also seem to me that his right to call for a review under R.S.C., Ord. 65, r. 27 (41), is also a right arising out of this relationship. Finally, by section 1 (7) it is provided that "Save as expressly provided by this Part of this Act . . . "(*a*) the fact that the services of counsel or a solicitor are given "by way of legal aid shall not affect the relationship between or "rights of counsel, solicitor and client or any privilege arising "out of such relationship." Accordingly, subject to the reservation mentioned above, I should be prepared to hold that the right of a solicitor to call for a review of a taxation of solicitor and client costs is expressly preserved by the Act.

Having reached these conclusions on the two main arguments addressed to me, I do not feel it necessary to express any concluded opinion upon the question of inherent jurisdiction. There is, however, in my judgment, much to be said for the view that, unless there is statutory provision to the contrary, the court has inherent jurisdiction to secure that the solicitor as an officer of the court is remunerated properly and no more for the work he does as a solicitor: see *Storer & Co.* v. *Johnson*[6] and *Cole* v. *Park*.[7]

Before considering *Rolph's* case[8] and *Hammond's* case,[9] it is convenient that I should list two groups of cases to which I was referred by counsel as being cases where a review of taxation of costs in legal aid cases was in fact entertained by judges of first instance. The first group consists of cases where review was undertaken but no point was raised as to the power for review. These cases are *Reed* v. *Gray*,[10] *Gibbs* v. *Gibbs*,[11] *Isaac* v. *Isaac*,[12] *Young* v. *Young*,[13] and *Francis* v. *Francis*.[14] The second group consists of cases in which a review was undertaken though some doubt or hesitation was expressed. These cases are *Self* v. *Self*,[15] *Theocharides* v. *Joannou*[16] and *Eaves* v. *Eaves*.[17] Finally, in *Lyon* v. *Lyon*[18] the Court of Appeal entertained an appeal from a review of such a taxation without comment.

I now turn to the two cases of *Rolph* v. *Marston Valley Brick Co. Ltd.*[19] and *Hammond* v. *Hammond*.[20] In *Rolph's* case[21] a

[6] (1890) 15 App.Cas. 203.
[7] (1888) 41 Ch.D. 326.
[8] [1956] 2 Q.B. 18.
[9] [1957] P. 349.
[10] [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.
[11] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.
[12] [1955] P. 333; [1955] 3 W.L.R. 253; [1955] 2 All E.R. 811.
[13] [1955] 1 W.L.R. 395; [1955] 1 All E.R. 796.
[14] [1956] P. 87; [1955] 3 W.L.R. 973; [1955] 3 All E.R. 836.
[15] [1954] P. 480, 485; [1954] 3 W.L.R. 119; [1954] 2 All E.R. 550.
[16] [1955] 1 W.L.R. 296, 298, 299; [1955] 1 All E.R. 615.
[17] [1956] P. 154, 159; [1955] 3 W.L.R. 984; [1955] 3 All E.R. 849.
[18] [1953] P. 1; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831.
[19] [1956] 2 Q.B. 18.
[20] [1957] P. 349.
[21] [1956] 2 Q.B. 18.

legally assisted infant obtained a compromise judgment for £1,500 with costs. Jones J., approving the settlement, directed that, of the £1,500, £1,475 should be paid into court, where it became subject to a first charge under section 3 (4) of the Act to the net liability of the legal aid fund on the infant's account, arising from the difference between the party and party costs and the solicitor and client costs on taxation. Taxation duly took place and the plaintiff's solicitor carried in objections to certain disallowances made on the solicitor and client taxation, which objections were disallowed. The solicitor took out a summons to review the taxation. I was informed at the hearing before me that the summons was stated in terms to be an application on behalf of the plaintiff and not, as in the present case, an application on behalf of the plaintiff's solicitor. Devlin J. proceeded to carry out the review, but overruled the objections. Application was then made to him for a direction that the costs of the summons to review should be taxed under the Third Schedule to the Act. This application was rejected on grounds which are not strictly material to the problem before me, but, in the course of his judgment, Devlin J., after stating that the first of three possible grounds for dismissing the application was that "it ought not to have been entertained "at all on the ground that the solicitor is acting without the "authority of the client in whose name he purports to act," continued as follows[22]: "I do not propose to refuse the applica- "tion on the first ground because the point was not investigated "in the argument before me, and I have not therefore got any "specific information about the nature of the solicitor's retainer. "As I intend to refuse the application on the other grounds I "have not felt it necessary that the expense should be incurred "of inviting a further argument from Mr. Ritchie on the first "point. But I think that probably I ought to have dismissed the "summons at the outset without going into the merits of it at all. "It is brought by the solicitor in the name of the assisted person. "But the solicitor cannot possibly have authority from the "assisted person to bring this summons. He could not be heard "to say that she was his client, for, if she was, he would be "acting in breach of duty towards her by seeking to obtain money "from her estate partly for his own benefit. When the court "becomes aware that a solicitor is acting without authority, I "think the court should act of its own motion and refuse to "grant relief: see *Daimler Co. Ltd.* v. *Continental Tyre and "Rubber Co. (Great Britain) Ltd.*,[23] *per* Lord Parker of Wad- "dington.[24] That was a different type of case from this, but I "think that the principle is of general application and certainly "should be applied in a case where the relief would affect an "infant plaintiff who is unrepresented."

In that case, as distinct from the present case, the infant

[22] [1956] 2 Q.B. 18, 27.

[23] [1916] 2 A.C. 307; 32 T.L.R. 624.

[24] [1916] 2 A.C. 307, 337.

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client was personally interested. But the reasoning that would lead to the rejection of the application to review on the basis of lack of authority would, as it seems to me, also lead to the rejection of the solicitor's original application to the taxing master, since any item allowed by the taxing master over and above the allowance in the party and party taxation would also be to the prejudice of the infant client. Accordingly, the court's direction for taxation under the Third Schedule would not be implemented without the employment of a second solicitor. For my part I am not satisfied that this line of reasoning, which raised doubts in Devlin J.'s mind as to his jurisdiction to entertain the review, should persuade me to depart from the conclusions I have stated earlier.

In *Hammond's* case [25] Karminski J. had before him an application to review the taxation of a legally aided petitioner's costs under the Third Schedule to the Act. The application, as in *Rolph's* case,[26] was brought in the name of the assisted person. It was conceded that the petitioner could neither suffer nor benefit from any variation of the order made on taxation. Nevertheless Karminski J., after referring to part of the passage in Devlin J.'s judgment which I have set out above, stated [27] that he had come to the conclusion that Devlin J.'s reasoning was unanswerable and that he ought to follow it. He concluded, acccordingly, that he had no power to deal with the application.

I, for my part, however, though I hope I always show proper respect to the views of my brethren, do not, for the reasons I have already stated, feel that the reasoning is unanswerable. It seems to me that when the Act or the regulations thereunder require that the court should direct that the costs of the legally assisted person should be taxed as between solicitor and client on the basis indicated, the legislative authority necessarily envisaged that the legally assisted person's solicitor should carry in his bill for taxation, and should continue to act until the taxation was completed, including any necessary review. The taxation of a solicitor's bill as between solicitor and client is in truth more akin to the exercise of an administrative than a judicial function. The taxing master and, though with less practical experience in matters of costs, the judge, are as I think charged with the task, as a matter of administration, of seeing that the solicitor is remunerated properly and no more.

For my part, I should not be deterred from undertaking a review by reason of the fact that the application was expressed to be, as it was in the cases of *Rolph* [28] and *Hammond* [29] (but not in the present case), an application on behalf of the client, when in fact it is clear that the application is made on behalf of the solicitor. If the taxing master or the judge thinks fit in a particular case, I see no reason why a direction for service on any

[25] [1957] P. 349.
[26] [1956] 2 Q.B. 18.
[27] [1957] P. 349, 355.
[28] [1956] 2 Q.B. 18.
[29] [1957] P. 349.

other party interested should not be made. It may well be that it is desirable that the regulations should be amended to provide for such service and for the manner in which a legally assisted person should be represented on such taxation, though, in cases involving infants, the jurisdiction, I am informed, is commonly exercised on an ex parte application by the solicitor without the infant being separately represented; the theory, I suppose, being that the taxing master is particularly well qualified to protect the interests of the infant. However that may be, I do not feel that the absence of such provision in the regulations debars me from exercising jurisdiction.

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I accordingly conclude that I have jurisdiction to entertain the present application.

Ruling accordingly.
No order as to costs.

Solicitors: *Merton Naydler; Law Society.*

[COURT OF APPEAL.]

In re ENDACOTT, DECD. CORPE *v.* ENDACOTT.

C. A.

1959
Oct. 8, 9, 12.

[1958 E. No. 1606.]

Lord Evershed M.R., Sellers and Harman L.JJ.

Charity — Public — Bequest to parish council — "For purpose of providing some useful memorial to myself" — Whether valid charitable trust.

Trust and Trustee—Possibility of execution by court—Trust for benefit only of objects—Memorial.

Local Government—Powers—Parish council—Power to accept gift for "any local public purpose" — Whether activities charitable — Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 268 — *Physical Training and Recreation Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 46), *s.* 4—*Recreational Charities Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 17), *s.* 1.

A testator gave his residuary estate to the North Tawton Parish Council "for the purpose of providing some useful memorial to "myself." Danckwerts J. held that the gift failed. On appeal:—

Held, dismissing the appeal, (1) that, as a matter of construction, the bequest was not an out-and-out bequest to the parish council; the words "for the purpose of providing some useful "memorial to myself" imposed an obligation in the nature of a trust.

(2) That the nature of a parish council's activities was not so clearly defined as being of a charitable character as to impose a charitable limitation on the words of the gift and that the power of a local authority under section 268 of the Local Government Act, 1933, to accept any gift for "any local public purpose" was not, in its context, confined to charitable purposes, nor were the powers of local authorities under section 4 (1) of the Physical Training and Recreation Act, 1937, and by section 1 of the Recreational Charities Act, 1958, limited to charitable activities.

C. A.

1959

ENDACOTT, DECD., *In re.* CORPE *v.* ENDACOTT.

Houston v. *Burns* [1918] A.C. 337; 34 T.L.R. 219 considered.

In re Garrard [1907] 1 Ch. 382; *In re Flinn* [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541; *In re Rumball* [1956] Ch. 105; [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71 distinguished.

(3) That this trust did not fall within the "anomalous" class of trusts of a public character which, although not charitable, were nevertheless trusts which the court could efficiently, and would, enforce, and that, accordingly, though the gift was specific, in the sense that it indicated a purpose capable of expression, it was of too wide and uncertain a nature to qualify as an enforceable trust.

In re Drummond [1914] 2 Ch. 90; 30 T.L.R. 429; *In re Astor's Settlement Trusts* [1952] Ch. 534; [1952] 1 All E.R. 1067; and *Leahy* v. *Attorney-General of New South Wales* [1959] 2 W.L.R. 722; [1959] 2 All E.R. 300 considered.

(4) That the gift was not limited to the provision of a memorial "useful" to the inhabitants of North Tawton and further that the formula of gift was not equivalent to "for the benefit of the "inhabitants of North Tawton."

Williams' Trustees v. *Inland Revenue Commissioners* [1947] A.C. 447; [1947] 1 All E.R. 513 considered.

Semble that the proposition that non-charitable trusts for public purposes, which fail as trusts, may survive as powers, is not one which can be treated as accepted in English law.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

The testator, Albert George Endacott, by his will dated January 2, 1952, after appointing the plaintiff, Thomas Denner Corpe, to be his executor, and making certain bequests, provided: "Everything else I leave to North Tawton Devon Parish Council "for the purpose of providing some useful memorial to myself "subject to the proviso that if my wife outlives me they must "during the lifetime of my wife pay to my wife the interest "which may accrue on the capital when properly invested by "them."

The testator died on June 18, 1958. The value of his residuary estate was approximately £20,000.

By this summons the plaintiffs asked whether the gift to the North Tawton Parish Council was valid or failed for uncertainty or otherwise. The defendants to the summons were the parish council, the testator's widow and son as his next-of-kin, and the Attorney-General.

Danckwerts J. held that the trust failed for uncertainty.

The parish council appealed.

J. L. Arnold Q.C. and *C. A. Settle* for the North Tawton Parish Council.

B. S. Tatham for the plaintiff executor.

Michael Albery Q.C. and *Oliver Lodge* for the next-of-kin.

Denys Buckley for the Attorney-General.

The following cases were referred to in argument which are

not mentioned in the judgments: *In re Compton* [1]; *In re Wood* [2]; *In re Price* [3]; *Cocks* v. *Manners* [4]; *In re Shaw* [5]; *Gibson* v. *South American Stores (Gath & Chaves) Ltd.* [6]; *Inland Revenue Commissioners* v. *Baddeley* [7]; *Dunne* v. *Byrne* [8]; *In re Bain* [9]; *Farley* v. *Westminster Bank* [10]; *In re Spensley's Will Trusts* [11]; *Goodman* v. *Saltash Corporation.* [12]

LORD EVERSHED M.R. By his will dated January 2, 1952, the testator, Albert George Endacott, who died in June, 1958, first of all made an appointment of a firm of solicitors as executors and then gave to his son certain buildings and premises comprising a factory, subject to a mortgage, together with certain chattels. He concluded his will by the following residuary gift: "Everything else I leave to North Tawton Devon Parish Council "for the purpose of providing some useful memorial to myself "subject to the proviso that if my wife outlives me they must "during the lifetime of my wife pay to my wife the interest "which may accrue on the capital when properly invested by "them."

The question before the court has been whether that residuary gift to the North Tawton Parish Council can take effect. Danckwerts J. answered that question negatively. He concluded his judgment, according to the short note of it: "It is argued "that the words 'for the purpose of providing some useful "'memorial to myself' are 'limiting words.' I think they are "very wide words which may well include non-charitable pur-"poses. The nature of the trust would limit those wider purposes "if the parish council's argument prevailed. I declare that the "gift fails for uncertainty." That short statement comprehends the various arguments that have been put forward, and the conclusion is one with which I entirely agree.

Mr. Arnold, for the parish council, has put his case on two broad distinct grounds. He has first said that the words "for "the purpose of providing some useful memorial to myself" merely indicated the reason why the testator had made this gift, but did not, and were not intended to, impose any obligation upon the parish council, with the result that the gift should be treated as a gift out and out to the parish council.

Alternatively, Mr. Arnold has argued on the footing that the words (contrary to his first contention) do impose a trust or

[1] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.
[2] [1949] Ch. 498; [1949] 1 All E.R. 1100.
[3] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.
[4] (1871) L.R. 12 Eq. 574.
[5] [1957] 1 W.L.R. 729; [1957] 1 All E.R. 745.
[6] [1949] Ch. 572; 65 T.L.R. 370; [1949] 2 All E.R. 18; on appeal [1950] Ch. 177; 66 (Pt. 1) T.L.R. 83; [1949] 2 All E.R. 985.
[7] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 523.
[8] [1912] A.C. 407; 28 T.L.R. 257.
[9] [1930] 1 Ch. 224; 45 T.L.R. 617.
[10] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.
[11] [1954] Ch. 233; [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178.
[12] (1882) 7 App.Cas. 633.

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obligation of some kind, though it is to be noted that it has not been suggested that such a trust would offend the rule against perpetuities. But on this alternative basis the argument has diverged thus: First, if the trust be not (upon its true interpretation) a charitable trust, still it is said to be of a public nature and valid and effective, on the ground that it falls within a class of cases which have been referred to as "anomalous," and which were recited by Roxburgh J. conveniently in his recent decision in the case of *In re Astor's Settlement Trusts.*[1] The contention is that this case, falling within that so-called anomalous class, must be treated as effective, being of a public character and being also such that, by appropriate machinery, it can be properly controlled by the court. It may perhaps be added that, since the gift was one of residue, then if the gift fails, an intestacy follows; and it is, of course, a fair comment to make that in a case of any kind where intestacy follows a particular result, the court will, at any rate, think carefully before arriving at such a conclusion.

Then, alternatively, it is said the trusts are in truth charitable, and the argument on this alternative again diverges. First of all, it has been submitted that a parish council (and, of course, this particular parish council) is, according to its statutory constitution, limited, at any rate quoad any gifts of this kind which it receives, to charitable functions and activities. If that is right, then it is said that the gift to such a body stamps (and, if necessary, qualifies) the nature of the trusts which are declared, and that they should, accordingly, be taken as being and intended to be within the scope of the (charitable) statutory activities or powers. Secondly (and this was a point particularly put to us by Mr. Buckley for the Attorney-General), it is said that, whether the parish council be or be not a body confined in activity to charitable purposes, the true view of the meaning of these vital words "for the purpose of providing some useful "memorial to myself" is that they are, as a matter of language, equivalent to a trust for the benefit of the local inhabitants of North Tawton Parish and therefore, according to authority, charitable.

Those, broadly, are the contentions; and I will deal at once and briefly with the first point, namely: Was the language which I have quoted intended to impose an obligation, or was it merely expository? That matter I can deal with briefly because it is, after all, a matter of mere construction. It will, therefore, be convenient if I state at once what my view is of the meaning of these words, which once more I repeat, "for the purpose of providing some useful memorial to myself": and I say, like Danckwerts J., that I do not think that these words were merely expository. In my judgment, they were intended to impose an obligation in the nature of a trust. In my judgment,

[1] [1952] 1 Ch. 534; [1952] 1 All E.R. 1067.

the object of these words, the trust, the obligation, which the testator intended them to impose was this: that the council were, with his money (and subject, of course, to the obligation about the widow), to create a memorial to himself. His first idea was (and I am not saying that it was either foolish or ignoble) that there should thereafter be in North Tawton, Devon, a memorial to himself; but that the memorial was to have this quality, that it was to be useful; and that I take to mean that it was intended that it should have the quality of utility rather than ornament. Though I do not think aesthetic or ornamental considerations were excluded, still his purpose was that the memorial, whatever form it took and whether material or not, should be useful; and, by way again of anticipation of my answer to Mr. Buckley, I cannot see that it was necessarily to be useful only to the inhabitants of North Tawton.

I have stated my view of the construction and that view answers the first point. It follows that this was not a gift out and out to the North Tawton Parish Council. My view of the intention of those words also carries with it the answer to many of the other points that have arisen. I go further and say that in the end of all, this case should be decided on the grounds on which Danckwerts J. decided it, namely, that here was a specific obligation sought to be imposed, specific in this sense, that it was to be for the purpose of providing a memorial for this testator having the quality of utility, something obviously that could not be confined to charitable purposes, but no doubt having the quality also that it served a public purpose of some kind. I think that that view of the words does carry with it the result, with all respect to the learning which has been put before us, that to hold it valid would be for this court to go beyond (and appreciably beyond) the tenor of the decided cases on these difficult subjects.

I come then to Mr. Arnold's alternative ground. It is plain that once you get involved in the considerations which have been put before us, you are in much more troubled waters than in dealing with the first point. Mr. Arnold has quite rightly drawn our attention to much learning in the form of case law that has grown up round these somewhat involved questions. All those who practise in this branch of the law know how infinite is the variety of the decided cases, how extreme sometimes are the refinements, and how apparent on occasions the contradictions which those cases demonstrate; and that is certainly not the least true about those cases dealing with the law of charity. I wish to acknowledge my indebtedness to Mr. Arnold for putting these matters before us as a premise to my statement that I do not propose in this judgment, by my reference to cases or indeed otherwise, to add to the future burden of citation. I am able fairly to say that and without, I hope, shirking any judicial duty, because, in the end of all and on the view I take, the real question

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in this case does depend upon the meaning of the words this testator has used according to their ordinary sense.

It is convenient and perhaps logical to take first the point that the parish council being, it is said, confined to charitable activities so far as is relevant, then this gift must take its character by reflection of that fact. I am unable to accept that argument. The cases, of which *In re Rumball* [2] in this court is the most recent, illustrate at any rate this proposition: that gifts to persons holding a particular office, and particularly an ecclesiastical office, if they are not to be treated as gifts to the holder of that office in his personal capacity, are taken to be gifts to be applied for the purposes for which the office is held. The vicar or the cardinal archbishop (to take references from two cases) receives the gift and disposes of it (as it is said) virtute officii, and the nature of the officium is such that the duties, the trusts, must be ecclesiastical and therefore charitable. If that is accepted, then general words which follow may be regarded either as merely emphasising the fact that the gift is to the ecclesiastical officer virtute officii or, possibly, not only to do that but also to limit to some extent the scope of his possible disposition, within the scope of his office, of those funds. No decided case, so far as we are aware, has applied that principle to such a body as a parish council. If it were shown perfectly clearly that every activity of a parish council, at any rate so far as gifts were concerned, must be of a charitable character, it might follow that a similar reasoning would apply; but I am not satisfied that it is true to say of a parish council that it is confined in its activities to charitable activities, or that it is so confined as regards any gifts it may receive. I do not forget the argument that you might give something to a vicar not personally, but having attached to it an obligation to apply it for purposes which were outside his ecclesiastical duties, but I cannot find in this case any true analogy to that kind of illustration. There is here a gift to this parish council for the purpose which I have stated, and the relevance of the matter must be (the purpose being a very wide one and not on the face of it charitable): Is the nature of a parish council's activities so clearly defined as being of a charitable character as to impose an essential limitation on the words which I have already tried to construe?

We were referred to section 268 of the Local Government Act, 1933. That deals with acceptance of gifts by local authorities and (so far as relevant) provides: " Subject to the provisions of " this section, a local authority may accept, hold and administer " any gift . . . for any local public purpose, or for the benefit " of the inhabitants of the area," etc. I have no doubt (and I do not think Mr. Arnold really contended to the contrary) that the words " for any local public purpose " cannot be confined in

[2] [1956] 1 Ch. 105; [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71.

that context to charitable purposes. It is only necessary to refer in passing to the language of Lord Haldane in *Houston* v. *Burns*,[3] to which Mr. Albery drew our attention. The words "local public purposes" are not, according to our law, regarded as being exclusively charitable; and, even against the background of the Local Government Act of 1894, I think it is plain that local public purposes in section 268 of the Act of 1933 are not only charitable purposes. But I do not forget the point that this section deals with acceptance of gifts and would not necessarily colour the general activities of a parish council, though I venture for my part to think that if, in the case of gifts, it is made plain that a parish council can apply them to non-charitable as well as charitable purposes, it is a severe obstacle in Mr. Arnold's way.

We were further referred to a more recent Act, the Physical Training and Recreation Act, 1937, which extended the powers of local authorities, by section 4 (1), in (among others) the following way: "A local authority may acquire . . . and provide "with suitable buildings . . . lands . . . for the purpose of gymna- "siums, playing fields, holiday camps or camping sites, or for the "purpose of centres for the use of clubs, societies or organisa- "tions having athletic, social or educational objects, and may "manage those lands and buildings themselves," etc. It is plain enough that the activities there contemplated go far beyond merely charitable activities; but Mr. Arnold has said that any indulgence of the powers by that section by parish councils was rendered retrospectively charitable by section 1 of the Recreational Charities Act, 1958, which provides: "Subject to the provisions of this Act, "it shall be deemed always to have been charitable to provide . . . "facilities for recreation or other leisure-time occupation, if "the facilities are provided in the interests of social welfare." Subsection (2) imposes a qualification upon that: "The require- "ment of the foregoing subsection that the facilities are provided "in the interests of social welfare shall not be treated as satisfied "unless—(*a*) the facilities are provided with the object of "improving the conditions of life for the persons for whom the "facilities are primarily intended, and (*b*) either (i) those persons "have need of such facilities as aforesaid by reason of their youth, "age, infirmity or disablement, poverty or social and economic "circumstances, or "—and then follows a phrase which in a sense slightly startles the reader—"the facilities are to be avail- "able to the members or female members of the public at large." I am not satisfied (and I put it quite briefly) that the effect of that section is to limit the powers of a parish council under section 4 of the Act of 1937 to activities in the form of providing such things as holiday camps, clubs and so forth, which would be deemed or would be retrospectively made by the Act of 1958 charitable only. I therefore have not been persuaded, as Danckwerts J. was not persuaded, that the colour or character of the

[3] [1918] A.C. 342; 34 T.L.R. 219.

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gift here made is to be determined by considering that the donee, the parish council, is one whose official activities or whose constitutional functions were limited to charitable activities or functions.

If that view is right, then I am absolved from further considering the kind of case illustrated by the decision which I have earlier mentioned of *In re Rumball*,[4] and I am not therefore going to take time by considering those cases and answering the hypothetical question—assuming the premise that a parish council is to be treated for this purpose as having charitable functions only—whether one should confine the scope of the relevant language so as not to impose obligations outside the charity. I will, however, venture to add this, that if I am wrong in the view I have taken as to the nature of the parish council's activities, I am not satisfied, as a matter of construction (and I have already stated what I think the meaning is), that these words can amount to no more than a general direction, with or without limitation, that a parish council is not to take absolutely and beneficially but to apply the fund according to its statutory (and I will now assume charitable) duties. I have stated already my view of the meaning of the words used here, and I hope that in so doing I have justified the conclusion just stated; but, putting it in other words, if the principle illustrated by such cases as *In re Garrard*,[5] *In re Flinn* [6] and *In re Rumball*,[7] to take three of them, is applicable to such a case as this—that is, to a non-ecclesiastical body or a body like a parish council, and I say no more on the matter whether it would be so applicable at all—the result is that this case falls on a side of the line different from that on which fell the decisions in such cases as *Garrard*,[8] *Flinn* [9] and *Rumball*.[10]

I now turn to Mr. Arnold's alternative argument based on the view that there is here a trust and a trust of a public character, but not a charitable trust. What he says is, that the trust is in line with the trusts which were rendered effective in those cases which I have called "anomalous," and many of which are referred to in Roxburgh J.'s decision, beginning with *In re Pettingall*.[11] I include in that list cases such as the three to which we have had our attention particularly drawn today. The argument is that assuming the non-charitable but public nature of this trust, still it is of a character which the court can efficiently, and will, enforce. It must be said that these cases are of a somewhat anomalous kind. They are classified in the recent book written by Mr. J. H. C. Morris and Professor Barton Leach. The Rule Against Perpetuities (1956) (p. 298). "We proceed," say the authors, "to examine these 'anomalous' exceptions. It will "be found that they fall into the following groups: (1) trusts

[4] [1956] Ch. 105.
[5] [1907] 1 Ch. 382.
[6] [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541.
[7] [1956] Ch. 105.
[8] [1907] Ch. 382.
[9] [1948] Ch. 241.
[10] [1956] Ch. 105.
[11] (1842) 11 L.J.Ch. 176.

"for the erection or maintenance of monuments or graves; "(2) trusts for the saying of masses, in jurisdictions where such "trusts are not regarded as charitable; (3) trusts for the main- "tenance of particular animals; (4) trusts for the benefit of "unincorporated associations (though this group is more doubt- "ful); (5) miscellaneous cases." I am prepared to accept, for the purposes of the argument, that it does not matter that the trusts here are attached to residue and not to a legacy; that is to say, it does not matter that the persons who would come to the court and either complain if the trusts were not being carried out, or claim the money on the footing that they had not been carried out, are next-of-kin rather than residuary legatees. Still, in my judgment, the scope of these cases (and I can call them anomalous because they have been so called both in the book of Mr. Morris and Professor Barton Leach and in the course of the argument) ought not to be extended. So to do would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts, so long only as the question of perpetuities did not arise; and, in my judgment, that result would be out of harmony with the principles of our law. No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries. These cases constitute an exception to that general rule. The general rule, having such authority as Lord Eldon, Lord Parker and my predecessor, Lord Greene M.R., as authority behind it, was most recently referred to in the Privy Council in *Leahy* v. *Attorney-General for New South Wales.*[12] I add also that, in my judgment, the proposition stated in Mr. Morris and Professor Barton Leach's book (p. 308) that if these trusts should fail as trusts they may survive as powers, is not one which I think can be treated as accepted in English law.

I therefore, so far as this case is concerned, conclude (having already stated my view of the meaning of the words) that, though this trust is specific, in the sense that it indicates a purpose capable of expression, yet it is of far too wide and uncertain a nature to qualify within the class of cases cited. It would go far beyond any fair analogy to any of those decisions. I do not wish to take time by much example, particularly because I am not unmindful of having already said that I do not wish to add to the future burden of citation; but, merely by way of example, take trusts for the maintenance of memorials, I refer to *In re Hooper.*[13] That was a case where the purposes of the bequest was to provide for the care and upkeep of certain graves, a vault and monuments. Maugham J. said[14]: "This point is one, to my "mind, of doubt, and I should have felt some difficulty in deciding

[12] [1959] 2 W.L.R. 722; [1959] 2 All E.R. 300.
[13] [1932] Ch. 38.
[14] Ibid. 39.

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" it if it were not for *Pirbright* v. *Salwey*.[15] That was a decision " arrived at by Stirling J. after argument by very eminent counsel. " The case does not appear to have attracted much attention in " textbooks, but it does not appear to have been commented upon " adversely, and I shall follow it." It may be said that other cases in regard to monuments, which were closely on the facts in line, might similarly follow the decision of Stirling J., but this case, as I construe the purposes of the gift, is very different from *In re Hooper*.[16]

In re Drummond[17] is the only other case under this head to which I need refer. That was a case, as will be recalled, where Eve J. held valid a gift by will and codicil for the Old Bradfordians Club. He said, in a short judgment, that " there was, in his " opinion, a trust, but there was abundant authority for holding " that it was not such a trust as would render the legacy void " as tending to a perpetuity; . . . The legacy was not subject to " any trust which would prevent the committee of the club from " spending it in any manner they might decide for the benefit of " the class intended." *In re Drummond*[17] was referred to at some little length by Lord Simonds in giving the judgment of the Privy Council in the *Leahy case*[18]; and, if I do not misread Lord Simonds' judgment, he thought that Eve J., in treating the Old Bradfordians Club case as he did, had somewhat overlooked the ground of the earlier decision to which alone he referred in his judgment in *In re Clarke*.[19] Lord Simonds said[20]: " He " [Eve J.] cited only *In re Clarke*,[21] though other cases had been " referred to in argument, and he ignored that Byrne J. had been " able to reach his conclusion in that case just because he " regarded the gift as a gift to the individual members of the " corps who could together dispose of its assets as they thought " fit." I do not propose to say more about *In re Drummond*[22] save this, that it seems on its facts to be a very widely different case from the present, and I am certainly not prepared to say that *In re Drummond*[22] is an authority which we should use as justifying an acceptance of the validity of this trust, making it (so to speak) a further addition to the anomalous number of cases classified in Morris and Professor Barton Leach's book.

I should, perhaps, as it was referred to, not pass from this point without a mention of a recent case (not, I think, reported) of *In re Catherall, deceased*,[23] decided by Roxburgh J. It was a case in which the testator had made the following disposition, according to the citation in the affidavit of which we have a copy: " (1) Unto the vicar and wardens of St. John's Church, " Great Harwood, £2,500 for a peal of bells and a clock for the " tower in memory of my dear parents and devoted sister;

[15] [1896] W.N. 86.
[16] [1932] Ch. 38.
[17] [1914] 2 Ch. 90, 97.
[18] [1959] 2 W.L.R. 722.
[19] [1901] 2 Ch. 110.
[20] [1959] 2 W.L.R. 722, 737.
[21] [1901] 2 Ch. 110.
[22] [1914] 2 Ch. 90.
[23] Unreported 1958 C. No. 2676.

" (2) Unto the vicar and wardens of Great Harwood Parish " Church £1,000 for a suitable memorial, at their discretion, in " memory of my dear parents and devoted sister; (3) Unto the " vicar and wardens of Great Harwood Parish Church £500 for " the upkeep and attention to the family grave." The question arose as to the second of those gifts, £1,000 for a suitable memorial. According to the note with which Mr. Buckley has provided us, Roxburgh J. thought that was valid. He said, according to the note: " It was argued whether this is a " charitable disposition. I have reached no concluded opinion " on that." Then he says: " Distinctions are very fine," an observation which may fairly find its place in every judgment on this type of issue. " I could construe the words as meaning " such purposes (of a religious character) as they may think fit, " being suitable as a memorial; that is, charitable; or I could " construe the words as meaning any purpose suitable as a " memorial; that is, non-charitable. But there is another ground " on which this trust can be upheld. It is not perpetuitous. I " went into these cases in *In re Astor*.[24] Such a trust as this is " valid whether charitable or not. Purpose must embody a " definite concept, and means to attain it must be described with " sufficient certainty. In this case I should have no difficulty in " deciding what would be a suitable memorial." Of course, we do not know much of the facts of that case, but the memorial was to be a " suitable " memorial in memory of the testator's parents and devoted sister, of whom we know nothing at all. I am not therefore saying that this decision was in any way decided on wrong grounds; but it does seem to me, in its context, that in any event the decision could be justified on the ground that, as I say, in its context the purposes were limited to religious (that is, charitable) purposes.

That brings me then back to the question of construction in relation to the point raised by Mr. Buckley, and I have already largely anticipated my answer to it. It is true, as Mr. Buckley pointed out, that there are several instances in the books of trusts expressed to be for the benefit of the inhabitants of a place or parish which have been held to be valid charitable trusts. They are discussed in a recent case of *Williams' Trustees* v. *Inland Revenue Commissioners*[25] by Lord Simonds; and as regards these cases also, as Lord Simonds observed, there is some ground for saying that they are anomalous. Whether some owe an origin to the strict language of Lord Macnaghten's famous fourth category of charities or not, it is no doubt true to say that that particular formula, " for the benefit of the inhabitants of A," has been taken on several occasions to be one which inherently has the quality that it is within the intendment of the Statute of Elizabeth, that the benefit indicated is the sort of benefit which would make it a charitable disposition. But the formula is not

[24] [1952] Ch. 534.

[25] [1947] A.C. 447.

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the same as that here used. It may well be, as Mr. Buckley observed, that purposes which are useful to a community will also benefit the community; but that, I think, is not the point. The formula is different. What the testator meant was that this council should provide a memorial to himself having the quality that it should be useful, which I take to mean useful rather than (though not necessarily exclusive of) being ornamental. I cannot myself see that the utility is confined to the inhabitants of North Tawton. In the course of the argument a car park was suggested. Whether that is a good illustration, it is not for me to say; but if it were a suitable memorial in other respects, its utility certainly would not be confined to the inhabitants of North Tawton. It would be wrong to treat this formula as being merely synonymous with "for the benefit of the inhabitants of North "Tawton" and, therefore, so construing it (but, as I think, illogically), giving to this formula the inherent quality which the other has been held to have and holding it to be a charitable gift. It would be contrary to the tenor of the law, more particularly as it has been recently expounded, and it would be carrying this case beyond any limits which authority justifies.

Those, then, are my reasons for the conclusion which I stated at the beginning of this judgment, that in my view Danckwerts J. rightly decided the case, and I therefore would dismiss the appeal.

SELLERS L.J. I agree with my Lord's judgment and find nothing I wish to add.

HARMAN L.J. I agree. At first sight, my mind recoiled from the possibility of this gift being held valid, and I have not seen any cause in the course of the hearing to resile from that view. One must first construe the will; and my view of that is that this testator, as my Lord has said, intended by his will to provide himself with a memorial in his native town. He added that the memorial to himself should also be useful. In other words, it must not consist of a statue of the testator in his trousers as he lived, unless that would serve some useful purpose; but it was not primarily of the benefit to the inhabitants of North Tawton that he thought, but of perpetuation of his own memory. So read, it seems to me apparent that the law cannot uphold the will, unless connected with the fabric of a church, without throwing over every kind of authority on this subject. A gift for public purposes in the parish of North Tawton, a gift for patriotic purposes, a gift for benevolent purposes, are all, as we all know, universally now held to be bad. How then shall it be held that a gift for useful purposes is good without upsetting the whole structure so elaborately built up and, one had hoped after *Diplock's* case,[26] so firmly established? I cannot think that charity has anything to do with this bequest. As for establishing it without the crutch

[26] [1944] A.C. 341; [1944] 2 All E.R. 60.

of charity, I applaud the orthodox sentiments expressed by Roxburgh J. in the *Astor* case,[27] and I think, as I think he did, that though one knows there have been decisions at times which are not really to be satisfactorily classified, but are perhaps merely occasions when Homer has nodded, at any rate these cases stand by themselves and ought not to be increased in number, nor indeed followed, except where the one is exactly like another. Whether it would be better that some authority now should say those cases were wrong, this perhaps is not the moment to consider. At any rate, I cannot think a case of this kind, the case of providing outside a church an unspecified and unidentified memorial, is the kind of instance which should be allowed to add to those troublesome, anomalous and aberrant cases.

In my judgment, Danckwerts J. came to the right conclusion, and this appeal ought to be dismissed.

Appeal dismissed with party and party costs of the parties other than the Attorney-General.

Solicitors: *Biddle, Thorne, Welsford & Barnes for G. D. Cann & Hallett, Exeter; Peacock & Goddard; Treasury Solicitor.*

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[27] [1952] Ch. 534.

[COURT OF APPEAL.]

HIGH COMMISSIONER FOR INDIA AND OTHERS *v.* GHOSH.

Conflict of Laws—Sovereign immunity—Counterclaim against sovereign plaintiff—Action by High Commissioner and by foreign sovereign—Claim for money lent—Defence repayment not due—Counterclaim for slander—Whether counterclaim infringes sovereign immunity—Whether counterclaim related to subject-matter of claim—Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 18), *s.* 1.[1]

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, s. 1: "(1) Subject "to the provisions of this section— "(*a*) a person for the time being "recognised by Her Majesty's "Government in the United King- "dom as the chief representative in "the United Kingdom of any country "to which this section applies, "whether he is known by the title "of High Commissioner for that "country or by any other title (in "this section referred to as 'a chief "'representative'), shall be entitled "to the like immunity from suit and "legal process, and the like inviol- "ability of residence, official premises "and official archives as are accorded "to the envoy of a foreign sovereign "power accredited to Her Majesty; ". . . (6) The countries to which "this section applies are Canada, "Australia, New Zealand, the Union "of South Africa, India, Pakistan, "Ceylon, Southern Rhodesia, and the "Republic of Ireland."

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The plaintiffs sued the defendant for money lent or, alternatively, for damages for breach of contract. The defendant contested liability on the claim, and counterclaimed damages for slander against the first two plaintiffs—the High Commissioner for India and the Union of India—in respect of certain statements allegedly made by two doctors at an Indian students' hostel in London. The two doctors were alleged to have been the servants or agents of both the first two plaintiffs or either of them.

The first two plaintiffs applied to strike out the counterclaim on the grounds (inter alia) that the High Commissioner for India was immune from suit and legal process under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952,[1] and that the Union of India was a sovereign State:—

Held, that a foreign sovereign by bringing an action in the English courts did not waive his immunity against counterclaims which were unrelated to and independent of the subject-matter of the action; accordingly, the counterclaim for slander would be struck out.

INTERLOCUTORY APPEAL.

By their statement of claim the High Commissioner for India, the Union of India, and the Government of West Bengal sued Dr. Satya Ranjan Ghosh, of 31 Howitt Road, London, N.W.3, for the return of money lent or, alternatively, damages for breach of contract.

The money lent was alleged to consist of three separate loans made by the High Commissioner for India in 1950 to the defendant comprising sums of £75 10s., £120, and £87. The second loan was made on behalf of the Union of India; the third on behalf of the Government of West Bengal. The first loan was alleged to be a repayable advance; the second a loan repayable on demand or, alternatively, repayable in India by instalments within six months of the defendant's arrival in India, it being an implied term of the loan that the defendant return to India within a reasonable time; the third loan was alleged to have been made on condition that the defendant returned to West Bengal within a reasonable time and served the Government of West Bengal for a period of five years.

By his defence the defendant did not admit that any moneys had been lent to him as alleged in the statement of claim, but he contended that, if any loans were made to him, they were repayable only upon his return to India after the completion of his studies in the United Kingdom.

The defendant counterclaimed damages for slander against the first two plaintiffs and two individual Indian doctors alleged to have been in control of or connected with an Indian students' hostel at 89–91, Guildford Street, London, W.C.1, as the servants or agents of the first two plaintiffs. The alleged slander was in respect of certain statements alleged to have been made by the two doctors on different occasions in 1956 and 1957 to students in the hostel, who were patients of the defendant, to the effect that the defendant was an undesirable doctor.

The first two plaintiffs applied by summons to Master Diamond

to strike out the counterclaim. The grounds of the application were that the High Commissioner was immune from suit and legal process under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952,[1] and that the Union of India was a sovereign State. The second ground of the application was that under R.S.C., Ord. 21, r. 15, the claim raised ought not to be disposed of by way of counterclaim. The master made an order striking out the counterclaim. On appeal to the judge in chambers, McNair J. affirmed the master's order. The defendant appealed.

Dr. Ghosh appeared in person.

T. O. Kellock for the first two plaintiffs.

The following cases were cited in argument, in addition to the case referred to in the judgment: *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*[2]; *Strousberg* v. *Republic of Costa Rica*[3]; *Oriendtoveen* v. *Hamlyn & Co. Ltd.*[4]; *Rahimtoola* v. *Nizam of Hyderabad.*[5]

JENKINS L.J. stated the facts and continued: The law which we have to apply is, I apprehend, well settled. A person entitled to diplomatic immunity, as the High Commissioner for India indisputably is, or a foreign sovereign state, as for this purpose the Union of India admittedly is, cannot be impleaded in the courts of this country in an action such as the plaintiff's counterclaim in respect of slander. It is unnecessary to refer to the law relating to diplomatic immunity and the immunity accorded to foreign sovereign states, because in this particular case it is quite manifest that the subject of the defendant's counterclaim could not have been maintained against the High Commissioner for India and the Union of India as an original action. But the High Commissioner and the Union of India have chosen to come to the courts in this country and to submit to the jurisdiction of those courts for the purpose of establishing their claim in debt against the defendant. By that course of action it is undoubtedly true that they must be taken to have waived their immunity to a certain extent, and the extent of such waiver for the present purpose is this: By bringing their action in this country and submitting to the jurisdiction, the plaintiffs must be taken to have submitted to the jurisdiction not only for the purpose of having their claim adjudicated upon but also for the purpose of enabling the defendant, against whom they are prosecuting their claim, to defend himself adequately, and his adequate defence may include a claim or demand asserted by way of counterclaim. That does not, however, mean that the plaintiffs,

[2] [1897] 2 Ch. 487; 13 T.L.R. 567.

[3] (1880) 29 W.R. 125; 44 L.T. 199.

[4] (1892) 8 T.L.R. 231.

[5] [1958] A.C. 379; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441.

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having brought their action here, are thereby exposed to any sort of claim which the defendant may choose to raise against them by way of counterclaim, however far removed from the plaintiffs' cause of action the counterclaim may be.

I can conveniently refer to the law as stated in two passages in the Annual Practice (1959). The first passage is to be found at p. 311 in the course of the note to R.S.C., Ord. 16, r. 1, and reads: "A foreign sovereign suing here submits to the jurisdiction so far as to subject himself not only to process of discovery and so forth, but to any set-off or cross-claim which the defendant may set up by way of defence against claim, and which it is necessary for the court to entertain in order to do justice between the parties in regard to plaintiff's claim, but he does not lay himself open generally to counterclaims or cross actions." That is one passage. The other passage is at p. 508 in the notes to Order 21, r. 17, and reads: "A similar rule applies when a sovereign prince or state over whom our courts have no jurisdiction (*Mighell* v. *Sultan of Johore* [1]) submits to bring an action in this country. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is 'outside of and independent of the subject-matter of' the claim."

Mr. Kellock, for the plaintiffs, referred us to *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* [2] as providing sufficient authority to support the effect of the passages in the Annual Practice to which I have referred.

Accordingly, I am of opinion that this counterclaim cannot be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Dr. Ghosh has said all that could possibly be said in support of his contention, but I am at a loss to see how the subject-matter of the counterclaim, which is a claim for alleged slanders of the defendant by servants of the High Commissioner for India or the Union of India, has any material bearing at all upon the subject-matter of the claim, which in its primary form is simply a claim for money lent.

Accordingly, on the principles to which I have referred, this does not seem to me to be a counterclaim to which the High Commissioner for India and the Union of India must be taken to have submitted by bringing their action in these courts. The counterclaim clearly could not be maintained by independent action, and it is equally clear in my opinion that it cannot be brought into the present litigation on the ground that it is necessary to adjudicate upon the claims for slander in order to do justice on the claim in debt. The view I have formed on the

[1] [1894] 1 Q.B. 149; 12 T.L.R. 155.

[2] [1898] 1 Ch. 190; 14 T.L.R. 65.

first ground, on which the striking out of the counterclaim was asked for, makes it unnecessary to deal with the second ground, which is the objection under R.S.C., Ord. 21, r. 15.

For the reasons I have endeavoured to state, I am of opinion that the master and the judge were perfectly right in the conclusion to which they came, and I would dismiss this appeal.

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MORRIS L.J. I am in entire agreement with the judgment which my Lord has delivered.

ORMEROD L.J. I agree.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *T. L. Wilson & Co.*

[QUEEN'S BENCH DIVISION.]

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Oct. 8, 9.
Diplock J.

Agriculture—Agricultural holding—Tenancy—Protection—Letting of farm and land for period of eighteen months—Whether let for interest less than tenancy from year to year—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1).

By an agreement in writing the plaintiff let to the defendant a farm and land for a term of eighteen months. After the expiry of the term by effluxion of time the defendant failed to give up possession contending, inter alia, that by virtue of section 2 of the Agricultural Holdings Act, 1948,[1] the agreement took effect and continued to take effect as an agreement for the letting of the farm for a tenancy from year to year, under which she was entitled to possession. On the plaintiff's claim for possession and mesne profits:—

Held, that the expression "tenancy from year to year" in section 2 (1) meant a tenancy which created an interest which had the invariable characteristics common to all tenancies from year to year at common law, namely, it must last for one year and unless determined at the end of the first year by notice would be renewed

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[Reported by E. CARYL-THOMAS, Barrister-at-Law.]

[1] Agricultural Holdings Act, 1948, s. 2: "(1) Subject to the provisions "of this section, where under an "agreement made on or after the first "day of March, 1948, any land is let "to a person for use as agricultural "land for an interest less than a "tenancy from year to year, or a "person is granted a licence to "occupy land for use as agricultural "land, and the circumstances are "such that if his interest were a "tenancy from year to year he would "in respect of that land be the tenant "of an agricultural holding, then, "unless the letting or grant was "approved by the Minister before "the agreement was entered into, the "agreement shall take effect, with "the necessary modifications, as if it "were an agreement for the letting "of the land for a tenancy from year "to year: . . ."

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by operation of law for successive periods of one year each until determined at the end of one yearly period by such notice. A lease for eighteen months was for an interest greater than a tenancy from year to year, and therefore section 2 (1) did not apply to the tenancy agreement made between the plaintiff and defendant, and the plaintiff was entitled to possession.

ACTION.

By an agreement in writing dated March 29, 1956, made between the plaintiff, Erskine William Gladstone, and the defendant, Alice Mary Bower, the plaintiff let to the defendant the messuage buildings, gardens, land and premises called the Manor Farm in the parishes of Hawarden and Saltney, Flintshire, "for "the term of eighteen months from the 1st day of November "1955 . . . and terminating on the 1st day of May 1957, at the "rent of £550 for the said term." The defendant failed to give up possession of the farm on May 1, 1957.

The plaintiff claimed possession of the farm and mesne profits from May 1, 1957, until possession was given. The defendant contended that she was entitled to possession, inter alia, by virtue of section 2 of the Agricultural Holdings Act, 1948, under which the agreement between the parties took effect as an agreement for the letting of the farm for a tenancy from year to year.

R. H. Blundell Q.C. for the landlord.
M. A. L. Cripps Q.C. and *B. Rayleigh* for the tenant.

In addition to the cases referred to in the judgment the following were cited in argument: *Doe* d. *Clarke* v. *Smaridge* [2]; *Doe* d. *Chadborn* v. *Green* [3]; *Doe* d. *Plumer* v. *Mainby* [4]; *Bishop of Bath's Case* [5]; *Scene Estate Ltd.* v. *Amos* [6]; *Oxley* v. *James*.[7]

Cur. adv. vult.

October 9. DIPLOCK J. read the following judgment: This case raises a point—I do not know whether the length of my judgment prevents me from calling it short—as to the true construction of section 2 (1) of the Agricultural Holdings Act, 1948. By an agreement in writing, dated March 29, 1956, the plaintiff let to the defendant a farm and land in Flintshire "for the term "of eighteen months from the 1st day of November, 1955, . . . "and terminating on the 1st day of May, 1957, at the rent of "£550 for the said term." It is common ground and indeed apparent from the other terms of the tenancy agreement, which are those usual in agricultural leases, that the land was used for agriculture and thus "agricultural land" within the meaning of section 1 (2) of the Act. The plaintiff does not contend that it was not an "agricultural holding" within section 1 (1). He

[2] (1845) 7 Q.B. 957.
[3] (1839) 9 Ad. & El. 658.
[4] (1847) 10 Q.B. 473.
[5] (1605) 6 Co.Rep. 34 b.
[6] [1957] 2 Q.B. 205; [1957] 2 All E.R. 325.
[7] (1844) 13 M. & W. 209.

concedes that the tenancy is a tenancy for a term of years and that, so far as concerns such rights as freedom of cropping, compensation for improvements and tenant right, etc., as are conferred on tenants of agricultural holdings by the Act, the defendant is entitled to the benefit of the provisions of the Act which relate to these matters. The sole questions are: (1) whether this tenancy agreement falls within section 2 (1) of the Act so as to give to the defendant greater security of tenure than she would have at common law by virtue of her tenancy; and (2) if not, whether Part II of the Landlord and Tenant Act, 1954, applies to the tenancy.

The tenancy agreement on its face created a tenancy for a term certain, that is to say, eighteen months, which expired on May 1, 1957. At common law the defendant's interest terminated on that date without any necessity for a notice to quit. The claim in the action is for possession and mesne profits. The principal ground of the defence is that by virtue of section 2 (1) of the Agricultural Holdings Act, 1948, the tenancy took effect as a tenancy from year to year and that, since—as is common ground—no notice to quit has been given, the defendant's tenancy is still continuing and the plaintiff has no right to possession.

The fixed term of eighteen months, which is unusual and, indeed, normally quite inappropriate for a farming tenancy, was admittedly chosen with the object of avoiding bestowing on the tenant the security of tenure which the Act confers on most tenants of agricultural holdings, but it is right that I should say —although it cannot affect the matter of construction which I have to determine—that the circumstances were unusual and it is not suggested that there was anything discreditable in the plaintiff's desire to achieve this object, if the law so permits. Whether he has done so is the sole matter which I have to decide.

The Agricultural Holdings Act, 1948, is a consolidation Act and it will be necessary at some stage, and is convenient now, to look briefly at its legislative history. The two principal Acts which it consolidated were the Agricultural Holdings Act, 1923, and Part III of the Agriculture Act, 1947, the latter of which added to and amended the former. As the former consolidated the previous enactments, it is unnecessary to go back further. The Act of 1923 dealt with three classes of agricultural tenancies, that is to say: (1) tenancies for a fixed term, (2) tenancies for lives or for lives and years, and (3) periodic tenancies. This is the result of the definition section, section 57 (1), which, so far as is relevant, is reproduced in section 94 (1) of the Act of 1948. The Act of 1923, however, did not, at any rate as respects termination of their interest, alter the common law rights of tenants and landlords of all agricultural holdings which fell within these classes. Tenancies in the first class, that is, tenancies for a fixed term, were dealt with by providing in section 23, now

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substantially reproduced in section 3 of the Act of 1948, that a tenancy for a term of two years or upwards should not terminate upon the expiration of the term for which it was granted, unless not less than one or more than two years' notice were given, and that, in the absence of such notice, the tenancy should continue as a tenancy from year to year.

Tenancies in the second class, that is, tenancies for lives or lives and years, now modified by the provisions of section 149 (6) of the Law of Property Act, 1925, were dealt with by section 24 of the Act of 1923 (reproduced substantially in section 4 of the Act of 1948) by granting to the tenant in lieu of emblements a right to continue in occupation until given twelve months' notice to quit, expiring at the end of a year of the tenancy.

The only tenancies in the third class, that is periodic tenancies, dealt with were "tenancies from year to year." It was provided by section 25 (1), now reproduced in section 23 of the Act of 1948, that a notice to quit in the case of such a tenancy should be invalid if it purported "to terminate the tenancy before the "expiration of twelve months from the end of the then current "year of tenancy." Subsection (2) created a number of exceptions to the general provisions. Those in paragraph (*c*), any notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose other than the use of the land for agriculture, and paragraph (*d*), any notice given by a tenant to a sub-tenant, are the most relevant.

The Act of 1923, therefore, did not purport to affect the common law rights of the parties to all tenancies of agricultural holdings as regards the termination of their interests. It left untouched (a) tenancies for a fixed term of less than two years, and (b) some tenancies from year to year and, in particular, sub-tenancies from year to year, although the tenants of such tenancies fell within the Act of 1923 and benefited from its other provisions. In 1944, however, it was held by the Court of Appeal in *Land Settlement Association Ltd.* v. *Carr* [1] that a periodic tenancy from 364 days to 364 days was not a tenancy from year to year. It did not, therefore, fall within the definition of a "contract of tenancy" in section 57 (1) of the Act of 1923, with the consequence not only that the tenant could not benefit from the provisions as regards notice to quit in section 25 of the Act, but was wholly excluded from the provisions of the Act including the provisions regarding freedom of cropping, compensation for improvements and disturbance, etc.

Such was the state of the law when Part III of the Agriculture Act, 1947, was passed. Section 40 of that Act is reproduced in section 2 of the Act of 1948 and it is convenient that I should turn to it in its present wording. [His Lordship read section 2 (1) and continued:] There follows a proviso excluding certain types

[1] [1944] K.B. 657; [1944] 2 All E.R. 126; 60 T.L.R. 488.

of occupation of land from the provisions of the subsection. By subsection (2): "Any dispute arising as to the operation of the "foregoing subsection in relation to any agreement shall be "determined by arbitration under this Act."

Subsection (1) thus assimilates to tenancies from year to year and so brings within the scope of the Act as a whole two kinds of occupation of agricultural land, neither of which was previously within the Act at all, namely: (1) letting for an interest less than a tenancy from year to year, and (2) licences to occupy land for use as agricultural land.

The question which I have to determine is whether this tenancy for a fixed period of eighteen months or one and a half years is a letting for an interest less than a tenancy from year to year. It is thus a question of the applicability of subsection (1) to the agreement between the parties as distinct from its operation in relation to that agreement, a distinction which counsel on both sides contend. The Court of Appeal, in *Goldsack* v. *Shore*,[2] gives this court jurisdiction to determine that matter, notwithstanding the arbitration provisions in subsection (2).

At common law a tenancy for a fixed period of one and a half years clearly creates an interest not less than a tenancy from year to year. This is because the tenant's interest under such a tenancy must continue for more than one year, whereas his interest under a tenancy from year to year may determine at the end of one year. The fact that under a tenancy from year to year it may continue for more than one year must be irrelevant to the test laid down in the subsection; otherwise any lease for a fixed term, however long, would create an interest less than a tenancy from year to year, and take effect by virtue of section 2 as a tenancy from year to year, which is inconsistent with the provisions of section 3.

Mr. Cripps, while conceding that this is so at common law, says that it is not so in the case of land occupied for use as agricultural land, to which alone the section relates, for a tenancy from year to year of such land cannot, by virtue of section 23 (1) of the Act, be determined before the expiration of the second year. Any letting of land for use as agricultural land for a fixed period of less than two years is therefore for an interest less than a tenancy from year to year of such land.

There is, I think, a fallacy in this attractive argument. It is in the first place to be observed that section 23 is not in terms dealing with tenancies from year to year. It has been held that it applies to any tenancy where the tenant's leasehold interest is determinable by notice, such as determination under a "break" clause in a lease for a fixed term: see *Edell* v. *Dulieu*.[3] Furthermore, as the provisos show, it does not apply to all tenancies from year to year, see provisos (*c*) and (*d*), or to all notices to quit under tenancies from year to year, see proviso (*b*).

[2] [1950] K.B. 708; [1950] 1 All E.R. 276.

[3] [1924] A.C. 38; 40 T.L.R. 84.

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What the section does is to invalidate certain notices which would otherwise determine a tenant's interest in agricultural land, whether under a tenancy from year to year or some other form of tenancy, and one of its consequences is that in the case of most—but not all—tenancies from year to year, the tenant's interest must continue for at least two years.

The expression "an interest less than a tenancy from year "to year" in subsection (1) of section 2 is quite general. The expression "tenancy from year to year" was used by the draftsman to describe an interest which had certain invariable characteristics which would enable one to say that other interests are greater or less than it. A tenancy from year to year at common law is an interest which does possess certain invariable characteristics without which it is not a tenancy from year to year and which constitute a standard by which the magnitude of other interests may be judged; it must last for one year and, unless determined at the end of the first year by notice (either six months' notice or whatever other length of notice, if any, is expressly provided for in the contract of tenancy), will be renewed by operation of law for successive periods of one year each, until determined at the end of one such yearly period by such a notice.

If Mr. Cripps is right, the "tenancy from year to year" referred to in the subsection has no such invariable characteristics. Whether it can be determined at the end of the first year depends not only upon who are the parties—see paragraphs (*c*) and (*d*) of the proviso to section 23 (1) of the Act—but also on the purpose for which it is determined—see paragraph (*b*). What he is really seeking to do is to read the words "tenancy "from year to year" in section 2 (1) as if they were "a "tenancy from year to year of agricultural land which is not "terminable by a notice to quit, to which the proviso to section "23 (1) of this Act applies."

In my view the expression "tenancy from year to year" in section 2 (1) must mean a tenancy which creates an interest which has invariable characteristics, namely, those which I have indicated are common to all tenancies from year to year at common law. Furthermore, I do not think that section 23 can properly be said to transform the interest created by a tenancy from year to year of an agricultural holding into an interest greater than that created by a tenancy from year to year at common law. The subsection modifies the way in which the parties to such a tenancy may exercise some of the rights incidental to that interest. The lease in the present case, being for eighteen months, is, in my view, for an interest greater than a tenancy from year to year.

Mr. Cripps naturally relies strongly in support of his construction upon the fact that the construction I have adopted will have some odd consequences. For instance, a licence to occupy land for use as agricultural land, he points out, is caught by the subsection even if it is for a fixed period longer than a year, but it is

no less odd, if one of the purposes of the Act is to give greater security of tenure to tenants of agricultural land, that the subsection should cut down the security of tenure of a licensee under a licence for a fixed period greater than two years. For another oddity see *Reid* v. *Dawson*.[4]

Mr. Cripps also relies on what he contends is the plain scheme of the Act as respects security of tenure, namely, that all occupiers of agricultural land, save those included in the proviso to section 2 (1), shall be entitled to remain in possession until their occupation is determined by a notice to quit, subject to the qualifications and restrictions laid down in sections 23 and 24.

If it were permissible to speculate at large as to the intentions of Parliament, I should be tempted to guess that Parliament simply overlooked the case of a lease for a fixed term of between one and two years. If it had considered such tenancies and thought that tenants thereunder should be given greater security of tenure, the obvious way to do so would be to amend section 23 of the Act of 1923, now section 3 of the Act of 1948, by removing the restriction of its application to tenancies for a term of two years and upwards. But I cannot speculate as to Parliament's intention.

The legislative history to which I have referred does not point conclusively to a neat scheme such as Mr. Cripps postulates. The Act of 1923 unambiguously omitted from its provisions relating to security of tenure all leases for a fixed term of less than two years. It also omitted from these provisions and from all other provisions of the Act—although this was not determined by the courts until 1944—all periodic tenancies for periods less than one year. The fact that the Act of 1947 (a) brought the latter class of tenancies within the provisions of the Act, including those relating to security of tenure, and (b) greatly enhanced, by what is now section 24 of the Act of 1948, the security of tenure of those tenants to whose tenancy the security of tenure provisions of the Act do apply, is no conclusive reason for holding, contrary to what I have held to be the natural construction of an Act which cuts down the common law rights of the subject, that it must have intended to bring within its provisions relating to security of tenure leases for a fixed term of more than one, but less than two, years which were already within the other provisions of the Act of 1923.

I hold, therefore, that section 2 (1) of the Act of 1948 does not apply to the tenancy agreement made between the plaintiff and the defendant and that, so far as this Act is concerned, the defendant's tenancy determined by effluxion of time on May 1, 1957.

Mr. Cripps' alternative defence under Part II of the Landlord and Tenant Act, 1954, I can deal with shortly. Section 43 (*a*) expressly excludes from the provisions of Part II " a tenancy of

[4] [1955] 1 Q.B. 214; [1954] 3 All E.R. 498.

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"an agricultural holding." By section 69 an "agricultural "holding" has the same meaning as in the Agricultural Holdings Act, 1948. This holding, being a holding of agricultural land comprised in the contract of tenancy for a term of years, is an agricultural holding in the meaning ascribed to it in section 1 of the Agricultural Holdings Act, 1948, and thus excluded from the operation of Part II of the Landlord and Tenant Act, 1954. Section 8 and paragraph 29 of the First Schedule to the Agriculture Act, 1958, upon which Mr. Cripps also relies, amend paragraph (*a*) of section 43 of the Landlord and Tenant Act, 1954, by saying at the end of the paragraph the words "or a tenancy "which would be a tenancy of an agricultural holding if the "proviso to subsection (1) of section 2 of the Agricultural "Holdings Act, 1948, did not have effect or, in a case where the "approval of the Minister of Agriculture, Fisheries and Food was "given as mentioned in subsection (1), if that approval had not "been given."

This amendment, which merely adds an additional exclusion from the operation of Part II of the Landlord and Tenant Act, 1954, of land which is occupied for use as agricultural land, although not an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, is irrelevant to the case of a tenancy agreement between plaintiff and defendant which creates a tenancy of an agricultural holding within the meaning of that Act. The plaintiff is accordingly entitled to judgment for possession and mesne profits as prayed.

Judgment for the plaintiff for possession and mesne profits, with costs.

Solicitors: *Theodore Goddard & Co. for Llewellyn-Jones and Armon Ellis, Rhyl; Ellis & Fairbairn.*

[CHANCERY DIVISION.]

1959
Oct. 20.

Danckwerts J.

In re CAUNTER'S CHARGE.
BISHOP *v.* SOUTHGATE CORPORATION.

[1959 No. C. 837.]

Mortgage — Small dwellings — Local authority first charge — Sale of premises by local authority—Whether local authority accountable out of surplus to second chargee—Small Dwellings Acquisition Act, 1899 (62 & 63 *Vict. c.* 44), *s.* 6 (2).

By section 6 of the Small Dwellings Acquisition Act, 1899: "(1) Where a local authority order the sale of a house without

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[Reported by Miss PHILLIPA PRICE, Barrister-at-Law.]

"taking possession, they shall cause it to be put up for sale by "auction, and out of the proceeds of sale retain any sum due to "them . . . and pay over the balance (if any) to the proprietor. "(2) If the local authority are unable at the auction to sell the "house for such a sum as will allow of the payment out of the "proceeds of sale of the interest and principal of the advance then "due to the authority . . . they may take possession of the house ". . . but shall not be liable to pay any sum to the proprietor."

In November, 1953, the plaintiff agreed to sell her freehold house to C., who obtained a loan of £1,800 from a local authority on the security of a first charge on the premises under the Small Dwellings Acquisition Acts, 1899 to 1923. The plaintiff lent C. the remaining £450 of the purchase-money on the security of a second charge on the premises. Completion took place on March 15, 1954, and on that date the two charges were executed. C. fell into arrears with the instalments payable to the local authority, who, on February 14, 1958, put the premises up for sale by auction under section 6 (1) of the Act of 1899, but the reserve price of £1,850 was not reached. On July 25, 1958, the local authority obtained an order for possession of the house and proceeded to sell it with vacant possession for £2,200. The total amount then due to them in respect of principal, interest, costs and expenses amounted to £1,905 3s. 5d. The local authority asserted that by reason of section 6 (2) they were not liable to account to the plaintiff out of the surplus for what remained due to her under the second charge, but that they were bound to retain such surplus as a profit for their ratepayers. On a summons to determine whether the local authority were accountable to the plaintiff for the moneys due to her under the second charge:—

Held, that section 6 (2) of the Act did not deprive a chargee, who could be a different person from the "proprietor," of his rights to repayment by reason of the default of the proprietor, and that those rights remained unless they were disposed of by a foreclosure action. The local authority were, therefore, accountable to the plaintiff for any balance of the proceeds of sale remaining in their hands after the satisfaction of their own claims.

In re Brown's Mortgage [1945] Ch. 166; [1945] 1 All E.R. 397 considered.

ADJOURNED SUMMONS.

In November, 1953, the plaintiff, Beatrice May Bishop, the registered proprietor with an absolute title of a house known as 55, Eaton Park Road, Palmers Green, Middlesex, arranged to sell the premises to a purchaser, Charles Richard Caunter, for £2,250. Since he could not find the purchase-money, it was arranged that he should borrow the first £1,800 thereof from the defendants, the Southgate Corporation, on the security of a first charge on the premises under the Small Dwellings Acquisition Acts, 1899–1923, and that the plaintiff would lend him the remaining £450 of the purchase-money on the security of a second charge on the said premises. The sale of the premises was duly completed in accordance with these arrangements on March 15, 1954. On that date there was executed a transfer of the premises by the plaintiff to the purchaser, a first charge on the premises made by the purchaser in favour of the defendants, to secure the principal sum of £1,800 and interest thereon, and

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a second charge on the premises made by the purchaser in favour of the plaintiff to secure the principal sum of £450 and interest thereon. On March 27, 1954, these documents were registered at H.M. Land Registry. As the advance secured by the defendants' first charge was made under the Small Dwellings Acquisition Acts, there was entered in the register of the title a restriction restraining disposition by way of transfer by the proprietor of the premises or in exercise of the power of sale in any subsequent charge without the consent of the proprietor of the defendants' first charge. At all material times, therefore, the defendants had notice of the plaintiff's second charge.

After the completion of the purchase the plaintiff remained in the house as the purchaser's tenant in part of the premises. At a later date the purchaser defaulted under his first charge to the defendants, sub-let the rest of the premises and disappeared. Early in 1958 the defendants offered the premises for sale by auction but at the auction sale the reserve price was not reached. The defendants then commenced proceedings for possession against the plaintiff and the other tenants, and on July 25, 1958, an order for possession was made by the Registrar of Edmonton County Court. Having obtained vacant possession, the defendants sold the premises for a sum which was more than sufficient to pay off all that was due to them in respect of principal, interest, costs and expenses under the first charge, and left a surplus in their hands. The defendants, however, refused to account to the plaintiff out of that surplus for what remained due to her under the second charge, and asserted that they were entitled and bound to disregard it and retain the surplus as a profit for their ratepayers.

The plaintiff took out an originating summons, asking the court to determine whether, upon the true construction of the Small Dwellings Acquisition Acts, 1899–1923, and in the events that had happened, the defendants were or were not liable out of the surplus of the proceeds of sale of the premises, remaining after satisfaction of the principal moneys, interest, costs and expenses due to the defendants under the first charge, to account to the plaintiff for the moneys due to her under the second charge.

G. B. H. Dillon for the plaintiff.

Donald C. Potter for the defendant corporation.

The following case was cited in argument: *In re Brown's Mortgage*.[1]

DANCKWERTS J. This summons involves the construction of the Small Dwellings Acquisition Act, 1899, which, as its title shows, was passed to empower local authorities to advance money to any person to enable him to acquire a small house in which he

[1] [1945] Ch. 166; [1945] 1 All E.R. 397.

intended to reside. In other words, it was an Act which enabled a proprietor to acquire a house on easy terms compared to those which he might have to pay if he had to go into the open market for a loan.

[His Lordship stated the facts and continued:] The Small Dwellings Acquisition Act, 1899, has been amended by certain statutes but those amendments do not affect the present point, their only material effect being to raise the total of the market value of a house on which a local authority might loan money from £1,300 to £5,000.

Section 1 provides: "(1) A local authority for any area may, "subject to the provisions of this Act, advance money to a "resident in any house within the area for the purpose of "enabling him to acquire the ownership of that house; . . ." Then there are certain provisos as to the market value of the house providing that an advance shall not be made for the acquisition of the ownership of a house where, in the opinion of the local authority, the market value exceeds a figure which is now £5,000, and, further, that the advance shall be repaid with interest over a period of thirty years. Then by section 2 it is provided: "Before making an advance under this Act in respect "of a house a local authority shall be satisfied—(*a*) that the "applicant for the advance is resident or intends to reside in "the house, and is not already the proprietor within the meaning "of this Act of a house to which the statutory conditions "apply; . . .": of course, the whole purpose of the Act is to enable people to acquire houses in which they intend to reside. Nothing material today turns on section 3. Section 4 provides: "(1) Where "the ownership of a house has been acquired by means of an "advance under this Act, the person who is the proprietor shall be "personally liable for the repayment of any sum due in respect of "the advance until he ceases to be the proprietor, by reason of "a transfer made in accordance with this Act. (2) The provisions "of this Act requiring the permission of the local authority to "the transfer of the proprietor's interest in a house under this "Act shall not apply to any charge on that interest made by the "proprietor, so far as the charge does not affect any rights or "powers of the local authority under this Act." That is the first time there is a reference to a charge and it is worth noting that it is a charge "on that interest"—that is, the interest of the proprietor—and nothing else.

Section 5 provides for the recovery of possession and disposal of a house as follows: "(1) Where a local authority take posses- "sion of a house, all the estate, right, interest, and claim of the "proprietor in or to the house shall, subject as in this section "mentioned, vest in and become the property of the local "authority, and that authority may either retain the house under "their own management or sell or otherwise dispose of it as "they think expedient. (2) Where a local authority take posses- "sion of a house they shall, save as hereinafter mentioned, pay

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" to the proprietor either—(*a*) such sum as may be agreed upon; " or (*b*) a sum equal to the value of the interest in the house at " the disposal of the local authority, after deducting therefrom the " amount of the advance then remaining unpaid . . ." In the case of taking a house under that section they have power to pay something to the proprietor. By section 6 (1): " Where a local " authority order the sale of a house without taking possession, " they shall cause it to be put up for sale by auction, and out " of the proceeds of sale retain any sum due to them on account " of the interest or principal of the advance, and all costs, " charges, and expenses properly incurred by them in or about " the sale of the house, and pay over the balance (if any) to the " proprietor." That subsection obviously can have no application to the present case because the authority ordered the sale of the house without taking possession; they did not effect a sale and consequently there was no question of any payment of a balance to the proprietor. Subsection (2) provides: " If the local " authority are unable at the auction to sell the house for such " a sum as will allow of the payment out of the proceeds of sale " of the interest and principal of the advance then due to the " authority, and the costs, charges, and expenses aforesaid, they " may take possession of the house in manner provided by this " Act, but shall not be liable to pay any sum to the proprietor." I can well understand the good sense of that subsection because if they are unable to sell after they take possession, they have no proceeds of sale, and there cannot be any question of any surplus being paid to the proprietor. It would be unfair to impose on the local authority any liability to pay a sum to the proprietor which they have not got. It has, however, been held under that section in *In re Brown's Mortgage* [1] that if subsequently, owing to the increase in value of the property, a council effects a sale which will provide a surplus over and above all the money lent, their interest and costs, they still cannot pay the proprietor anything out of the surplus which has accrued. I do not know that it follows from section 6 (2) that such a result should occur whereby the proprietor is deprived of all further interest in the property or the proceeds of sale, but, at any rate, that was the result reached by Cohen J. in that case.

Sections 7, 8 and 9 have no application to the point which I have to decide, but section 10, which may be material, provides: " (1) A person shall not be deemed for the purposes of this Act " to be resident in a house unless he is both the occupier of and " resident in that house. (2) For the purposes of this Act " ' ownership ' shall be such interest or combination of interests " in a house as, together with the interest of the purchaser of the " ownership, will constitute either a fee simple in possession or a " leasehold interest in possession of at least sixty years unexpired " at the date of the purchase. (3) Where the ownership of a

[1] [1945] Ch. 166; [1945] 1 All E.R. 397.

" house is acquired by means of an advance under this Act, the " purchaser of the ownership, or, in the case of any devolution " or transfer, the person in whom the interest of the purchaser is " for the time being vested, shall be the proprietor of the house " for the purposes of this Act."

It is claimed on behalf of the defendant corporation that (because of the interests of the ratepayers, for whom they are trustees), they are not entitled to pay any part of the surplus which is in their hands to the plaintiff. The result is that she will lose the benefit of her charge and cease to have any right to recover from the proceeds of the sale of the property any part of the money which in fact she lent to the purchaser. That seems a very hard result as she was not in default in any way. The argument put forward on behalf of the defendants is this: Cohen J. held, as a result of section 6 in *In re Brown's Mortgage*,[2] that where a local authority sold after taking possession, the proprietor lost any right to share in any surplus proceeds of sale. In the same way it is said that a person who has advanced money by way of a second mortgage on the security of the property has no better title than that of the person who owns the equity of redemption in the first mortgage and as a borrower has raised money on the security of a mortgage made in favour of the local authority. A lender who advances money on a second mortgage in such circumstances must face the prospect that there may be the misfortune of the proprietor being expropriated as a result of the provisions contained in the Small Dwellings Acquisition Act, 1899. That is a very unfair result and one would not credit the legislature with such an intention, unless it was a necessary result of the provisions of the Act. It seems to me remarkable that the proprietor should be entirely expropriated, as was held in *In re Brown's Mortgage*,[3] without either the formality of a foreclosure action or anything of that sort, and without, therefore, the traditional protection afforded by the Court of Equity to a borrower who finds himself in difficulty with regard to repayment of the loan. It seems to me still more hard to expropriate a lender who has merely been deprived of repayment in the same way as the first mortgagee has been deprived of repayment. I do not think it follows from the provisions of the Act that such a result should occur. It is quite plain from sections 3 and 4 that a person having a charge may be a different person from the proprietor. I cannot see anything in the Act which requires the chargee to be deprived of a chargee's rights to repayment by reason of the default of the proprietor. Consequently, the chargee's rights remain unless disposed of by due process of law, as, for instance, by foreclosure. In the present case, therefore, the defendant local authority are accountable to the plaintiff for any balance of the money which remains in their hands from the sale of the property after the

[2] [1945] Ch. 166. [3] Ibid.

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satisfaction of their own claims and paying the amount of the principal, interest and costs of the charge.

Declaration accordingly.
Plaintiff to have costs.

Solicitors: *H. W. Pegden; Gordon H. Taylor.*

[PROBATE, ETC., DIVISION.]

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July 27, 28;
Oct. 2.

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Husband and Wife — Nullity — Jurisdiction — Marriage celebrated in jurisdiction — Voidable marriage — Incapacity — Husband resident and domiciled in Scotland — Wife resident in England — Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 22 — *Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 32.

A wife presented a petition praying for a declaration that her marriage be declared null and void on the ground of the husband's incapacity to consummate it. At the date of the proceedings the husband was resident and domiciled in Scotland and the wife was resident in England. The marriage was celebrated in England. At the hearing of the petition, which was undefended, the court was satisfied as to the husband's incapacity but adjourned the matter for argument by the Queen's Proctor on the question of jurisdiction:—

Held, that, it was well established that the celebration of a marriage in England gave the courts jurisdiction in nullity suits in which the marriage was void, such jurisdiction being derived from the practice of the ecclesiastical courts which knew no distinction between void and voidable marriages as far as jurisdiction was concerned; whether or not the courts had jurisdiction on the basis of the celebration of the marriage in England where the ground alleged was wilful refusal to consummate the marriage, there was nothing to preclude the assumption of jurisdiction on that basis where the ground was the fundamentally different one of incapacity; and the wife was entitled to a decree.

Ramsay-Fairfax v. *Ramsay-Fairfax* [1956] P. 115; [1956] 3 W.L.R. 849; [1955] 3 All E.R. 695 applied.

Casey v. *Casey* [1949] P. 420; 65 T.L.R. 528 distinguished.

Addison v. *Addison* [1955] N.I. 1 considered.

PETITION for nullity on the ground of incapacity.

A ceremony of marriage was performed on July 15, 1950, at the Parish Church in Hornsey, Middlesex, and, thereafter, the parties lived together in England. The husband, who was Scottish, was employed in England at the time of the marriage ceremony.

The parties separated on September 7, 1951, when the husband left the matrimonial home as the result of an order of that date made by the Highgate justices, by which the court

adjudged that the husband had treated the wife with persistent cruelty and ordered that the wife should no longer be bound to cohabit with him. The court also ordered the husband to pay maintenance, and payments were made pursuant to that order until June, 1957. Despite the existence of the non-cohabitation clause, the wife allowed the husband to stay with her in the matrimonial home on some four occasions during his week-end leaves from the Royal Air Force. Attempts at intercourse were made during those visits but they were abortive and the marriage was never consummated. The last visit was at Whitsun, 1955, and thereafter the husband returned to live in Scotland. In January, 1956, the wife had an interview with an officer of the Royal Air Force and discussed her matrimonial affairs with him and in February, 1958, she filed a petition seeking a declaration that the marriage be declared null and void on the ground of the husband's incapacity to consummate it and alleging that the husband was domiciled in Scotland.

After hearing the evidence Collingwood J. adjourned the matter for argument by the Queen's Proctor.

James Stirling Q.C. and *A. B. Hollis* for the wife.
Colin Duncan for the Queen's Proctor.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

October 2. COLLINGWOOD J. referred to the facts and, holding that the husband was, at the date of the ceremony of marriage and thereafter incapable of consummating it and that it was not until the interview of January, 1956, that the wife had knowledge of the law and the facts as to nullity and that she had not, therefore, approbated the marriage, and continued: The husband is resident and domiciled in Scotland. The wife is resident in England, and the sole ground upon which it is submitted that this court has jurisdiction to hear and determine the petition is that the ceremony of marriage took place in England.

The problem is a difficult one; it is not covered by direct authority and it is the subject of a divergence of opinion in the textbooks. It is accepted by counsel for the wife that the fact that the wife alone is resident in England is not sufficient to found jurisdiction in this court, but it is submitted on her behalf —and counsel for the Queen's Proctor supported that submission— that the law on this question is correctly stated in Rayden on Divorce, 7th ed., at p. 51, which reads: "The court has jurisdic- "tion to entertain a suit for nullity where the marriage was "celebrated in England, where the marriage is void ipso jure "and where it is voidable also, for the court does not draw a "distinction, for jurisdictional purposes, between void and void- "able marriages."

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It is necessary to go back to the Matrimonial Causes Act, 1857, by section 6 of which Act the jurisdiction then vested in or exercisable by any ecclesiastical court over matrimonial causes —including suits of nullity—was transferred to a new "Court of "Record, to be called 'The Court for Divorce and Matrimonial "'Causes.'" By section 22 of this same Act it was provided that "In all suits and proceedings *other than* proceedings to "*dissolve* any marriage, the said court shall proceed and act and "give relief on principles and rules which in the opinion of the "said court shall be as nearly as may be conformable to the "principles and rules on which the Ecclesiastical Courts have "heretofore acted and given relief. . . ." This section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, but was, in effect, re-enacted by section 32 of that Act which provides that: ". . . where no special provision is "contained in this Act or in rules of court with reference thereto, "any such jurisdiction shall be exercised as nearly as may be in "the same manner as that in which it might have been exercised "by the court to which it formerly appertained."

As was held by Pilcher J. in *Hutter* v. *Hutter* [1]: "In sub-"stance, therefore, it is still the duty of this court in all matri-"monial suits, including suits for nullity, but excluding suits "for dissolution, to proceed and act and give relief on principles "and rules which shall conform as closely as possible to the "principles and rules acted upon by the ecclesiastical courts."

In 1860, shortly after the Matrimonial Causes Act, 1857, came into force, the case of *Simonin* v. *Mallac* [2] was heard before the full court consisting of the Judge Ordinary (Sir Cresswell Cresswell), Channell B. and Keating J. In that case, two French subjects, then domiciled in that country, came over to England and were married by licence according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects, irrespective of the place where celebrated. They then returned to France, where the man refused to celebrate the marriage according to French law, nor was the marriage consummated. The woman instituted a suit for nullity in the French courts, and obtained a decree. She subsequently came to reside in England and petitioned for a decree of nullity here. The first question considered was whether the court had any jurisdiction, and this is the only part of the judgment which is material in this connection.

The court held that it had jurisdiction, based on the lex loci contractus. The Judge Ordinary, in the course of his judgment, said [3]: "This question therefore depends upon the first proposi-"tion, that the parties by professing to enter into a contract in "England mutually gave to each other the right to have the

[1] [1944] P. 95, 99; 60 T.L.R. 541; [1944] 2 All E.R. 368.

[2] (1860) 2 Sw. & Tr. 67.

[3] 2 Sw. & Tr. 75.

"force and effect of that contract determined by an English "tribunal. . . . There is nothing contrary to natural justice in "calling upon him [the respondent] to have the validity or "invalidity of a supposed contract ascertained and determined "by the tribunal of the country where it was entered into by "him: for according to Lord Stowell in *Dalrymple* v. *Dalrymple* [4] "it is an indisputable rule of law, as exercised in all civilised "countries, that a man who contracts in a country engages for a "competent knowledge of the law of contracts in that country. "If he rashly presumes to contract without such knowledge he "must take the inconveniences resulting from such ignorance "upon himself, and not attempt to throw them on the other "party." It is to be observed that in coming to the conclusion that the court had jurisdiction to hear the suit, the Judge Ordinary made no suggestion that there was any distinction for this purpose between void and voidable marriages.

In *Sottomayor* v. *De Barros* [5] two Portuguese subjects, domiciled in Portugal, went through a marriage ceremony in England where they were then residing. They were first cousins and by the law of Portugal such a marriage between Portuguese subjects was prohibited. They subsequently returned to Portugal where they continued to reside. Phillimore J. held [6] that the court was not bound to recognise the incapacities affixed by the law of the domicile of the parties, and refused to grant a decree of nullity to the petitioner.

The Court of Appeal reversed this decision,[7] but the importance of the case for the present purpose is that, neither in the court of first instance nor in the Court of Appeal, before James, Baggally and Cotton L.JJ., was the jurisdiction of the court questioned—nor was it suggested that the decision on the point of jurisdiction in *Simonin* v. *Mallac* [8] was wrong. The Queen's Proctor was represented at both hearings, and the case was subsequently reheard before Sir James Hannen P., when again jurisdiction was assumed.[9]

In *Cooper* v. *Crane* [10] the wife petitioner asked for a decree on the ground of coercion. The respondent was resident in the United States of America, and apparently domiciled in one of the states thereof. It was not suggested that he was domiciled in England, and the only ground for jurisdiction which appears is the fact that the marriage was celebrated here. *Linke* v. *Van Aerde* [11] was a petition upon the ground of bigamy. The parties were foreigners, and were assumed to be of foreign domicile. Gorell Barnes J. said [11]: "The marriage contract was entered "into here, and on that ground this court was asked to deal with "it." He then referred to the cases of *Simonin* v. *Mallac* [12] and

[4] (1811) 2 Hag.Con. 54, 61.
[5] (1877) 2 P.D. 81.
[6] 2 P.D. 86–89.
[7] (1877) 3 P.D. 1.
[8] 2 Sw. & Tr. 67.
[9] (1879) 5 P.D. 94.
[10] [1891] P. 369.
[11] (1894) 10 T.L.R. 426.
[12] 2 Sw. & Tr. 67.

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Sottomayor v. *De Barros*,[13] and decided that he had jurisdiction to hear the case. Again it is to be observed that Gorell Barnes J., so far as the report shows, attached no significance to the fact that the claim was that the marriage was void, as affecting his jurisdiction.

This distinction, for the purposes of jurisdiction, between void and voidable marriages, appears for the first time in *Inverclyde* v. *Inverclyde*.[14] This was a wife's petition upon the ground of the respondent's impotence. The petitioner alleged that the parties were domiciled in Scotland, that she was resident in England, where the marriage ceremony had taken place, and that the respondent was resident both in England and in Scotland. The respondent entered an appearance under protest on the ground that the court had no jurisdiction.

Bateson J. held that a decree in a nullity suit on the grounds of impotence, being a decree affecting status of the parties, was a judgment in rem just as a decree in a divorce suit is a judgment in rem; therefore, the only court competent to pronounce it was the court of the domicile. He said[15]: "The marriage being "voidable and not void and the decree affecting and involving "an alteration in status and being a judgment in rem binding on "all the world, there can be no jurisdiction in this court unless "the parties are domiciled in this country. It seems to me that "if the principle is sound that in a suit for dissolution of marriage "in divorce jurisdiction depends on domicile it must equally so "depend in a suit for dissolution of marriage on the ground of "impotence. To call it a suit for nullity does not alter its "essential and real character of a suit for dissolution."

Seven years later, in *Easterbrook* v. *Easterbrook*,[16] Hodson J. refused to follow this decision. It was a husband's petition for nullity on the ground of the respondent's wilful refusal to consummate. The parties went through a ceremony of marriage in a register office in England, and, thereafter, the petitioner—a soldier serving with the Canadian forces—and the respondent cohabited in this country. The petition, which was undefended, alleged that the petitioner was domiciled in Canada and that the respondent was domiciled in England. There was no protest to the jurisdiction. It was submitted by counsel for the petitioner that the court had the same jurisdiction in nullity suits as was vested in the ecclesiastical courts—and that that was so whether the marriage was void or voidable. It was pointed out in argument[17] that *Inverclyde* v. *Inverclyde*[18] was the first reported case in which it had been held that the husband's domicile was the exclusive test of jurisdiction, and that the decision in that case rested on an obiter dictum of Lord Phillimore in *Salvesen* (*or Van Lorang*) v. *Administrator*

[13] 3 P.D. 1.
[14] [1931] P. 29; 47 T.L.R. 140.
[15] [1931] P. 41, 42.
[16] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.
[17] Ibid.
[18] [1939] P. 29.

of Austrian Property.[19] In his judgment Hodson J. said[20]: "The petitioner is domiciled in Canada, and the respondent is "domiciled in England. Both parties at all material times were "resident in England, and the ceremony of marriage was "celebrated in England. The case is undefended, and I have "heard argument only on behalf of the petitioner, who, through "his counsel, has drawn my attention to a number of authorities "dealing with the question of jurisdiction. I have in particular "been referred to *Salvesen* v. *Administrator of Austrian Pro-"perty*,[19] *Inverclyde* v. *Inverclyde*[21] and *White* v. *White*.[22] As "in *White* v. *White*,[22] so in this case, there has been no appear-"ance and no protest to the jurisdiction, and I am unable, with "all respect to Bateson J., to see the distinction for the purposes "of jurisdiction which he appears to have drawn in *Inverclyde* "v. *Inverclyde*[21] between voidable and void marriages. In my "judgment, on the facts of this case, I have jurisdiction as there "was held to be jurisdiction in *White* v. *White*[22] to pronounce a "decree of nullity on the grounds set out in the petition."

In the same year, in *Hutter* v. *Hutter*,[23] Pilcher J. also declined to follow *Inverclyde* v. *Inverclyde*.[21] In that case the petitioner, a soldier in the United States Army, sought a decree of nullity on the ground that the ceremony of marriage had never been consummated owing to the wilful refusal of the respondent. The petitioner was, according to the report, domiciled in the United States of America, and was on military service in this country when the petition was filed. After the ceremony of marriage the respondent continued to live at the home of her parents in England where she was visited by the petitioner. After hearing arguments by counsel for the petitioner and by the Attorney-General for the King's Proctor, Pilcher J. held that he had jurisdiction to hear the suit. In the course of his judgment Pilcher J., referring to *Simonin* v. *Mallac*,[24] said[25]: "The wife, who had come to live "in this country, sought a decree of nullity here. The marriage "which she had contracted in this country was perfectly good "under English law, and the court entertained the suit, but "dismissed the wife's petition. I refer to this case only because "it decided among other things that the wife, having entered into "a contract of marriage in this country, was subject to the "jurisdiction of the competent court in this country in respect "of her personal status resulting from the marriage so contracted. "It is, moreover, to be observed that under French law the "marriage in this case appears to have been merely voidable, "and not void. So far as I am aware the proposition that this "court has jurisdiction to inquire into and pronounce on the "validity of every marriage contracted in accordance with

[19] [1927] A.C. 641; 43 T.L.R. 609.
[20] [1944] P. 11.
[21] [1931] P. 29.
[22] [1937] P. 111.
[23] [1944] P. 95.
[24] 2 Sw. & Tr. 67.
[25] [1944] P. 102.

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"English law in this country has never been questioned." That is, of course, until *Inverclyde* v. *Inverclyde*.[26] Later, Pilcher J. went on to say[27]: "It would seem, therefore, that both on "principle and on authority there is good ground for saying that "in suits for nullity the mere residence of the parties in this "country is sufficient to found the jurisdiction of the court to "pronounce on the validity of a marriage celebrated in England. "If this were not so, it would mean that the competent court "for matrimonial suits in this country renounced jurisdiction in "matters which were within its own peculiar competence, "namely, questions relating to the validity of a marriage con-"tracted in England by persons who, if English, are subject as "such to the laws of this country, and, if foreigners, must be "taken to have subjected themselves to such laws." He concludes his judgment with these words[28]: "In my humble "opinion there is no justification either on principle or on "authority for drawing such a distinction" (that is to say, the distinction drawn in *Inverclyde* v. *Inverclyde*[26] for the purposes of jurisdiction between void and voidable marriages). "Inas-"much as practical questions of status are involved in the "declaration of any court which pronounces on the validity of "a marriage, the court of the domicile of the parties has, no "doubt, a peculiar competence to adjudicate in such suits. The "authorities to which I have referred made it clear, however, "that the courts of this country have not regarded the court of "domicile of the parties as having exclusive competence to "pronounce on the validity of a marriage more particularly "where such marriage has, as in the case now before me, been "celebrated in this country. I accordingly hold that the court "has jurisdiction to entertain the present suit and pronounce a "decree of nullity." As I read this judgment, Pilcher J., in referring to the fact of residence of the parties in this country as founding jurisdiction in the court to pronounce upon the validity of a marriage celebrated in England, was not intending to detract from the previous proposition, that the court has jurisdiction to pronounce on the validity of every marriage contracted in accordance with English law in this country. He was basing the jurisdiction upon each of these separately—though in fact they were found in conjunction in the case before him.

The decision in *Inverclyde* v. *Inverclyde*,[29] however, was considered, and to some extent restored, in *Casey* v. *Casey*.[30] There a soldier domiciled and normally resident in one of the provinces of Canada (which province is not stated) married an English woman in England. There were short periods of cohabitation, both in England and Canada, after which the wife returned to England and brought a suit for nullity on the ground of the respondent's wilful refusal to consummate the marriage.

[26] [1931] P. 29.
[27] [1944] P. 103.
[28] [1944] P. 108.
[29] [1931] P. 29.
[30] [1949] P. 420; 65 T.L.R. 528.

It was admitted in the petition that at the time when it was filed both parties were domiciled in Canada. The husband did not enter an appearance and took no part in the proceedings. The commissioner found that the husband had wilfully refused to consummate the marriage, but held that the court had no jurisdiction to grant a decree, on the ground that the case was governed by *De Reneville* v. *De Reneville*.[31] The wife appealed. The Court of Appeal held there was no jurisdiction. Bucknill L.J. based his judgment upon two considerations, first that the balance of hardship lay in the respondent's favour, and secondly that a petition to annul a voidable marriage was really indistinguishable from a petition for dissolution. He said[32]: "I find, "therefore, no clear decision on the point as to the jurisdiction "in nullity cases on the ground of wilful refusal to consummate "it, where the marriage has been celebrated in England, but "the respondent husband is domiciled and resident abroad. It "is well established that in a case where the petition is for "dissolution of a marriage the court has no jurisdiction to grant a "decree on the ground that the marriage took place in England, "if the domicile of the husband, and therefore of the wife, is "abroad at the time of the institution of the suit. Such jurisdiction is based exclusively on domicile, as decided by the Privy "Council in *Le Mesurier* v. *Le Mesurier*,[33] and approved by the "House of Lords in *Salvesen's* case.[34] Why, then, should there "be a distinction on the ground of the place of celebration of "marriage, between a petition for dissolution of a valid marriage "and a petition to annul a marriage on the ground of wilful "refusal to consummate it? I can see no good reason for such "a distinction." Later, Bucknill L.J. said[35]: "My opinion in "favour of dismissing this appeal is based partly on the balance "of hardship to the parties, but mainly on the analogy of the "rule that the court of the domicile of the husband is the sole "court with jurisdiction to dissolve a valid marriage. It seems "to me reasonable that a similar rule should be applied in "principle to a marriage which is merely voidable on the ground "of wilful refusal to consummate it. There may be an exception to the rule in the case of a voidable marriage where both "parties are resident in the country where the petition is filed, "but I do not see the necessity of making an exception on the "ground that the marriage has been celebrated in the country "where jurisdiction is invoked." Somerville L.J.[36] clearly rejected the basis of the decision in *Inverclyde* v. *Inverclyde*[37]—that is, that a petition to annul a voidable marriage was equated to a petition for divorce—but he was of opinion that in the circumstances of that case the fact of the celebration of the

[31] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.
[32] [1948] P. 428–429.
[33] [1895] A.C. 517; 11 T.L.R. 481.
[34] [1927] A.C. 641.
[35] [1948] P. 431.
[36] [1948] P. 432–433.
[37] [1931] P. 29.

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marriage in England did not afford jurisdiction there. Cohen L.J.[38] concurred with the judgment of Bucknill L.J.

The final stage was reached in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[39] This was a wife's petition for nullity on the ground of the husband's incapacity, or alternatively wilful refusal, to consummate the marriage. The marriage was celebrated in Egypt, under the provisions of the Foreign Marriages Act, 1892, the husband being, at all material times, an officer serving in Her Majesty's Forces. At the time of the presentation of the petition both parties were resident in England. The husband appeared under protest, alleging that he was domiciled in Scotland, and denying that the court had jurisdiction. At the hearing of this issue Willmer J. held, on the facts, that the husband was, at all material times, domiciled in Scotland and the question, therefore, arose whether the court had jurisdiction on the basis of the residence of both parties in England. Willmer J. held[40] that the court had jurisdiction. He pointed out that both in *De Reneville* v. *De Reneville*[41] and in *Casey* v. *Casey*[42] the Court of Appeal expressly left open the question whether the court should exercise jurisdiction over a voidable marriage in a case where both parties were resident in England, and went on to say that the decisions at first instance were conflicting, namely, *Inverclyde* v. *Inverclyde*,[43] where Bateson J. drew a distinction between proceedings for nullity in cases where the marriage is void ab initio, and those where the marriage is merely voidable (as in the case before him) and held that in the latter case nothing short of domicile would suffice to found jurisdiction to entertain the suit. On the other hand, there were the decisions of Hodson J. in *Easterbrook* v. *Easterbrook*[44] and of Pilcher J. in *Hutter* v. *Hutter*,[45] and Willmer J. said[46]: "After careful consideration I do not feel able to do other than "follow the decision of Pilcher J. in *Hutter* v. *Hutter*,[43] a case "which has twice been considered and discussed by the Court of "Appeal without adverse comment."

Against this decision the husband appealed.[47] Denning L.J. gave the first judgment and, after stating the facts, he said[48]: "The jurisdiction in nullity cases is, in my judgment, entirely "different from the jurisdiction in cases of divorce. In cases of "divorce, ever since *Le Mesurier* v. *Le Mesurier*[49] in 1895, the "only courts which have had jurisdiction to decree a dissolution "of a marriage are the courts of the domicile; but the jurisdiction of our courts in nullity cases is different, dating from 1857, "when, by section 22 of the Matrimonial Causes Act, 1857, it "was said . . ." Then he quoted the section to which I referred

[38] [1948] P. 434.
[39] [1956] P. 115; [1955] 3 W.L.R. 188; [1955] 2 All E.R. 709.
[40] [1956] P. 116–126.
[41] [1948] P. 100.
[42] [1949] P. 420.
[43] [1931] P. 29.
[44] [1944] P. 10.
[45] [1944] P. 95.
[46] [1956] P. 125.
[47] [1956] P. 126; [1956] 3 W.L.R. 849; [1955] 3 All E.R. 695.
[48] [1956] P. 131.
[49] [1895] A.C. 517.

at the beginning of this judgment, and continued[50]: "That "section shows plainly that the jurisdiction in nullity suits "depends on the principles and rules which were observed in "the ecclesiastical courts before 1857. It is true that the grounds "of nullity have since been extended, but nevertheless, in my "opinion, all suits for nullity, whether on the original grounds— "for instance, for incapacity—or on the new grounds—for "instance, for wilful refusal—are to be governed by the prin- "ciples and rules which were observed in the old ecclesiastical "courts. It is quite clear that the ecclesiastical courts based "their jurisdiction in cases of nullity on residence, not upon "domicile. If the respondent, the defendant to a petition, was "resident within the local jurisdiction of the court, then the "court had jurisdiction to determine it. So in the present case. "The husband and wife were, at the issuing of the petition, both "resident in this country, and that is sufficient to give the court "jurisdiction to decide the case. So much seems to me plain on "the interpretation of the statutes. In addition, in *Baxter* v. "*Baxter*,[51] in the House of Lords in 1948, Viscount Jowitt L.C. "said that section 22 manifestly applied to suits for nullity on "the ground of incapacity. It must also apply to suits on the "new ground of wilful refusal. That is a sufficient ground for "the determination of this case, but, as there has been much "difference of opinion on this matter, I must say a word about "*Inverclyde* v. *Inverclyde*,[52] in which Bateson J. held that in a "case of nullity on the ground of impotence the only court "which had jurisdiction was the court of the domicile. The "basis of his reasoning was that a case of nullity, whether for "importance or for wilful refusal, was much more like a suit for "divorce than anything else; and that it should be equated, so "to speak, with a suit for dissolution and be governed solely by "the law of the domicile, so that the only courts which should "have jurisdiction should be the courts of the domicile. He "said, in a sentence, 'To call it a suit for nullity does not alter "'its essential and real character of a suit for dissolution.'[53] "I beg to differ from this view. Looking at the ground of wilful "refusal from a legalistic standpoint, and treating marriage as a "contract, the remedy of nullity does look like a remedy of "divorce or dissolution, because it depends on events which "occur subsequent to the marriage; but looking at it from a "sensible standpoint, and having regard to the true ends of "marriage, one of the principal aims of which is the procreation "of children, it seems to me that the remedy falls more truly "within the category of nullity. No one can call a marriage a "real marriage when it has not been consummated; and this is "the same, no matter whether the want of consummation is due "to incapacity or to wilful refusal. Let the theologians dispute as

[50] [1956] P. 131–132.
[51] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.
[52] [1931] P. 29.
[53] [1931] P. 42.

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" they will, so far as the lawyers are concerned, Parliament has " made it quite plain that wilful refusal and incapacity stand " together as grounds of nullity and not for dissolution; and " being grounds of nullity, they fall within the old ecclesiastical " practice, in which the jurisdiction of the courts is founded upon " residence and not upon domicile." Then, after referring [54] to the argument which had been advanced by counsel, Denning L.J. continued [54]: " It is to be noticed that in 1944 there " were two cases, *Easterbrook* v. *Easterbrook*, before Hodson J., " and *Hutter* v. *Hutter*, before Pilcher J., in which it was " held that the English courts have jurisdiction in nullity " cases where both parties are resident here. In the first of " those cases a Canadian soldier married an English woman here, " and it was held that although he was domiciled in some province " in Canada, nevertheless the courts here had jurisdiction to " determine his claim for nullity. Any other view would be most " unfortunate. It would be absurd that a Canadian soldier " married to an English woman should have to go to the courts " of Canada to get his remedy (or, conversely, that she should) " when they were both resident here. The next case was that of " a United States soldier who married an English woman here. " Again it was held that the courts in this country had jurisdic- " tion even though the soldier was domiciled in one of the states " of America. It is far too late in the day to say that those two " cases were wrongly decided, considering that many decrees " must have been given on the self-same footing, and that many " people have regulated their affairs on the basis of them. It " would be very wrong to suggest now that those decisions were " bad, and that the people who have acted on them have been " guilty of bigamy. I am clearly of opinion that those two cases " were rightly decided and should be upheld: but *Inverclyde* v. " *Inverclyde* was wrongly decided and should be overruled."

Then he concluded [55]: " One more word. It may be in these " nullity cases that the courts of the domicile also have jurisdic- " tion: so may the courts of the place where the marriage was " celebrated: but the courts where both parties reside certainly " have jurisdiction. I find myself in agreement with Willmer J. " and would dismiss the appeal."

Hodson L.J. said [56]: " The question in this case is whether " the court has jurisdiction to entertain a petition for nullity " where the parties are resident in this country. The field of " jurisdiction in nullity cases is a very wide one. There are a " great many cases which have been discussed by judges and by " professors, and it is not always easy to see whether in a given " case the decision can be justified or, if it can be justified, the " precise ground on which it ought to be supported. But in this " case I have no doubt that the decision of the judge was right " for the reasons which he gave. I agree also with the reasoning

[54] [1956] P. 133.
[55] Ibid.
[56] [1956] P. 134.

" of Pilcher J. in *Hutter* v. *Hutter*,[57] which I think put this class " of case on the right footing, basing his judgment, as he did, on " the ecclesiastical jurisdiction and the way in which that juris- " diction was exercised." Morris L.J. said [58] that he was of the same opinion.

Dr. Cheshire, in Private International Law (5th edition, at p. 348, n. 5) suggests that Denning L.J. was perhaps " misled " into saying what he did in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [59] by the decision in Northern Ireland in the case of *Addison* v. *Addison*.[60] In that case the facts were: the ceremony of marriage was celebrated in Northern Ireland where the wife petitioner was then domiciled and resident. The respondent was a serving soldier domiciled in England. After the respondent was demobilised the parties lived in England for a very short time, after which they separated and the petitioner returned to Northern Ireland, while the respondent continued to live in England. The petitioner presented a petition to the High Court in Northern Ireland seeking annulment of the marriage on the ground of the respondent's impotence, or alternatively, on the ground of his wilful refusal to consummate the marriage. Lord MacDermott C.J. found, as a fact, that at all material times the respondent was incapable of consummating the marriage by reason of impotence and held [61] (inter alia) (i) that the residence of the petitioner within the jurisdiction was not, of itself, sufficient to confer jurisdiction on the court. In this he followed *De Reneville* v. *De Reneville*.[62] (ii) That in the exercise of the jurisdiction to annul a marriage there was no ground for distinguishing between a void marriage and a voidable marriage—and, as the courts of England and Ireland had long exercised jurisdiction to annul void marriages celebrated within the jurisdiction irrespective of the domicile or residence of the parties, there was power in the court to pronounce a decree of nullity in the case before him on the ground that the marriage was celebrated in Northern Ireland. Lord MacDermott C.J., after a careful consideration of *Inverclyde* v. *Inverclyde* [63] and *Casey* v. *Casey*,[64] felt unable to follow them.[65] It is to be noted that section 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, makes the same provision as to conformity with the principles and rules on which the ecclesiastical courts acted as section 22 of the Matrimonial Causes Act, 1857.

The decision in *Casey* v. *Casey* [64] is, of course, binding upon this court. But it was submitted by counsel for the wife, and by counsel for the Queen's Proctor, that the overruling of *Inverclyde* v. *Inverclyde* [63] in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [66] necessitated careful review of the grounds upon which *Casey* v.

[57] [1944] P. 95.
[58] [1956] P. 135.
[59] [1956] P. 134.
[60] [1955] N.I. 1.
[61] [1955] N.I. 15, 33.
[62] [1948] P. 100
[63] [1931] P. 29.
[64] [1949] P. 420.
[65] [1955] N.I. 15, 33.
[66] [1956] P. 126.

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Casey [64] was decided, and that the decision in that case should be confined strictly to the facts which were before the court. In my opinion this submission is correct. In *Casey* v. *Casey* [64] the ground of the petition was wilful refusal. At the conclusion of the leading judgment Bucknill L.J., after saying that he based his opinion mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage, added [67]: "It seems to me reasonable "that a similar rule should be applied in principle to a marriage "which is merely voidable on the ground of wilful refusal to "consummate it." Incidentally, the headnote appears to extend this by the insertion of the letters "e.g." before the words "On "the ground of wilful refusal."

In a case of wilful refusal a valid marriage is a condition precedent to the cause of complaint—the duty to consummate depends on the existence of a valid marriage. Where, however, as in the present case, the ground of the petition is impotence, the cause of complaint is that the respondent was, at the time of the ceremony and has, ever since, been incapable of consummating it. This was the matter dealt with by the ecclesiastical courts, who knew nothing of wilful refusal as, of itself, affording a ground for relief. The impotence recognised by the ecclesiastical courts as a ground for annulment had to exist at the time of the marriage ceremony—and on proof of this an essential element in the contract was held to have been missing. Thus in *Greenstreat* v. *Cumyns* [68] Sir William Scott held that a marriage was impeachable if "there was incapacity on the part of the man" (or woman) "to perform the duties of marriage; a capacity to "perform which is necessary to render it valid." In *Dickinson* v. *Dickinson* [69] Sir Samuel Evans P. said [70]: "It has always "been held that the contract of marriage implies the ability to "consummate it," and the form of the decree in such a suit was to declare the marriage "esse et fuisse nullum." The ecclesiastical courts having no power to dissolve, this was the only form of declaration open to them, irrespective of the question whether the marriage ceremony itself was unexceptionable as to form, and without any distinction between void and voidable marriages. In *Lewis* v. *Hayward* [71] the House of Lords held that the proper order in a wife's suit for nullity on the ground of impotence was "it is declared that the said marriage . . . "was null and void ab initio." Further, the fundamental difference between impotence and wilful refusal to consummate was emphasised by Lord Merriman P. in *Harthan* v. *Harthan*, [72] where both causes were pleaded in the alternative. "Much of "the difficulty in this case," he said, "has been caused by the "mutually inconsistent character of these allegations. . . ."

[64] [1949] P. 420.
[67] Ibid. 431.
[68] (1812) 2 Hag.Con. 332.
[69] [1913] P. 198; sub nom. *D.* v. *D.*, 29 T.L.R. 765.
[70] [1913] P. 205.
[71] (1866) 35 L.J.P. & M. 105, 109.
[72] [1948] 2 All E.R. 639; [1949] P. 115.

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The result of the authorities appears, therefore, to be: (1) The jurisdiction in suits for nullity depends upon the practice of the ecclesiastical courts. (2) Though a petition to annul a voidable marriage is, in some respects, analogous to one for dissolution, the attempt to equate them in *Inverclyde* v. *Inverclyde* [73] has been held to have been erroneous. (3) In *Ramsay-Fairfax* v. *Ramsay-Fairfax* [74] not only was *Inverclyde* v. *Inverclyde* [73] overruled, but the Court of Appeal expressly approved of the decisions in *Easterbrook* v. *Easterbrook* [75] and *Hutter* v. *Hutter*,[76] and as regards the latter case expressly approved the reasoning of Pilcher J. (4) From 1860 onwards there is a long line of decisions in which the courts have exercised jurisdiction in nullity suits on the ground of the celebration of the marriage in England. While it is true that, with the exception of *Simonin* v. *Mallac*,[77] the decisions appear to be concerned with void marriages, it is equally clear that the distinction between void and voidable had no significance in the ecclesiastical courts so far as jurisdiction was concerned. (5) The general proposition that, apart from any other consideration, the court has jurisdiction because the marriage was celebrated in England (a proposition accepted by Lord MacDermott C.J. in *Addison* v. *Addison* [78] in regard to a marriage in Northern Ireland) is limited, so far as this court is concerned, by the decision in *Casey* v. *Casey*.[79] That is to say, it does not apply where the ground is wilful refusal to consummate. But so far as the fundamentally different ground of incapacity is concerned, there is nothing in the authorities which precludes the court from assuming jurisdiction where the marriage was celebrated in this country.

I, therefore, hold that the court has jurisdiction and grant a decree accordingly.

Order accordingly.

Solicitors: *Montagu's & Cox & Cardale; Queen's Proctor.*

E. J.

[73] [1931] P. 29.
[74] [1956] P. 126.
[75] [1944] P. 10.
[76] [1944] P. 95.
[77] 2 Sw. & Tr. 67.
[78] [1955] N.I. 1.
[79] [1949] P. 420.

[HOUSE OF LORDS.]

H. L. (E.)*

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July 15, 16, 20, 21, 22; *Nov.* 5.

WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION) . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

RAMSHAW COAL CO. LTD. (IN LIQUIDATION) . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION) . . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

[CONSOLIDATED APPEALS.]

Revenue — Income tax — Basis of assessment — Case III — Case VI — Whether payments assessable in respect of year in which received or year in respect of which they were paid—Meaning of "income" "arising"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III, r.* 2, *Case VI, r.* 2.

Revenue—Income tax—Crown—Payments by—Whether Case III can apply — Crown immunity — Income Tax Act, 1918, *rr.* 19, 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*).

Revenue — Income tax — "Annual payment"—Coal nationalisation—Interim income payments—Coal Industry Nationalisation Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 5 (1), 19, 21, 22—*Coal Industry* (*No.* 2) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *r.* 21 *of General Rules, Sch. D, Case III, r.* 1 (*a*), *Case VI, r.* 2.

Revenue — Income tax — "Interest of money" — Statutory payment calculated as sum equal to interest on compensation to which it is added — Coal Industry Nationalisation Act, 1946, *s.* 22 (2) (*a*) — *Income Tax Act,* 1918, *Sch. D, Case III, r.* 1 (*a*).

Mines and Minerals—Coal—Nationalisation—Compensation—Interim income payments—Whether to be included in actual income of year of receipt or of year or period in respect of which it was paid — Coal Industry Nationalisation Act, 1946, *s.* 5 (1).

Meaning of "income."

The W. P. Coal Co. Ltd. carried on the trade of a colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied, and was

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE and LORD KEITH OF AVONHOLM.

Note.—LORD REID and LORD TUCKER were present at the hearing of the appeals but were not present on the consideration of the report of the Appellate Committee for the reasons stated by VISCOUNT SIMONDS in his opinion.

an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936. The company received from time to time payments from the Ministry of Fuel and Power of interim income under (1) section 22 (2) (*a*) of the Act of 1946, and (2) section 22 (3) thereof, and section 1 of the Coal Industry (No. 2) Act, 1949, some or all of such payments being avowedly paid by the Ministry as income of periods preceding the revenue year of receipt.

The company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as amended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51, and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

On the question whether, in computing the actual income of the company for the purpose of such apportionments, interim income should be included in the actual income of the year in which it was received, or (as the company contended) of the year or period in respect of which it was paid:—

Held, (1) (unanimously) on the assumption that the payments in question were annual payments within Case III of Schedule D, rules 19 and 21 of the General Rules were inapplicable since the payer was the Crown (post, pp. 853, 860, 867).

(2) (Lord Radcliffe dissenting). But that did not of itself preclude such payments from falling within Case III since rules 19 and 21 were general rules applicable to all Schedules and must not be taken to control the applicability of Case III, r. 1 (*a*) (post, pp. 855, 873). All the payments were in the nature, when received, of pure income profit and were of a recurring character and, accordingly, they fell within Case III (post, pp. 855, 865).

Inland Revenue Commissioners v. *Butterley Co. Ltd.* [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411 considered.

(3) That for the purposes of Case III, r. 2, in the case of a non-trader, "income" did not "arise" until the date of its receipt (post, pp. 858, 872).

Lambe v. *Inland Revenue Commissioners* [1934] 1 K.B. 178; 18 T.C. 212; *Dewar* v. *Inland Revenue Commissioners* [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561 and *Grey* v. *Tiley* (1932) 16 T.C. 414 considered.

(4) That, in any event, income, once it had been received, could not be regarded as having arisen not only before it was received but even before it was payable and whilst it was merely accruing (post, p. 858). Accordingly, the payments in question arose in the years in which they were received, and must be treated as income of such years.

Per Lord Radcliffe. The payments in question fell within Case VI of Schedule D as being in the nature of casual payments, since although they could and were indeed likely to recur in the sense that several payments might well be so called for before full compensation was provided, they were essentially the temporary product of an exceptional measure of State expropriation, and as such were oddities more fitted to Case VI than to Case III (post, p. 860). Further, that it was both right in principle and in accordance with previous authority to attribute these various payments to the years or parts of years in respect of which they were paid (post, p. 861).

Meaning of "income" (post, p. 856) *per* Lord Simonds.

Decision of the Court of Appeal sub nom. *Inland Revenue Commissioners* v. *Whitworth Park Coal Co.* (*In Liquidation*) [1958] Ch. 792; [1958] 2 W.L.R. 815; [1958] 2 All E.R. 91 affirmed.

H. L. (E.)

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WHITWORTH PARK COAL CO. LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS.

RAMSHAW COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

BRANCEPETH COAL CO. LTD. (IN LIQUIDATION) *v.* SAME.

APPEALS from the Court of Appeal (Jenkins, Romer and Ormerod L.JJ.).

This was an appeal, consolidated on October 6, 1958, by leave of the House of Lords, from three orders of the Court of Appeal dated March 12, 1958, dismissing an appeal by the appellants, three former colliery companies, from three orders of Harman J. dated July 31, 1957, whereby the appeals of the Commissioners of Inland Revenue from three determinations of the Commissioners for the Special Purposes of the Income Tax Acts were allowed and the decisions of the commissioners were reversed.

The Whitworth Park Coal Co. Ltd. (hereinafter called "the "company") carried on the trade of colliery proprietors until January 1, 1947 when its colliery assets vested in the National Coal Board under the provisions of the Coal Industry Nationalisation Act, 1946. At all material times the Ramshaw Coal Co. Ltd. held shares in the company, and the Brancepeth Coal Co. Ltd. held shares in the Ramshaw Coal Co. Ltd.

The matter arose upon directions being made upon the company under the provisions of section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51. In consequence of the said directions the actual income of the company for each of the said three years was apportioned among its members (including the Ramshaw Coal Co.) and a part thereof was sub-apportioned to the members of the Ramshaw Coal Co. (including the Brancepeth Coal Co.).

It was not disputed that at all material times the company was an investment company within the meaning of section 20 (1) of the Finance Act, 1936, and that section 21 of the Finance Act, 1922, applied to it, or that the Ramshaw Coal Co. and the Brancepeth Coal Co. were companies to which section 21 of the Finance Act, 1922, applied. It followed that there was no dispute as to the actual making of the directions; the only issue in the appeals was as to the manner of computing the income of the Whitworth Park Coal Co. which fell to be apportioned and sub-apportioned by virtue of the provisions referred to above.

Accordingly, the appeal of the Whitworth Park Coal Co. Ltd. alone was argued, since the decision in that case governed the other two appeals. The following facts relating to the appeal of the Whitworth Park Coal Co. Ltd. are taken from the case stated.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 28, 1955, the company appealed against directions made upon it under the provisions of section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, for the years of assessment 1948–49, 1949–50 and 1950–51 and against the apportionments of the actual income of the company made for each of the said three years in consequence of the said directions.

The sole question for determination was whether, in computing

the actual income of the company for the purpose of the apportionments, interim income received by the company under the provisions of the Coal Industry Nationalisation Act, 1946, and the Coal Industry (No. 2) Act, 1949, should be included in the actual income of the year in which it was received or (as the company contended) of the year or period in respect of which it was paid, it being (for the purpose of the hearing) conceded by the company that authorities binding on the commissioners would preclude them from holding that the sums received were of the nature of capital and should not be included in the company's actual income at all.

The company carried on the trade of colliery proprietor until January 1, 1947, when its colliery assets vested in the National Coal Board under the provisions of the Act of 1946. At all material times the company was one to which section 21 of the Finance Act, 1922, applied and was an "investment company" within the meaning of section 20 (1) of the Finance Act, 1936.

The company received from time to time payments from the Ministry of Fuel and Power for or in respect of interim income under the provisions (in the case of some of such payments) of the Act of 1946 and (in the case of others of such payments) of that Act and of the Act of 1949. Those payments are set out in tabular form below, and were made under deduction of income tax; each payment was accompanied by a letter from the Ministry and a certificate of deduction of income tax.

Serial Number	Date of receipt	Gross amount of payment	Net amount paid	Period for which it is stated to be paid in accompanying letter
(1)	August 7, 1948.	£9,068	£4,987	Eighteen months ended June 30, 1948.
(2)	January 26, 1949.	£2,733	£1,503	Half-year ended December 31, 1948.
(3)	September 12, 1949.	£68	£37	From January 1 to September 12, 1949.
(4)	March 28, 1950.	£1,837	£1,011	For the year ended December 31, 1949.
(5)	July 14, 1950.	£1,616	£889	Half-year ended June 30, 1950.
(6)	August 11, 1950.	£5	£3	From July 1 to August 11, 1950.
(7)	November 13, 1950.	£7	£4	From July 1 to November 13, 1950.
(8)	February 21, 1951.	£1,519	£835	Half-year ended December 31, 1950.
(9)	May 25, 1951.	£1,343	£705	Two years ended December 31, 1948.
(10)	August 9, 1951.	£810	£425	Half-year ended June 30, 1951.

The payments numbered 3, 6 and 7 in the above table were payments of the interest addition under section 22 (2) (*a*) of the Act of 1946 made on the occasions of payment under section 21 (1) (*b*) of the Act of 1946 of partial compensation for transferred assets.

The payments numbered 1 and 2 in the above table were made under section 22 (3) of the Act of 1946 after deductions of £7 and £86 respectively in respect of adjustments for compensation already satisfied made under the provisions of regulation 20 of Statutory Rules & Orders, 1946 of 1947. The accompanying

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letters state: (in the case of payment No. 1) "It should be noted "that the gross amount allowed is an instalment subject to audit. "Any adjustment necessary will be made in a future payment," (and in the case of payment No. 2) "It should be noted that "the gross amount allowed is a provisional instalment subject to "audit of the statutory revenue payment. Any adjustments in "respect of over-payments or under-payments will be payable "forthwith to or by the Minister." An adjustment to the said two payments was made by deducting a sum of £1,394 in calculating the gross amount of payment No. 4. This deduction (referred to as an "Overpayment (provisional)") was based on an estimate of the comparable ascertained revenue, and a further and final adjustment was made by payment No. 9, the accompanying letter to which states that the comparable ascertained revenue had been approved by the Minister.

Payments Nos. 4, 5, 8 and 10 in the above table were made under the Act of 1949. In the case of 4, 5 and 8 the accompanying letters show that the payments were calculated with reference to a provisional calculation of the comparable ascertained revenue, and each such letter states: "It should be noted that where the "amount now payable is based on provisional comparable ascer-"tained revenue, any necessary adjustment will be made later, "after the comparable ascertained revenue has been finally "approved by the Ministry." Payment No. 10 was based on the comparable ascertained revenue as approved by the Ministry. The payments Nos. 4, 5, 8 and 10 were each expressed to be subject to the provision contained in section 1 (5) of the Act of 1949 to the effect that if the said payments should exceed the interim income towards satisfaction of which they were paid, the excess would be repayable by the company. The latter accompanying payment No. 5 (dated July 14, 1950, and in respect of the half-year to June 30, 1950) shows that in arriving at the gross sum of £1,616 a deduction was made in respect of interest at 3 per cent. per annum for the half-year in respect of compensation satisfied before June 30, 1950. A footnote to the letter states that "Any necessary adjustments as a result of S.I. 1950, No. "967, dated June 12, 1950, which prescribes an interest rate of "3 per cent. per annum for the period January 1, 1949, to June "30, 1949, and 3½ per cent. per annum for the period July 1, "1949, to June 30, 1950, will be made at a later date." Adjustments were duly made in computing payment No. 8.

The company's accounts were made up to March 31 in each year. In the accounts for the year ended March 31, 1948, there appears on the credit side of the revenue account the item "in-"terim income provision (gross) £6,050 0s. 0d." In the accounts for the year ended March 31, 1949, there is credited to the revenue account "Interim income" (net) £2,500 7s. 3d. In the accounts for the year ended March 31, 1950, there is credited to the revenue account "interim income (net) £37 4s. 11d." In

the accounts for the year ended March 31, 1951, there is credited to the revenue account "interim income (net) £2,741 11s. 8d."

For the purposes of the apportionments under appeal, each of the payments set out in paragraph 4 above was treated as forming part of the actual income of the company of the year in which such payment was received by the company. The said payments made by the Ministry were not payable out of profits or gains brought into charge to income tax.

The commissioners held that the payments in question were chargeable to income tax under the provisions of Case VI of Schedule D to the Income Tax Act, 1918, and were not chargeable under Case III of the said Schedule nor under Schedule C. They further held that the payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods. They confirmed the directions under appeal and in due course adjusted the apportionments on the basis of an actual income (as agreed between the parties in accordance with their decision) of £5,422 14s. 0d., for 1948–49, £3,453 15s. 0d., for 1949–50 and £2,949 3s. 0d., for 1950–51.

F. N. Bucher Q.C. and *Peter Rowland* for the company.

John Pennycuick Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *The Trustees of Psalms and Hymns* v. *Whitwell* [1]; *Lawrence* v. *Inland Revenue Commissioners* [2]; *Foley* v. *Fletcher* [3]; *Wylie* v. *Eccott* [4]; *Riches* v. *Westminster Bank* [5]; *Madras Electric Supply Corporation Ltd.* v. *Boarland.* [6]

Their Lordships took time for consideration.

VISCOUNT SIMONDS. My Lords, at the conclusion of the argument in this case I found myself in full agreement with my noble and learned friend LORD REID. He thereafter wrote an opinion, to which, since I concurred in it at all points, I intended to add nothing. He has, however, been prevented by illness from taking his seat in your Lordships' House in the present Parliament and cannot speak in it. I have therefore, with his permission, adopted his opinion as my own and I will now state it.

My noble and learned friend LORD TUCKER, who is also unable to be here today, has intimated to me that he takes the same view.

[1] (1890) 7 T.L.R. 164; 3 T.C. 7.
[2] (1940) 23 T.C. 333.
[3] (1858) 3 H. & N. 769.
[4] 1913 S.C. 16; 6 T.C. 128.
[5] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469; 28 T.C. 159.
[6] [1955] A.C. 667; [1955] 2 W.L.R. 632; [1955] 1 All E.R. 753; 35 T.C. 612.

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The first appellant, which I shall call "the company," owned and operated a colliery until January 1, 1947, when its colliery assets were vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946. Thereafter it was an investment company to which the provisions of section 21 of the Finance Act, 1922, and section 14 of the Finance Act, 1939, had to be applied. Directions under these sections were given to the company with regard to the years 1948–49, 1949–50 and 1950–51 under which its "actual income" for those years fell to be apportioned among its members, so that surtax would become payable as if the amounts so apportioned were parts of the incomes of the members. When another company is a member of such a company a sub-apportionment has to follow and the second and third appellants are only concerned with such sub-apportionments. No separate point arises in their cases: it is agreed that the decision of the company's appeal must rule these other cases and I shall therefore say no more about them.

The "actual income" from any source of a company subject to such a direction is, under paragraph 6 of the schedule to the Act of 1922, the income from that source estimated in accordance with the provisions of the Income Tax Acts. Under some of these provisions the income of the tax-payer for a particular year is the income which he actually receives during that year. Under others that is not so and it may make a great difference to liability for surtax if particular income payments are included in the actual income of one year rather than in that of another. For example, if five years' arrears of interest are paid in one year it is clearly to the advantage of the surtax payer that these arrears should be spread back so as to be regarded as income of the years when the interest fell due or accrued rather than that the whole sum should be regarded as income of the year of receipt.

The income payments with which this case is concerned are a number of payments made to the company by the Ministry of Fuel and Power under the Act of 1946 and the Coal Industry (No. 2) Act, 1949, during the three years which I have mentioned. The contention of the Crown is that all these payments form part of the actual income of the company for these years and that is denied by the company. So it is necessary to decide which provisions of the Income Tax Act applied to these payments and that depends on the nature of the payments. Then, having decided which provisions apply, it will be necessary to decide what they mean.

When the Act of 1946 was passed it was realised that it would take a considerable time to work out and satisfy the rights to compensation which arose under it and this Act provided rights to interim income under sections 19 and 22, of which the relevant parts are as follows:

"19.—(1) Compensation in respect of a transfer of transferred "interests or of an overhead expenses increase shall be due on "the primary vesting date, subject to determination of the

" amount thereof. (2) For the period between the primary " vesting date and the date on which any such compensation is " fully satisfied, there shall be a right to interim income, to be " satisfied in accordance with the provisions of section twenty-" two of this Act. (3) Provisions may be made by regulations " for authorising the partial satisfaction of such compensation " before the determination of the amount thereof has been " completed."

" 22.—(1) The right conferred by subsection (2) of section " nineteen of this Act to interim income for the period between " the primary vesting date and the date of the satisfaction in " full of compensation in respect of a transfer of transferred " interests, or of an overhead expenses increase, shall be satisfied " in accordance with the provisions of this section. (2) Subject " to the provisions of subsections (3) and (4) of this section as to " the revenue payments therein mentioned—(*a*) the said right " conferred by subsection (2) of section nineteen of this Act shall " be satisfied, so far as regards interim income for the period " between the primary vesting date and the time when any " amount of compensation in respect of a transfer of transferred " interests or of an overhead expenses increase is satisfied, by " making, in addition to the issue of the stock then issued in " satisfaction of that amount of compensation or to the making " of the money payment then made in satisfaction of that amount " of compensation, as the case may be, a money payment of an " amount equal to interest for that period on that amount of " compensation at such rate or rates as may be prescribed as " respects that period or different parts thereof by order of the " Treasury; (3) The following provisions of this subsection shall " have effect as to the making to colliery concerns, and to " subsidiaries within the meaning of the First Schedule to this " Act of such concerns, of payments in respect of each of the two " years beginning with the primary vesting date and the first " anniversary thereof respectively, that is to say—(*a*) a colliery " concern or such a subsidiary shall be entitled in respect of each " of the said two years to a payment of an amount equal to one " half of the comparable ascertained revenue of the concern, or " of the subsidiary, as the case may be, attributable to activities " thereof for which the transferred interests thereof were used or " owned; (*b*) the payments to be made under the last preceding " paragraph are in this section referred to as ' revenue payments,' " and shall be money payments; (*c*) . . . (Method of computing " comparable ascertained revenue); (4) The provision made by " the last preceding subsection shall be deemed, in the case of " any colliery concern or of any such subsidiary, to be in " substitution for the provisions of subsection (2) of this section, " so far as regards additions thereunder for the said two years or " any part thereof to compensation for a transfer of transferred " interests being compensation attributable to transferred interests " of that concern or subsidiary, except as to any excess of the

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" aggregate amount of such additions over the aggregate amount " of the revenue payments of that concern or subsidiary. (5) The " Minister may by regulations make such provision supplementary " to or consequential on the provisions of this section as appears " to him to be necessary or expedient, and in particular, but " without prejudice to the generality of this subsection, provision " may be made by regulations made thereunder for making " adjustments requisite for giving effect to the last preceding " subsection and for making good any underpayment or over- " payment to a colliery concern or such a subsidiary which may " occur in consequence of the making of additions or revenue " payments under this section before all the facts relevant for " giving effect to the last preceding subsection have become " ascertainable."

Section 22 (2) is comparatively simple. Whenever a part of the compensation is satisfied, the company is to be paid a sum equal to interest on that part from January 1, 1947, until the date when that part is satisfied. But then subsection (3) confers a further right to receive " revenue payments " which are to be equal to half the " comparable ascertained income " for the years 1947 and 1948; and subsection (4) provides that these are to be in substitution for the provisions of subsection (2) at least, so far as they go. Then further provision was apparently thought necessary, and that further provision is contained in section 1 of the Act of 1949. All these provisions are extremely complicated, but I think that it is sufficient to say that in effect the Act of 1949 provides for further payments analogous to revenue payments under section 22 (3) of the Act of 1946 in respect of 1949 and subsequent years. I do not think that a meticulous examination of these provisions is necessary, and I do not propose to quote from the Act of 1949.

I can now turn to the case stated and I would set out the main parts of paragraphs 2 and 4: " 2.—(A) The sole question " for our determination was whether, in computing the actual " income of the company for the purpose of the said apportion- " ments, interim income received by the company under the " provisions of the Coal Industry Nationalisation Act, 1946 (here- " inafter called the Act of 1946) and the Coal Industry (No. 2) " Act, 1949 (hereinafter called the Act of 1949), should be included " in the actual income of the year in which it was received or " (as the company contended) of the year or period in respect of " which it was paid,

. . . . . .

" 4.—(1) The company received from time to time payments " from the Ministry of Fuel and Power (hereinafter called ' the " ' Ministry ') for or in respect of interim income under the pro- " visions (in the case of some of such payments) of the Act of " 1946 and (in the case of others of such payments) of that Act " and of the Act of 1949. The said payments are set out in

" tabular form below, and were made under deduction of income " tax; each payment was accompanied by a letter from the " Ministry and a certificate of deduction of income tax in the " form of (or in a form similar to) the letter and certificate both " dated January 26, 1949, copies of which are annexed hereto, " marked A1 and A2 respectively, and form part of this case. " The other letters and tax deduction certificates which were " produced to us are not annexed hereto but are available for " reference if required. Each such letter states that the payment " relates to a claim by the company for interim income for a " stated period.

" Serial " Number	Date of receipt	Gross amount of payment	Net amount paid	Period for which it is stated to be paid in accompanying letter
" (1)	August 7, 1948.	£9,068	£4,987	Eighteen months ended June 30, 1948.
" (2)	January 26, 1949.	£2,733	£1,503	Half-year ended December 31, 1948.
" (3)	September 12, 1949.	£68	£37	From January 1 to September 12, 1949.
" (4)	March 28, 1950.	£1,837	£1,011	For the year ended December 31, 1949.
" (5)	July 14, 1950.	£1,616	£889	Half-year ended June 30, 1950.
" (6)	August 11, 1950.	£5	£3	From July 1 to August 11, 1950.
" (7)	November 13, 1950.	£7	£4	From July 1 to November 13, 1950.
" (8)	February 21, 1951.	£1,519	£835	Half-year ended December 31, 1950.
" (9)	May 25, 1951.	£1,343	£705	Two years ended December 31, 1948.
" (10)	August 9, 1951.	£810	£425	Half-year ended June 30, 1951.

There follow a number of particulars about these 10 payments, but, again, I do not think that in the end these particulars throw light on the present question. It will be observed from the table which I have set out from the case that, although all these sums were paid during the three years in question, to a large extent the periods for which they were stated to be paid fall outside these three years; accordingly, if the appellants are right, a considerable proportion of these payments should not be included in the actual income of the company for these three years.

The only provisions of the Income Tax Acts which could apply to these payments are those of Case III or of Case VI of Schedule D, and it is admitted that one or other of these Cases must apply. The Crown argue that Case III applies and that rule 21 of the general rules applicable to all Schedules also applies. If that is right, then, admittedly, the Crown must succeed. The company, on the other hand, argues that Case III does not apply at all and that the payments fall within Case VI or, alternatively, that even if Case III does apply, rule 21 does not apply. If either of these alternative contentions is right, then difficult questions of construction arise.

The Special Commissioners held " that the payments in " question were chargeable to income tax under the provisions of " Case VI of Schedule D to the Income Tax Act, 1918, and were " not chargeable under Case III of the said Schedule nor under

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" Schedule C. We further held that the said payments formed " part of the actual income of the company for the years or other " periods for which they were stated to have been paid, and " accrued from day to day throughout such years or periods."

On appeal Harman J. held that these payments were within Case III, and he also held that rule 21 applied, so he allowed the Crown's appeal. He dealt with rule 21 so shortly that it would seem that the argument against its applicability cannot have been fully developed before him. The Court of Appeal held that rule 21 did not apply to these payments and that, as rule 19 did not apply either, that prevented these payments from falling within Case III. They held that the payments fell within Case VI but they held that under the rules of Case VI these payments were income of the years of their receipt. Accordingly they dismissed the company's appeal.

I must now set out and consider these provisions of the Income Tax Acts.

" Rules applicable to Case III. 1. The tax shall extend to— " (*a*) any interest of money, whether yearly or otherwise, or any " annuity, or other annual payment, whether such payment is " payable within or out of the United Kingdom, either as a charge " on any property of the person paying the same by virtue of " any deed or will or otherwise, or as a reservation thereout, or " as a personal debt or obligation by virtue of any contract, or " whether the same is received and payable half-yearly or at any " shorter or more distant periods;

. . . . . .

" 2.—(1) The tax shall, subject as hereinafter provided, be " computed—(*a*) as respects the year of assessment in which the " profit or income first arises, on the full amount of profits or " income arising within that year; (*b*) as respects subsequent " years of assessment, on the full amount of the profit or income " arising within the year preceding the year of assessment. (2) " Tax shall be paid in the actual amount computed as aforesaid " without any deduction."

The remainder of the rules do not appear to be material for the present purpose.

" Rules applicable to Case VI. 1. The nature of the profits " or gains, and the basis on which the amount thereof has been " computed, including the average, if any, taken thereon, shall " be stated to the Commissioners.

" 2. The computation shall be made, either on the full amount " of the profits or gains arising in the year of assessment, or " according to an average of such a period not being greater than " one year, as the case may require . . ."

" General Rules applicable to Schedules A, B, C, D and E.

" Rule 19: (1) Where any yearly interest of money, annuity, " or any other annual payment (whether payable within or out " of the United Kingdom, either as a charge on any property of

"the person paying the same by virtue of any deed or will or "otherwise, or as a reservation thereout, or as a personal debt "or obligation by virtue of any contract, or whether payable half-"yearly or at any shorter or more distant periods), is payable "wholly out of profits or gains brought into charge to tax, no "assessment shall be made upon the person entitled to such "interest, annuity, or annual payment, but the whole of those "profits or gains shall be assessed and charged with tax on the "person liable to the interest, annuity, or annual payment, with-"out distinguishing the same, and the person liable to make such "payment, whether out of the profits or gains charged with tax "or out of any annual payment liable to deduction, or from which "a deduction has been made, shall be entitled, on making such "payment, to deduct and retain thereout a sum representing the "amount of the tax thereon at the rate or rates of tax in force "during the period through which the said payment was accruing "due."

"Rule 21: (1) Upon payment of any interest of money, "annuity, or other annual payment charged with tax under "Schedule D, or of any royalty or other sum paid in respect of "the user of a patent, not payable, or not wholly payable out of "profits or gains brought into charge, the person by or through "whom any such payment is made shall deduct thereout a sum "representing the amount of the tax thereon at the rate of tax "in force at the time of the payment. (2) Where any such "payment as aforesaid is made by or through any person, that "person shall forthwith deliver to the Commissioners of Inland "Revenue, for the use of the Special Commissioners, an account "of the payment, or of so much thereof as is not made out of "profits or gains brought into charge, and of the tax deducted "out of the payment or out of that part thereof, and the Special "Commissioners shall assess and charge the payment of which "an account is so delivered on that person. (2A) The Special "Commissioners may, where any person has made default in "delivering an account required by this rule, or where they are "not satisfied with the account so delivered, make an assessment "according to the best of their judgment, and if any person "neglects or refuses to deliver an account so required, he shall "forfeit the sum of one hundred pounds over and above the tax "chargeable."

It will be convenient first to assume that these payments were annual payments within the meaning of Case III and to consider whether on that assumption rule 21 can be applied to them. It was argued, I think rightly, that rule 21 cannot be applied to payments made by the Crown. I do not base my opinion on any presumption or general rule as to applying to the Crown statutory provisions which do not bind it either expressly or by clear implication. In my view an examination of the provisions of rule 21 shows that these provisions cannot be applied and can never have been intended to apply to the Crown. Rule 19 deals

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with annual payments, etc., "payable wholly out of profits or "gains brought into charge to tax," and rule 21 deals with payments "not payable or not wholly payable out of profits or "gains brought into charge." Neither expression appropriately describes payments out of moneys provided by Parliament, and, moreover, in all ordinary cases the Crown has other authority for deducting tax in making income payments. It can only be in a most exceptional case that the Crown would have to rely on rule 21 as its only warrant for deducting tax. It is plain that between them rule 19 and rule 21 are intended to cover all cases of annual payments, etc., made by a taxpayer. Under both there is provision for deducting tax when making the payment, but the purpose is quite different according to whether or not the money which is paid has already borne tax. If it has, then the Crown has no interest because the same money is not to be taxed twice, and the authority to deduct tax is for the purpose of enabling the taxpayer to recoup himself when he has already paid tax on the money which he has now to pay away; and the payee has to submit to this deduction of tax because it ought in the end to fall on him. But if the money has not borne tax, then the Crown has an interest because the money becomes on payment a part of the taxable income of the payee. So the payer is bound to deduct tax and to pay it to the Revenue. Rule 21 operates not as an authority to deduct tax but as an obligation to do so and to account to the Revenue for the tax deducted, and the whole purpose of rule 21 appears to me to be to enable the Revenue to recover from the payer tax which is really due by the payee. That, I think, appears even more clearly from the original form of rule 21, which first appeared as section 24 (3) of the Customs and Inland Revenue Act, 1888. Before then a payer of interest, etc., out of money which had not borne tax was under no obligation to deduct tax and the tax was payable by the payee, but provisions authorising the payer to retain tax out of money which had already borne tax so as to recoup himself go back to 1842. Section 24 (3) of the Act of 1888 provided that upon payment of interest, etc., not payable or not wholly payable out of profits brought into charge the payer "shall deduct thereout the rate "of income tax in force at the time of such payment and shall "forthwith render an account to the Commissioners of Inland "Revenue of the amount so deducted . . . and such amount shall "be a debt from such person to Her Majesty and recoverable as "such accordingly." In my opinion it would need not interpretation but complete redrafting to turn that provision or its modern equivalent into an authority to the Crown to deduct tax when making payments out of moneys provided by Parliament.

Two questions now arise. Can Case III apply to payments which do not come within either rule 19 or rule 21, and, if it can, is the nature of the payments in this case such that Case III should be applied to them? The Court of Appeal answered the first of these questions in the negative but they gave no reasons,

and I do not see why Case III cannot be applied if the nature of the payments is such that apart from this point they would come within the scope of that Case. I would agree with the Court of Appeal if direct assessment were impossible under Case III, either because the rules of Case III are inadequate or for any other reason, but it was not argued that there can never be direct assessment under Case III. Moreover, rules 19 and 21 are not linked with Case III in the Act; they appear among the general rules applicable to all schedules. It is true that all but the most unusual cases under Case III, rule 1 (*a*) do fall within either rule 19 or rule 21 but that does not seem to me to mean that these rules must be held to control the applicability of Case III, rule 1 (*a*). So I pass on to consider whether the nature of these payments is such that Case III cannot apply to them.

It was argued that the decision of this House in *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[1] showed that these payments are unique in character and that therefore they cannot be annual payments within the meaning of Case III. "Annual payment" must, it is said, be read in its context and must in some way resemble or be ejusdem generis with interest or annuities, but these payments are sui generis. That argument appears to me to be no more than a play on words. One must look at the true nature of the payments. It is well recognised that many payments which in the ordinary sense of the words might well be called annual payments do not come within Case III. One limitation is that Case III only applies to payments received as pure profit income; that is because no deductions are permitted under Case III. And further, the payments must recur or at least be of a recurring character. I think that the payments in this case comply with both these requirements.

An argument was submitted to the effect that these payments were not received as pure profit income of the company because there ought, on proper accounting principles, to be an allowance in respect of deductions, i.e., expenses necessary to "earn" or achieve these payments. But any such argument must be based on facts and there are no facts in the stated case to support it. On the contrary, paragraph 2 of the case, which I have already quoted, clearly shows that this point was never raised before the commissioners. In my opinion we cannot do otherwise in this case than regard these payments as pure profit income.

On the matter of recurrence the Court of Appeal drew a distinction between those payments which were made under section 22 (2) of the Act of 1946 and the others, but I do not think that there is room for any such distinction. All the payments were payments of "interim income" under section 19 of the Act of 1946 and they should, in my view, be regarded as a single series of payments although their amounts were determined by different provisions of the Acts of 1946 and 1949. Otherwise

[1] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

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I agree with the opinion of the Court of Appeal that the requirements of Case III are satisfied in the case of these payments.

If I am right so far the decision of this case depends on the proper interpretation of Case III, rule 2, which enacts the method of assessment of Case III payments. Under that rule the income of any year of assessment is the "income arising" during either that year or the previous year, and I may add that if the payments were held to fall within Case VI, substantially the same question would arise because there the words "profits or gains arising" would have to be construed. To my mind the most difficult question in this case is to determine the meaning of these two words "income arising." Do they include only money which has been received, or do they also include money which is due and payable but has not yet been received, or money which has accrued but is not yet payable?

Most of the argument on this point turned on the meaning of the word "arising" but I do not think that that is the most important word. No income can arise before there is any income and as soon as there is income the income has arisen. The word "income" appears to me to be the crucial word, and it is not easy to say what it means. The word is not defined in the Act and I do not think that it can be defined. There are two different currents of authority. It appears to me to be quite settled that in computing a trader's income account must be taken of trading debts which have not yet been received by the trader. The price of goods sold or services rendered is included in the year's profit and loss account although that price has not yet been paid. One reason may be that the price has already been earned and that it would give a false picture to put the cost of producing the goods or rendering the services into his accounts as an outgoing but to put nothing against that until the price has been paid. Good accounting practice may require some exceptions, I do not know, but the general principle has long been recognised. And if in the end the price is not paid it can be written off in a subsequent year as a bad debt.

But the position of an ordinary individual who has no trade or profession is quite different. He does not make up a profit and loss account. Sums paid to him are his income, perhaps subject to some deductions, and it would be a great hardship to require him to pay tax on sums owing to him but of which he cannot yet obtain payment. Moreover, for him there is nothing corresponding to a trader writing off bad debts in a subsequent year, except perhaps the right to get back tax which he has paid in error.

The case has often arisen of a trader being required to pay tax on something which he has not yet received and may never receive, but we were informed that there is no reported case where a non-trader has had to do this whereas there are at least three cases to the opposite effect—*Lambe* v. *Inland Revenue*

Commissioners,[2] *Dewar* v. *Inland Revenue Commissioners*[3] and *Grey* v. *Tiley*,[4] and I would also refer to what was said by Lord Wrenbury in *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia (Colonial Treasurer)*.[5] I certainly think that it would be wrong to hold now for the first time that a non-trader to whom money is owing but who has not yet received it must bring it into his income tax return and pay tax on it. And for this purpose I think that the company must be treated as a non-trader, because the *Butterley* case [6] makes it clear that these payments are not trading receipts.

I would not put it that there is any general or universal principle that sums not yet paid must or must not be brought in to assessment to income tax. There are two quite different cases. Traders pay tax on the balance of profits and gains and bring money owed to them into account in striking that balance, but ordinary individuals are not assessable and do not pay tax until they get the money because until then it is not part of their income. There may well be difficult border-line cases which do not clearly fall into either of these classes and I do not attempt to foresee how that should be decided, but the payments in this case being pure profit income and not being trading receipts must, I think, be put in the second of these classes. Part of these sums accrued during the years 1946–47 and 1947–48, but in my view the company could not have been assessed and required to pay tax on amounts which accrued during those years but had not been paid when the assessment was made even if the exact amount which had accrued could have been determined.

But then it was argued that, although payment of tax could not have been demanded before the sums were received, now that they have been received they can be spread back over the years during which they were accruing. I would willingly accede to that argument if I saw anything in the Income Tax Acts which I thought would warrant it. In a case where the whole or parts of money received during one year had become due and payable in one or more earlier years there is much to be said for the view that, although no part of it can be taxed until it is received, it ought when taxed to be spread back and regarded as income of the year or years when it became due: a debtor ought not to be able to alter his creditor's liability for surtax by delaying payment of his debt. There is some authority for holding that that was the effect of section 5 (3) (*c*) of the Act of 1918. But that has now been superseded. On one view section 39 (1) of the Finance Act, 1927, achieves the same result in the case of payments to which rule 19 applies. But in the case of payments to which rule 21 applies, spreading back has clearly been excluded by section 39 (2) of the Act of 1927. It was not argued that the appellants could in the present case derive any

[2] [1934] 1 K.B. 178; 18 T.C. 212.
[3] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 561.
[4] (1932) 16 T.C. 414.
[5] [1924] A.C. 508 (P.C.).
[6] [1957] A.C. 32.

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advantage from section 34 of the Act of 1927. And there appears to be no provision expressly dealing with payments to which neither rule 19 nor rule 21 applies. In the present case it appears to me that any authority for spreading back these payments would have to be inferred from the terms of the rules of Case III. I have already stated my view that in this case no income arose until the money was received and I cannot see how receipt of the money can alter the meaning of "income arising" so as to make it possible after receipt to hold that income arose not at the date of receipt but at some earlier date. And if the income had not arisen in the earlier year I can find no ground for taxing it as part of that earlier year's income.

But even if it were possible to spread income back to the years when it became due and payable, that would not cover the present case. In the present case the income can be regarded as accruing during the earlier years, but I do not think that it can be regarded as having become due and payable then in the sense that the company could have demanded payment then. I can find nothing on which to base an inference that income, once it has been received, can be regarded as having arisen not only before it was received but even before it was payable and while it was merely accruing. For these reasons I must hold that these payments were income arising at and not before the dates when they were received by the company, and therefore these appeals should be dismissed.

LORD RADCLIFFE. My Lords, these appeals raise two questions as to the determination of income for the purposes of the Income Tax Acts. One seems to me to be mainly of technical or administrative significance; the other is of considerable general importance.

The first question is whether the various sums of money paid to the appellants under the Coal Industry Nationalisation Act, 1946, s. 22 (2) (*a*) or (3), or the Coal Industry (No. 2) Act, 1949, s. 1 (2), were assessable under Case III or Case VI of Schedule D. It is not in dispute that they are taxable income under one or other of those heads. Following upon a decision between these two Cases certain arguments are developed for or against the substantial question in issue, whether for the purposes of the surtax direction which has been made under section 21 of the Finance Act, 1922, as extended by section 14 of the Finance Act, 1939, the income of the appellants is to be computed on the basis that each payment forms part of the income of the revenue year in which it was received or, alternatively, is to be written back, when received, over the years in respect of which it was paid.

Under rule 1 of the rules applicable to Case III the subject of charge is "any interest of money, whether yearly or otherwise, "or any annuity, or other annual payment." The payments with which we are concerned are payments of what the statute calls "interim income"; they take the form either (1) of a "revenue payment" for each of the calendar years 1947 and

1948 equal to one-half of the comparable ascertained revenue of the concern before nationalisation, or (2) of a payment for 1949 and subsequent years of a further calculated sum based on the amount by which one-third of the comparable ascertained revenue might exceed interest on any sum of compensation satisfied before the end of the year, or (3) of a sum "equal to interest" from the vesting date (January 1, 1947), to the date on which any compensation was paid or satisfied, so far as not covered by the other two forms of interim income.

I do not think it necessary or useful to dwell upon the details of these complicated and barely intelligible provisions. It is sufficient to say that all the payments made represented some form of compensation in the form of interim income for the fact that as from January 1, 1947, the concern had been dispossessed of its assets, the use and benefit of which passed to the Crown, and, until compensation in money or stock was provided had been left without the means of earning an equivalent income from the employment of the compensation. Nor do I think it useful to distinguish between the various forms which these payments of interim income took according to the different statutory rules which were their warrant. None of them, in my view, constituted "interest of money" or an "annuity" for the purpose of Case III of Schedule D. It is much more difficult to say whether any of them constituted an "other annual payment" under this Case.

Neither the Acts nor the courts have supplied any definition of these words, "other annual payment." There is authority for saying that "the category is quite a limited one" (*In re Hanbury* [7]). There is ample authority for saying that not all payments that are made annually are annual payments under Case III (*Howe* v. *Inland Revenue Commissioners* [8]; *Hill* v. *Gregory* [9]). The reason for limitation lies in the fact that for the courts Case III annual payments have been inseparably associated with payments from which tax is deductible in accordance with general rule 19 or 21, and it has been thought to be inconsistent with the idea of tax being deducted at the source at the standard rate to allow within the case payments that are likely to be gross receipts of the payee and not "pure income profits." Although this distinction may be a good general guide in determining the scope of Case III it does not in all circumstances throw a very certain light upon the duty of the payer, who is not necessarily in a position to know whether or not the sum he pays will be treated as "pure income" or a gross receipt in the computation of the payee's tax. That, in itself, perhaps, argues for a restricted interpretation of the words "annual payment."

The word "annual" has not been found to admit of any significant interpretation. To the courts it means no more than "recurrent"—see, e.g., *Moss' Empires Ltd.* v. *Inland Revenue*

[7] (1939) 20 A.T.C. 333, 334.
[8] [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 296.
[9] [1912] 2 K.B. 61; 6 T.C. 39.

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Commissioners [10]—or even "capable of recurrence." That may be so; but I think that it would be both bad logic and bad law to deduce that merely because a payment is in fact recurrent or capable of recurrence it is therefore to be treated as an annual payment.

In the end, the question what is or is not such a payment is a question of judgment formed in the light of the considerations that I have alluded to. On the whole I should not regard these payments as coming within the description. Although they could and were indeed likely to recur in the sense that several payments might well be so called for before full compensation was provided, they were essentially the temporary product of an exceptional measure of State expropriation. The income provided was in that respect casual. Such temporary and casual incomes appear to me to fit less naturally into Case III, with its interest of money, annuities and other annual payments, than into Case VI, which has always been regarded as the case that covers what I may call the oddities of Schedule D. To my mind, this interim income presents itself as just one of these oddities: and in any choice between the claims of Case III and Case VI, I would favour the claims of the latter.

There is another independent reason for preferring Case VI. That is the reason which determined the judgment of the Court of Appeal on this point. Your Lordships are at one, I believe, in holding that neither rule 19 nor rule 21 of the general rules is so expressed as to be capable of requiring or authorising the deduction of tax from these payments made by the Crown. I agree with that and I need not recite my reasons separately. If so, not only are the payments not income "chargeable with income tax "by way of deduction," with the consequence that section 39 (2) of the Finance Act, 1927, has no application at all, and provides no rule to determine the year to which they are to belong as income; but also there is at any rate strong prima facie ground for saying that payments for which the tax scheme provides no deduction at source are not annual payments within the meaning of Case III. For, as is indicated by the decisions to which I have referred, the courts have tended to treat liability to deduction at source as affording a distinguishing mark of a Case III annual payment; and if here the freedom from deduction would be due not so much to the nature of the payment as to the accident that it is made by the Crown itself and not by a subject, that circumstances serves only to reinforce the point already made that these interim payments are an exceptional form income tax for which the regular scheme of the Income Tax Acts has made no provision.

I turn now to the important question whether the sums paid are bound by law to be treated as income of the revenue year in which they were received, regardless of the fact that some or all of them were avowedly paid by the Crown as income of periods

[10] [1937] A.C. 785; 53 T.L.R. 867; [1937] 3 All E.R. 381; 21 T.C. 295.

preceding the revenue year of receipt. It is sufficient to take as an illustration payments 1, 2 and 9 itemised in paragraph 4 (1) of the case stated. These payments cover the interim income to which the appellants were entitled in respect of the calendar years 1947 and 1948: they were made under section 22 (3) (*a*) of the Act of 1946 which itself describes the payments as due "in "respect of" those two years: and in each case they were accompanied by an official letter identifying the period to which they related. In the most obvious sense they represented income of the three revenue years 1946–47, 1947–48 and 1948–49, and were due to be apportioned between those years accordingly. Yet because the first payment (in respect of the 18 months to June 30, 1948) was not made until August 7, 1948, nor the second payment (in respect of the half-year ended December 31, 1948) until January 26, 1949, the Crown claims that these two payments must be allocated wholly to the revenue year 1948–49; and because the third payment was made on May 25, 1951 (as a further payment in respect of the two years December 31, 1948), it is similarly claimed as income of the revenue year 1951–52, with which, if I may be pardoned for begging the question, it has nothing in the world to do.

Only one or two further points need to be noticed. Neither the Act of 1946 nor 1949 fixed a date of payment for the compensation due by way of interim income. It was left to the Crown to make its payments as and when it could or would, due allowance being made for the vast administrative task involved in ascertaining and checking the multifarious compensation claims to which nationalisation gave rise. Secondly, if the argument of the Revenue on this appeal is well founded, the dates actually selected for payment have led to the most unfortunate "bunching" of assessable income for the purposes of surtax, no income at all, for instance, being attributable to the revenue year 1947–48. Surtax is a steeply progressive tax and in connection with it bunching of income is always to be regretted, since it is much to the detriment of any taxpayer with a high marginal rate. I do not make any apology therefore for saying that I should be sorry if I thought that the Revenue's claim was well founded in law.

I am of opinion that it is not. I think that it is both right in principle and in accordance with previous authority to attribute these various payments to the years or parts of years in respect of which they were paid. To take one instance, I think that the first payment of £9,068 (wrongly paid net of income tax) should be distributed between the three years 1946–47, 1947–48 and 1948–49.

It is not easy to give an account of my reasons for this conclusion without burdening the House with an opinion of altogether immoderate length. I believe, however, that the substance of them can be conveyed by the following propositions, for whose brevity of statement I apologise.

1. In computing profits or gains or other income chargeable

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under Schedule D for any year the basis of computation is the income that "arose or accrued" during that year. The year in which a payment is actually received is not necessarily the year in which the income which it represents arose or accrued.

2. There is no fundamental or general principle of income tax law that the year in which a payment is made must be taken to be the year to which the assessable income belongs.

On the other hand, there may be special statutory rules that do secure just this result, as, for instance, the provision made by section 39 (2) of the Finance Act, 1927, that, in estimating total income, income chargeable with tax by way of deduction at the standard rate in force for any year is to be deemed to be income of that year. This rule could be very injurious to the taxpayer, but was evidently intended that it should not operate to the injury of the payer of super-tax or surtax, since by section 34 of the same Finance Act (see now section 238 of the Income Tax Act, 1952), he is allowed to spread any income affected by the rule as if it accrued from day to day. Nevertheless, where the rule applies, cadit quaestio. But then there arises this dilemma; if this would have been the legal result anyway according to general principle, why introduce the rule in 1927 with regard to the special class of payments made under deduction? And why, if there was such a principle, had rule 19 of the general rules provided until section 39 (1) was enacted that tax was to be deducted "at the "rate or rates of tax in force during the period through which the "payment was accruing due"? Lastly, does section 34 of the Act of 1927 represent a principle or an exception from a principle?

3. Subject to the operation of any such special rules, when a payment is received in one year, and it can be clearly seen that it ought to be treated as income arising in another year, the law not only permits but requires that it should be attributed to that other year. This principle has been frequently acted upon in the case of traders—see *Issac Holden & Sons* v. *Inland Revenue Commissioners* [11]; *Lambert Bros.* v. *Inland Revenue Commissioners* [12]; *Ensign Shipping Co.* v. *Inland Revenue Commissioners* [13]—and has twice received the indorsement of this House—see *Inland Revenue Commissioners* v. *Newcastle Breweries* [14]; *Inland Revenue Commissioners* v. *Gardner Mountain & D'Ambrumenil Ltd.* [15]

4. In the case of trading income the ordinary test for determining the year to which a payment "belongs" is to ascertain the year in which it was "earned" or in which entitlement to the payment arise. As Viscount Cave L.C. said in the *Newcastle Breweries* case [16]: "The rum was taken in 1918, and the right "to some payment arose at once, though there was delay in

[11] (1924) 12 T.C. 768.
[12] (1927) 12 T.C. 1053.
[13] (1928) 12 T.C. 1169.
[14] (1927) 43 T.L.R. 476; 12 T.C. 951.
[15] (1947) 29 T.C. 69; [1947] 1 All E.R. 650.
[16] 43 T.L.R. 476, 477.

" ascertaining the amount to be paid." The present case reproduces that situation precisely; but it is so much the clearer as to the date of entitlement in that the Nationalisation Act itself prescribed the date from which the right to payment arose and the periods of time to which each payment of income was to relate.

5. The principle applied in the cases I have just mentioned is not attributable to any special quality of trading income or other income chargeable under Case I or Case II. There is no relevant distinction involved in the fact that Case I income is computed on the " balance " of the profits or gains. What distinction could that be? To put it in its simplest form, the balance is merely the gross receipts less the expenses, and it is the excess of those receipts that is brought to charge. Case II income is not described as computable on the " balance." Yet if a professional income is computed on the basis that debts are receipts, as nearly all such incomes are today, is not the same principle to be applied?

6. Neither is it a relevant distinction that in computing Case I income trade debts are habitually treated as receipts. The suggestion which appears in *Johnson* v. *W. S. Try Ltd.*,[17] that this practice, which governs a very considerable slice of the total tax yield, is somehow an anomaly because a departure from a fundamental conception of income tax legislation that profits are ascertained in reference to receipts, is, with great respect to the learned Master of the Rolls [Lord Greene] who made it, a misconception. For this purpose trade debts are receipts. The truth, as I understand it, is that very long ago it was accepted by traders that to measure receipts by trade debts rather than by cash incomings gave a truer measure of the year's profit income. I hope that it is not pedantic to point out that in our economy there are few payments that amount to anything more than transfers of debts. I do not think that appreciation of the fact that some debts are equivalent to receipts need be confined to traders or professional men, but obviously such a method of computation can have only a limited application to other forms of income—see e.g., *Lambe* v. *Inland Revenue Commissioners*.[18] I should myself have thought that Crown debts created by statute were a sufficiently solid category and that we need not look for an allowance for bad debts. But no part of this interesting question is directly in point here.

7. The proof of what I have said lies, I think, in the fact that in none of the cases in which the principle of " writing " back " was applied was this principle based by the court on any practice of computing income that was peculiar to traders or even on the supposition that at the close of the year in which the profit was held to have arisen anything could have been entered as a receipt in respect of the right to or the expectation of the future payment which ultimately matured. Such a point is simply not noticed as relevant. It was relevant, of course,

[17] (1946) 27 T.C. 167, 181; 52 T.L.R. 355; [1946] 1 All E.R. 532.

[18] [1934] 1 K.B. 178; 18 T.C. 212.

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that the payment made had its origin in a trading transaction or a transaction analogous to trade, because otherwise the receipt would not have been taxable at all. But that is a different point. In fact in two of the cases, there was no debt—merely an uncovenanted payment—see, e.g., Rowlatt J. in the *Isaac Holden* case [19]: "It was uncertain whether they would ever receive more "at that time: they certainly had no right to demand more," and the remarks of Viscount Simon L.C. in the *Gardner Mountain* case.[20] In my opinion therefore it is not only safe but necessary to treat these decisions as directed wholly upon the general principle of relating back payments made in one year to the year or years in which the income which they represent can be seen to have arisen. They are decisions upon the meaning or rather upon the application of the word "arising" in connection with Schedule D.

8. There have been other decisions which have more or less bearing on the present issue. In *Hawley* v. *Inland Revenue Commissioners* [21] Rowlatt J. decided a super-tax appeal relating to two payments covering several years' income in accordance with the principle of "spreading": in *Grey* v. *Tiley* [22] he decided a case, not obviously distinguishable, in accordance with the principle of "bunching." The latter case was settled by the Crown before it was heard by the Court of Appeal. His decision in *Grey* v. *Tiley* [23] was, he thought, required by his own earlier decision in *Leigh* v. *Inland Revenue Commissioners*,[24] a case which in fact turned on the meaning of the word "receivable" in the Income Tax Act, 1918, s. 5 (3) (*c*), the section which was repealed to make way for new provisions in 1927. But *Leigh's* case [25] contains a passage about receivability without receipt for the purpose of income tax being nothing at all, which is, in my view, too widely expressed. In any event the proposition is of no assistance when the situation is reached that money has been received and the question has then to be answered in which revenue year it should be treated as arising. It is not then of any significance to ask whether there could have been an assessment on some debt or estimated claim at the close of the earlier year. Lastly, in *Inland Revenue Commissioners* v. *Haddington (Earl)* [26] the converse case of a single deductible payment out of income was treated by the Court of Session as due to be "spread" over the two years to which it related. This too was a decision which turned primarily on the meaning of the word "payable" in the tax legislation relating to Scotland.

9. It is evident to me that in some cases the argument against spreading has been thought to rest upon or be supported by a supposed principle of income tax law that at the close of

[19] 12 T.C. 768, 772.
[20] 29 T.C. 69, 93.
[21] [1928] 1 K.B. 578; 13 T.C. 327.
[22] 16 T.C. 414.
[23] Ibid.
[24] [1928] 1 K.B. 73; 43 T.L.R. 328; 11 T.C. 590.
[25] [1928] 1 K.B. 73, 77; 11 T.C. 590, 595.
[26] 1924 S.C. 456; 8 T.C. 711.

the year of charge the taxpayer is entitled to "know where he "is" and to expect a final clearance of tax according to the ascertained results of the year—see *Johnson* v. *W. S. Try Ltd.*[27]; *Grey* v. *Tiley*.[28] I can make little of this general principle anyway under a system which allows additional assessments and less of it in relation to the realities of current practice in dealing with the complexities of industrial, commercial, and personal incomes in the modern economy. But, however that may be, I imagine that this solicitude would readily be forgone by a taxpayer in favour of getting his true income fairly distributed over the appropriate tax years, and he would think his peace of mind bought at altogether too dear a price if the cost of it proved to be a quite fortuitous surcharge on his tax bill.

I am in favour of allowing the appeals.

LORD KEITH OF AVONHOLM. My Lords, I would place the payments here in question within Case III of Schedule D of the Income Tax Act, 1918, as coming under the description of "other "annual payment" in rule 1 (*a*) of that Case. The fact that they owe their origin to statutory enactment, which is not a source specifically recognised by the rule, does not, for the reasons stated by Harman J. and the Court of Appeal, exclude them from coming within the rule (*Smith* v. *Smith*[29]; *Inland Revenue Commissioners* v. *City of London* (*as Conservators of Epping Forest*[30])). The nature of the payments as prescribed by sections 19 and 22 of the Coal Industry Nationalisation Act, 1946, and section 1 of the Coal Industry (No. 2) Act, 1949, brings them, I think, easily under the rule. They are expressly described in section 19 of the 1946 Act as "interim income." Section 22 fixes the measure by which that interim income is to be quantified. It is clear that that income was going to be paid for at least two years. Its complete and final quantification and so its full satisfaction might have to be postponed, but there would at least be substantial payments to account. I can draw no distinction between the payments under subsection (2) and subsection (3) of section 22. They are complementary to one another and in certain events subsection (2) may not be invoked at all. Where both are invoked, each makes its respective contribution to the interim income provided for by section 19 of the Act. The "revenue payments" under section 22 (3) (*a*) of the 1946 Act may be regarded as an instalment to account of the money payment calculated under section 22 (2) (*a*), although for the years 1947 and 1948 there was to be no recoupment in the event of the "revenue payments" being found to have exceeded the sum calculated, under that subsection, as satisfying the right to interim income. It may be true to say, as the Court of Appeal have said, that it is difficult to discern the quality of

[27] 27 T.C. 167, 181.
[28] 16 T.C. 414, 422.
[29] [1923] P. 191.
[30] [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.

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recurrence in the payment made under subsection (2) (*a*), but as the subsection is part of the machinery for fixing the "interim income" and filling any deficiencies of amount resulting after payment of the "revenue payments" under subsection (3), I think the payment made under it should be regarded as part of an annual payment. The circumstances here seem to me to be every bit as potent to bring these payments under the words of rule 1 (*a*) of Case III as were the circumstances in *Moss' Empires Ltd.* v. *Inland Revenue Commissioners* [31] to make the payments under guarantee in that case so chargeable. With this qualification I would agree with the Court of Appeal that these payments have the characteristics required of "other annual "payments" under rule 1 of Case III. There is nothing, in my opinion, in the decision of this House in *Inland Revenue Commissioners* v. *Butterley & Co. Ltd.*[32] to preclude that conclusion.

If then these payments came under rule 21 of the general rules of the Income Tax Act there would be a simple end to this case. Tax would be deducted from the payments at the rate of tax in force at the time of the payments as being annual payments charged with tax under Schedule D and not payable out of profits or gains brought into charge. By section 38 of the Finance Act, 1927, the tax deducted would be tax at the standard rate and by section 39 (2) of the same Act the payments would be treated as income of the year in which the deduction was made, i.e., of the year in which the payments were received by the company. The appeal of the company would be dismissed and the order of Harman J. reversing the determination of the special commissioners would stand affirmed.

The contention, however, of the company is that rule 21 does not apply to the Crown and that accordingly the payments being payments by the Crown do not come under the rule. Rule 21 stems from section 40 of the Income Tax Act, 1853, which "entitled" and "authorised" the payer to deduct the tax at the time of payment. Had the rule continued in this form I can see no reason why the Crown equally with the subject should not have deducted tax from such payments. The section did not, however, compel the deduction of tax and Lord Macnaghten in *London County Council* v. *Attorney General*,[33] also thought that it did not compel the payer to account to the Crown for the tax if deducted though Lord Davey in the same case [34] took, I think, a different view on this point. The rule though not expressly repealed, was in effect replaced by section 24 (3) of the Customs and Inland Revenue Act, 1888, which directed that "the person "by or through whom such interests or annuities shall be paid, "shall deduct thereout the rate of income tax in force at the "time of such payment, and shall forthwith render an account to

[31] [1937] A.C. 785; 53 T.L.R. 867; [1937] 3 All E.R. 381; 21 T.C. 295.

[32] [1957] A.C. 32.

[33] [1901] A.C. 26, 40, 41; 17 T.L.R. 131; 4 T.C. 265.

[34] [1901] A.C. 26, 43.

" the Commissioners of Inland Revenue of the amount so " deducted, . . . ; and such amount shall be a debt from such " person to Her Majesty, and recoverable as such accordingly;" The rule as so modified was carried into the Income Tax Act, 1918 (which also repealed the 1853 Act and section 24 of the 1888 Act). The Finance Act, 1927, made certain amendments for reinforcing the machinery for recovery of tax so deducted and in its amended form is the rule now under consideration. One, if not the main reason for the amendment, was to place a direct assessment on the payment and so secure priority of ranking in bankruptcy or liquidation which would not have been available to a mere debt due to the Crown. My Lords, it seems strange that a rule, which in its original form would, I think, have entitled the Crown to deduct tax, should, when strengthened for the protection of the Crown, by improving the machinery for the recovery of the tax, cease to apply to the Crown. Much, I think, might be said for the view that what was compulsory on the subject was permissive to the Crown and that if the Crown deducted tax the other directives of the rule became clearly inoperative, because the circumstances for their operation could never arise. But I find it unnecessary to pursue this line further as your Lordships take the view that rule 21 cannot be invoked by the Crown. I am content to proceed on this view.

It is then contended by the company, rule 21 being out of the way, that the payments fall to be attributed to the years in respect of which they were paid. As the commissioners made no direction in respect of the year 1947–48 no question in respect of that year now arises. The directions in issue are directions in respect of payments in the years 1948–49, 1949–50 and 1950–51, with reference to which the dispute is whether the year of receipt or the period of accrual is to count. By rule 2 of the rules applicable to Case III in its original form under the Act of 1918 and in its form as amended by the Finance Act, 1922, tax is to be computed on the amount of income " arising " in a particular year. The word " arising " is to be found in various contexts in the Income Tax Acts. By Schedule C to the Act of 1918 tax is charged " in respect of all profits arising from interest, " annuities, dividends and shares of annuities payable out of any " public revenue." It is difficult to see how this can mean anything other than that tax shall be charged on profits from the receipts of interest, etc. If interest is not received there can be no profits. Passing over for the moment the opening paragraph of Schedule D we find in the rule applicable to Case II of that schedule that the tax shall extend, inter alia, to " all profits " and earnings of whatever value arising from employments." " Arising " here might reasonably be taken as referring to the source of the profits and earnings, as also in rule 2, the proviso to rule 4 (1) and rule 5 of the rules applicable to Cases I and II. Under Case III, which is the material Case here, rule 2 originally provided that the tax should be computed " on the full amount

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" arising " within a particular year. As amended in 1922 the rule provides that the tax shall be computed " on the full amount of " the profits or income arising within " certain specified years. As we are concerned here only with tax on item 1 (*a*) of the Case " any interest of money whether yearly or otherwise or any " annuity, or other annual payment," I think, that as in Schedule C, the natural reading of rule 2 is to apply it, in the case of income, to income received in the specified years. Rule 1 of Case IV, as amended by the Finance Act, 1926, yields, I think, a similar inference. It is suggested that the rule shows a clear differentiation between income arising and income received. I can see no such distinction. We are faced here again with a computation " on the full amount [of the income] arising in the year " preceding the year of assessment, whether the income has been " or will be received in the United Kingdom or not, subject in " the case of income not received in the United Kingdom " to certain deductions and allowances. Here, also, I think income arising means income received, which in this case means received abroad, and that income received in the United Kingdom is income remitted in some form to the United Kingdom, which could only be from income already received abroad. The same constructions falls, in my opinion, to be given under Case V to " income arising from stocks, shares or rents " and " income " arising from possessions." More careful consideration, I think, must be given to the words in rule 2 of Case VI, which does not refer to " income arising " but to " the profits or gains arising in " the year of assessment." This is a sweeping-up Case charging tax " in respect of any annual profits or gains not falling under " any of [Cases I to V] and not charged by virtue of any other " Schedule." (Schedule D, para. 2.) It is frequently applied to what are called casual profits, or to isolated transactions, but is not necessarily so confined (see *Forth Conservancy Board* v. *Inland Revenue Commissioners* [35]). While it does not cover the profits of any concern " in the nature of trade " which come under Case I (see definition of " trade " in section 237) it can be invoked to cover the profits of transactions analogous to trade and other transactions which require the striking of a balance of profits and gains. In such cases the method of assessment may differ from that applied in the case of receipt of a pure income profit. Under Case VI the words " profits or gains arising in the year of " assessment " will be apt to cover both. Reference was made for the appellants to section 35 of the Finance Act, 1926. This section provides for apportionment of profits or gains chargeable under Case I, Case II, rule 4 of Case III or Case VI. The purpose of this section is, I think, clear. It is to provide for the apportionment of profit over a series of years when that has been earned not by activities conducted in one year, but by activities continued over a number of years. This may happen

[35] [1931] A.C. 540; 47 T.L.R. 429; 16 T.C. 103.

in the exercise of a trade, or profession, or business of cattle or milk dealers curiously brought under Case III by rule 4. By association it would seem reasonably clear that the profits and gains under Case VI covered by the section are similar profits and gains of analogous activities assessed under this Case.

The word "accruing" with reference to income or profits and gains is of infrequent use in the Act of 1918. Paragraph 1 (*a*) of Schedule D provides that tax shall be charged in respect of annual profits or gains arising or accruing to persons "from any "kind of property whatever" and "from any trade, profession, "employment, or vocation." Paragraph 1 (*b*) makes no reference to profits or gains arising or accruing. It charges tax directly on "all interest of money, annuities, and other annual profits or "gains not charged under Schedule A, B, C or E, and not "specially exempted from tax." In this respect it follows closely section 2, Schedule D, of the Income Tax Act, 1853. To take up at once the matter of taxation of the profits of a trade, or vocation, it is familiar law that under Cases I and II, with which I think may be classed some instances under Case VI, where profits and gains are ascertained on an earnings basis, a receipt can be related back, for purposes of assessment to tax, to a year prior to the year of receipt. In such case the receipt is itself not income subject to tax, but a payment to be brought into computation for the purpose of striking a balance of profits and gains of the earlier year. It may in effect result in a pure profit to the trader or professional or other earner but that is only if all his expenses have already been allowed for in assessing the profits and gains brought into charge for tax. This practice is not, I think, based in any way on the use of the word "accruing" in paragraph 1 of Schedule D, which it may be noted is not used in Cases I and II of that schedule, but on a recognition of the method by which traders and others are accustomed to ascertain their profits for any year. This is no argument for applying such a rule to receipt of a pure income profit. The only other references in the 1918 Act to accrual of income are in section 5 (3) (*c*) dealing with super-tax and rule 19 of Schedule D. Section 5 (3) (*c*) may have been introduced to avoid any difficulties arising from the language of rule 19 in the matter of assessment to super-tax. It does not apply any principle of accrual, but rather supersedes it. It has been considered in some cases to which I refer later and for the moment I pass to rule 19. This rule in the Act of 1918 authorises deductions from payments of any yearly interest of money, annuity or other annual payment "at the rate or rates of "tax in force during the period through which the said payment "was accruing due." That does not help the appellants. The deduction is not an assessment to tax. The rule expressly says so. The rule has an ancient origin dating back to 1803 (43 Geo. 3, c. 122, s. 208) when there was only one rate of deduction. The deduction authorised by the Act of 1918 dates from the Customs and Inland Revenue Act, 1864, and remained

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until changed by section 39 (1) of the Finance Act, 1927, to the form which at present obtains authorising deduction "at the "standard rate for the year in which the amount payable becomes "due." In either form it is, in my opinion, of no assistance to the appellants and is in contrast with rule 21 which requires deduction of tax at the rate in force at the time of payment.

Mr. Bucher, for the appellants, submitted that the general principle (if any) of the Income Tax Acts is to charge income when received, in the period in which it was earned or arising. It is for that reason that I have examined in some detail any provisions of the 1918 Act that be thought relevant. I have been unable to extract from them any such principle. The inferences, indeed, I think point in the opposite direction. The appellants would seem to be in something of a dilemma. Either they must say that income arising "means income accruing," in which case it should be taxed during each year of accrual, whether received or not; or that it only arises when received and thereafter should be taxed for the years in which it has accrued. The first alternative might be productive in many cases of great hardship and injustice to the taxpayer. The second alternative ignores the twofold difficulty that if receipt fixes the date of the income arising the Act says it shall be charged with tax on the amount of that income in the following year, and that there is no statutory provision for spreading the income received over the years of accrual. Special provision was made by section 34 of the Finance Act, 1927, in a case of assessment to super-tax, now to surtax, for relief in such a case, but that does not touch the present issue and no reference was made to this section in the course of the argument.

Several cases were cited touching the meaning of "income "arising" under the Income Tax Acts. The one decision which is directly in point on the issue here is the decision of Rowlatt J. in *Grey* v. *Tiley*,[36] a case of commission earned in one year and partly paid in two instalments in subsequent years. The learned judge held in a case of assessment under Case VI that the instalments fell to be charged in the years of receipt as profits or gains arising in these years. In so holding he applied the reasoning expressed by him in the earlier case of *Leigh* v. *Inland Revenue Commissioners*.[37] The question there was a different one, being concerned with the measure of liability to super-tax under section 5 (3) (*c*) of the Act of 1918. The ratio of these judgments was followed in *Lambe* v. *Inland Revenue Commissioners* [38] by Finlay J. and in *Dewar* v. *Inland Revenue Commissioners*,[39] by the Court of Appeal. While these latter cases merely decided that interest which was accruing but had not been received could not be charged to tax, the necessary correlative follows that income assessable to tax only arose when it was received.

[36] 16 T.C. 414.
[37] [1928] 1 K.B. 73; 43 T.L.R. 528; 11 T.C. 590.
[38] [1934] 1 K.B. 178; 18 T.C. 212.
[39] [1935] 2 K.B. 351; 51 T.L.R. 536; 19 T.C. 568.

Against this view some reliance was placed on the judgments in *Simpson* v. *Bonner Maurice's Executors* [40] and *Inland Revenue Commissioners* v. *Haddington (Earl)*.[41] The first of these cases creates, in my opinion, no difficulty. The assessments were there made under Cases IV and V on the income arising from securities and stocks and shares, belonging to a naturalised and domiciled British subject, which had been paid into certain German banks during the 1914–18 war. None of this income was received in England till 1923. It was held by the special commissioner, Rowlatt J. and the Court of Appeal that the income arose when it was received by the German banks on behalf of the stockholder or his representatives.

The *Earl of Haddington's* case [42] calls for rather more consideration. Rowlatt J. thought it was in conflict with his decision in *Leigh's* case,[43] as did Finlay J. in *Lambe's* case.[44] Some of the expressions of opinion by the judges in the case would lead to that conclusion. But the case was a very special case. The Earl had succeeded his grandfather as heir of entail in possession to the estate of Tynninghame. His father (Lord Binning) who would have succeeded to the estate had died some five months earlier, on January 12, 1917. On the occasion of his marriage Lord Binning had, by virtue of the Entail Acts, burdened the entailed estates with a life-rent annuity of £2,125 in favour of his widow and also with a provision in favour of the younger children of the marriage. On Lord Binning's death it was found that the estate was burdened by these provisions to a greater extent than was permissible under the Entail Acts and after his succession to the entailed estate the Earl brought a petition to restrict the annuity of Lord Binning's widow to the sum of £1,627 14s. 1d. and the younger children's provisions to £7,234 5s. This application was granted by an interlocutor of the court dated November 27, 1918, and a bond and disposition in security to secure the children's provisions was granted by the Earl. The position thus was that there had been, since the death of Lord Binning on January 12, 1917, an effective life-rent annuity belonging to his widow and secured on the rents of the entailed estate and provisions to the children secured by bond and disposition in security as from the same date. There was no question of Lord Binning's widow or children having waived their rights or of the Earl being unable to satisfy them. The widow and children were in possession of their provisions from the death of Lord Binning with all the rights attached to them by statute. As Lord Ormidale put it the right to the provisions had vested at the death of the heir-apparent. The widow and children might be said to be domini of the sums in question as they became due, to use an expression used by Lord Hanworth M.R. and Maugham

[40] (1929) 45 T.L.R. 581; 14 T.C. 580.
[41] 1924 S.C. 456.
[42] Ibid.
[43] [1928] 1 K.B. 73.
[44] [1934] 1 K.B. 178.

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L.J. in *Dewar's* case.[45] The question in the case was whether under section 66 (2) of the Finance (1909–10) Act, 1910 (the precursor of the original section 5 (3) (*c*) of the Income Tax Act, 1918), the sums in question were payable in each year as they accrued or in the year in which they were in fact paid. Owing to the proceedings for restriction which had been taken by the Earl, the first two years' payments were not made till the second fiscal year after Lord Binning's death. He sought to deduct the whole of these payments from his income of that year in order to reduce the super-tax exigible from him in that year. The court held that he could only deduct one-half of the payments, as the other half must be held to have been payable in the previous year. Rowlatt J.'s view in *Leigh's* case[46] was that "payable" was the correlative of "receivable" in the same section of the Act and that, as there was no receivability without receipt, there could be no payability without payment. The case is no direct authority on the meaning of "income arising" under any of the Cases, but in *Grey* v. *Tiley*[47] he clearly regarded the principle of that case as applicable to the meaning of "profits or gains "arising" under Case VI. For the reasons I have given it may be possible to reconcile the *Earl of Haddington's* case[48] with *Leigh's* case.[49] But in any event, looking to its specialties, I could not regard it as an apt precedent in support of the appellants' case. Reliance was also placed by counsel for the appellants on *Hawley* v. *Inland Revenue Commissioners*.[50] I find difficulty in discovering the ratio of the decision of Rowlatt J. in that case. But as the same learned judge in *Grey* v. *Tiley*[51] had his previous decision in *Hawley*[52] before him, which he found himself able to distinguish, I must assume there is no conflict between the two decisions. His reasoning and decision in *Grey* v. *Tiley*[53] are perfectly clear and, in my opinion, entirely applicable to the case now under appeal.

Other cases were cited but, except for the decision of the Privy Council in *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia (Colonial Treasurer)*,[54] I find them of little help on the point at issue here. The *St. Lucia* case[54] was decided on the words "income arising or accruing" in a Colonial Ordinance. It was held that no income arose or accrued until receipt. This decision is in line with the reasoning of Rowlatt and Finlay JJ. and the Court of Appeal in the cases already cited.

In the result I have come to the opinion that the payments received by the company were income of the year in which they were received and as such were subject to direction and apportionment under section 21 of the Finance Act, 1922.

The Court of Appeal took the view that the payments fell

[45] [1935] 2 K.B. 351, 362, 372.
[46] [1928] 1 K.B. 73, 77.
[47] 16 T.C. 414.
[48] 1924 S.C. 456.
[49] [1928] 1 K.B. 73.
[50] (1925) 9 T.C. 331.
[51] 16 T.C. 414.
[52] 9 T.C. 331.
[53] 16 T.C. 414.
[54] [1924] A.C. 508.

within Case VI of Schedule D. That was mainly because they thought that the only annual payments to which Case III 1 (*a*) could apply were payments from which deduction of tax could be made under rules 19 or 21. They also pointed out that certain payments from public funds were separately provided for in Case III. I do not find these considerations compelling. If the payments are of the character that would bring them under rule 19 or rule 21 if made by any person or body other than the Crown, I do not see how they lose their character by the accident that the person liable to pay happens to be the Crown. The payments from public funds dealt with in Case III are small payments not exceeding fifty shillings and interest on Exchequer Bonds and other securities issued under the authority of the Treasury or under the War Loan Acts during the 1914–18 war, from which tax was not deducted at the source. Special considerations applying to such payments which have put them into Case III and not into Schedule C seem to me to have no bearing on the question of what is the appropriate Case for the payments here under the Coal Industry Nationalisation Act. But this difference of view is, in my opinion, immaterial. Treated as coming under Case VI they would still, in my opinion, for the reasons I have tried to express, be income arising in the year of payment.

It is said, however, that as the company has not received the tax deducted, the deductions cannot, on the view that income only arises when received, be held to be the income of the company. This submission is more ingenious than sound. Income for the purpose of the Income Tax Acts is gross income whether paid with or without deduction of tax. If rule 21 had applied to the tax deducted here, the income that arose would still have been the gross income. It is because it is the taxpayer's income that tax is deducted from it. The same, in my opinion, applies here. This contention was rejected and, I consider, rightly rejected by the Court of Appeal.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *Tamplin, Joseph & Flux for Darling, Heslop & Forster, Darlington; Solicitor of Inland Revenue.*

J. A. G.

[PRIVY COUNCIL.]

J. C.* 1959 Nov. 12.

GEORGE N. HOURY . . . . . APPELLANT;

AND

COMMISSIONER OF INCOME TAX . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Revenue—Surtax—Company—Apportionment following surtax direction—Effect—Settlement of shares on child by father—Notional distribution of dividend—Whether assessable as income of father—Meaning of "deemed"—East African Income Tax (Management) Act, 1952, *ss.* 22, 24.

Revenue — Income tax — Child — Settlement by settlor on — Company shares—Surtax direction—Whether child's income to be regarded as income of settlor for that purpose.

Eastern Africa—Tanganyika.

By section 22 of the East African Income Tax (Management) Act, 1952, the undistributed portion of the total income of certain companies, subject to a limit of 60 per cent. of such income, is deemed to have been distributed as dividend amongst the shareholders of the company if the Commissioner of Income Tax makes an order to that effect, and "the proportionate share thereof of "each shareholder shall be included in the total income of such "shareholder for the purposes of this Act."

Section 24 provides: "(1) Where, by virtue or in consequence "of any settlement to which this section applies and during the "life of the settlor, any income is paid to or for the benefit of a "child of the settlor in any year of income, the income shall be "treated for all the purposes of this Act as the income of the "settlor for that year and not as the income of any other person."

The appellant, his wife and his two infant children each held a number of shares in a company registered in Tanganyika, the children's shares having been transferred into their names by their father, the transfer constituting a "settlement" within the meaning of section 24 of the Act of 1952. The Commissioner of Income Tax having made an order under section 22 of the Act that 60 per cent. of the company's income for two specified years should be deemed to have been distributed amongst its shareholders, the appellant was assessed on the basis that under section 24 the sums deemed to have been received by his children upon the distribution were in the respective years to be treated as part of his income for tax purposes:—

Held, that section 22 and section 24 were independent charging provisions and the charges which they imposed were mutually exclusive; the two sections could not be read as part of a co-ordinated scheme in which the provisions of one reflected upon and adopted the provisions of the other. The income "paid" within the meaning of section 24 and as such attributed to the father could not include income deemed to be distributed by virtue of section 22 and as such attributed to the children, and accordingly the notional dividends attributed to the children were not within the charge of section 24 and could not be treated as the income of the father.

Judgment of the Court of Appeal for Eastern Africa reversed.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE and LORD KEITH OF AVONHOLM.

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APPEAL (No. 27 of 1958) from a judgment of the Court of Appeal for Eastern Africa (April 2, 1958), dismissing the present appellant's appeal from a judgment of the High Court of Tanganyika (November 12, 1956), which had dismissed his appeal against additional assessments to income tax for the years of income 1951 and 1952.

The following facts are taken substantially from the judgment of the Judicial Committee: In the Coastal Freights & Co. Ltd., a company registered in Tanganyika with a share capital of Shs.500,000 divided into 500 shares of Shs.1,000 each, the appellant, George N. Houry Q.C., held 251 shares, his wife 49 and his two infant children 100 each. The children's holdings were transferred into their names by their father, the transfer constituting a "settlement" within the meaning of section 24 of the East African Income Tax (Management) Act, 1952.

On November 17, 1954, the respondent, the Commissioner of Income Tax, made an order under section 22 that 60 per cent. of the company's income for the periods ending December 31, 1950, and December 31, 1951, respectively, should be deemed to have been distributed among its shareholders, with the result that each child was deemed to have received Shs.44,162 in respect of the first year and Shs.33,568 in respect of the second.

Assessments were then made upon the appellant on the basis that under section 24 those sums were to be treated as part of his income. The actual assessments involved were in the sum of Shs.104,304 for the year of income 1951 and Shs.72,900 for the year of income 1952, the difference being due to the sums attributable to him in respect of his own shareholding. No challenge was made to the assessments so far as they related to those last sums.

The appellant appealed against the assessments so far as they related to the "dividends" on the children's shares. The course that the case had taken hitherto was that the respondent refused to amend the assessments: on appeal, the High Court of Tanganyika (Lowe J.) confirmed them; and on April 2, 1958, the Court of Appeal for Eastern Africa (O'Connor P., Forbes J. A. and Macduff J.) dismissed his appeal from the High Court.

1959. Oct. 21, 22. *Roy Borneman Q.C.*, *P. J. Brennan* and *M. Heald* for the appellant.

F. N. Bucher Q.C. and *Roderick Watson* for the respondent.

The following cases were referred to in argument: *Inland Revenue Commissioners* v. *Prince-Smith* [1]; *Inland Revenue Commissioners* v. *Countess of Kenmare* [2]; and *Russell* (*Inspector of Taxes*) v. *Scott*.[3]

[1] (1943) 25 T.C. 84; [1943] 1 All E.R. 434.

[2] [1958] A.C. 267; [1957] 3 W.L.R. 461; [1957] 3 All E.R. 33; 37 T.C. 383.

[3] [1948] A.C. 422, 433; 64 T.L.R. 297; [1948] 2 All E.R. 1.

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November 12. The judgment of their Lordships was delivered by LORD RADCLIFFE. The East African Income Tax (Management) Act, 1952, which it will be convenient to refer to as the Income Tax Act, contains two sections, section 22 and section 24, the effect of each of which is to attribute to a person income as paid to or received by him despite the fact that no such income has actually been paid or received. Each section has its analogue in the taxing code of the United Kingdom; their purpose is by a fiction to place in the hands of a taxpayer income which, though not his in the eyes of the law, is thought to be fairly attributable to him in the measurement of his taxable capacity. By the first, section 22, the undistributed portion of the total income of certain companies, subject to a limit of 60 per cent. of such income, is deemed to have been distributed as dividend among the shareholders of the company, if the Commissioner of Income Tax makes an order to that effect, and the proportionate share of each shareholder is then to be included in his own total income. The second, section 24, requires that any income which by virtue of a settlement is paid to or for the benefit of a child of the maker of that settlement during the infancy of the child shall be treated as the income of the settlor for the purposes of the Act and not as the income of any other person.

The short question raised by this appeal is whether the dividend which is deemed to have been paid under section 22, when an order affecting the company comes into operation, is to be reckoned as a payment of income to or for the benefit of a child shareholder when the computation of a settlor's income is made for the purposes of section 24. Another way of putting the question is to ask whether the notional payment that is effected under section 22 amounts to a "payment" for all the purposes of the different sections of the Act, or at least of section 24; or whether the fiction that it sets up is for the purposes of section 22 alone and is confined in its operation to that section 22 and the resulting assessment.

The facts upon which this question arises are simple. [His Lordship stated the facts as set out above and continued:] It is now for their Lordships to express their opinion upon the issue involved. The words of section 24 (1) that are to be construed run as follows: "Where, by virtue or in consequence of any "settlement to which this section applies and during the life of "the settlor, any income is paid to or for the benefit of a child "of the settlor in any year of income, the income shall be treated "for all the purposes of this Act as the income of the settlor for "that year and not as the income of any other person." With regard to the ambit of these words it is, of course, apparent that in the present case no income has in fact been paid to or for the benefit of a child. No payment has been made at all. All that has happened is that a fictitious payment of dividend has been brought about by the operation of the order made under section 22. Unless, therefore, the effect of such an order is to impose upon

the meaning of the word " paid " in section 24 an interpretation which includes sums deemed to have been paid by virtue and for the purposes of another section of the Act, these notional dividends attributed to the children are not within the charge of section 24 and cannot be treated as the income of the father.

In the High Court a solution of the difficulty was found by reference to the special provisions of section 24 (2) (*a*). This construction of the subsection was not adopted by the Court of Appeal and was not relied upon in argument before the Board. Their Lordships do not therefore refer to it further except to say that they would not find it maintainable. The point of view that commended itself to the Court of Appeal, on the other hand, was in substance that since the order under section 22 had the effect of bringing about a notional payment of dividend and attribution of income to the children for the purposes of the Act, that statutory fiction of a payment having taken place ought to be carried through and applied in any other part or section of the Act in which a payment to the children was referred to. The argument is stated cogently and persuasively in the judgment of Forbes J.A., who delivered the opinion of the court. In effect, it treats the provision in section 22, which requires the assumption of a fictitious payment in order to impose the charge created by that section, as if it set up an interpretation of the general meaning of the word " paid " throughout the body of the Act.

Their Lordships do not think that section 22 can be treated in this way or that the Income Tax Act is so constructed as to allow the assumptions of section 22 to be imported into the operation of section 24. The two sections are independent charging provisions and the charges which they impose are mutually exclusive. If the relevant words of section 22 (1) are set out, it will be seen that they run as follows: " the undistributed portion of " sixty per cent. of such total income of the company for that " period shall be deemed to have been distributed as dividends " amongst the shareholders . . . and thereupon the proportionate " share thereof of each shareholder shall be included in the total " income of such shareholder for the purposes of this Act." It is not merely that there is to be a notional payment of dividend; it is also that each shareholder's share of the dividend is to be included in his total income for the purposes of the Act. The dividend then must go into the total income of the child who owns the shares, and for the purpose of taxation it is to be treated as his income. Such an enactment would be blankly inconsistent with the enactment contained in section 24 that whatever is paid to or for the benefit of a child is to be treated for all the purposes of the Act as the income of the father and not as the income of any other person if " paid " in this section were to include what is deemed to be paid by the earlier section. It appears to their Lordships to be the unavoidable conclusion that in construing section 24 the income " paid " within the meaning of that section and as such attributed to the father cannot include income deemed

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to be distributed by virtue of section 22 and as such attributed to the child.

It is natural to look to the other provisions of the respective sections to see if they throw any light upon the meaning to be given to the word "paid" in section 24. So far as they go, they favour a construction of that word that does not extend it beyond actual payments that have reached the child or its trustee. Subsection (4) of section 24, for instance, gives a settlor who has paid tax on the income attributed to him a right to recover the amount of the tax from the "trustee or other person to whom "the income is payable" under the settlement. There is nothing surprising in this right of recoupment so long as it does not extend beyond cases where an actual payment of income has been made. It would be a very surprising thing, on the other hand, to find provision for this right to be asserted against a trustee or beneficiary who had never had any money at all in his hands and, for all that appears, might never at any time receive any distribution on his shares except the fictional one introduced by section 22. Again, section 22 (4), which gives a shareholder the right to require the company to pay his tax to the commissioner, where no actual distribution has taken place, operates only when "the "proportionate share of any shareholder . . . in the undistributed "profits . . . has been included in his total income." This is not just a piece of machinery; some such right as this is an important part of any scheme which taxes persons in respect of income which they have never had and may have no power to obtain. Yet it is impossible to find any acceptable explanation of the manner in which this subsection could be made to work if the respondent's argument is right, since (*a*) the proportionate share would not have been included in the total income of the child, but of the father, and (*b*) the child is, but the father is not, the shareholder in the company.

It is fair to recognise that the appellant's argument is itself capable of producing anomalies in the relation between the charges imposed by the two sections. But the effect of them is only to drive home the point which has appeared from the considerations adduced above, that the two sections cannot be read as part of a co-ordinated scheme in which the provisions of one reflect upon and adopt the provisions of the other. They do not in fact harmonise as they stand; if they are to be harmonised, it must be by new enactment of the legislature in which the various complications of their inter-relation can be foreseen and specifically provided for.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the order of the Court of Appeal for Eastern Africa dated April 2, 1958, and the order of the High Court of Tanganyika dated November 12, 1956, be set aside and that the respondent be ordered to pay the appellant's costs of those two hearings; and that the assessments T. 1234 and 3718 which are under appeal should be remitted to the

respondent with directions to amend them in accordance with their Lordships' opinion here expressed. The respondent must pay the costs of the appellant of this appeal.

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Appeal allowed.

Solicitors: *Field, Roscoe & Co.; Charles Russell & Co.*

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[COURT OF APPEAL.]

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Oct. 6, 7, 8, 21.
Lord Evershed M.R., Sellers and Harman L.JJ.

[1958 L. No. 1449.]

Revenue—Estate duty—Incidence—Property not passing to executor—Dispensing power—Power to appoint jointure—Appointment of jointure "without any deduction"—Whether jointress liable to contribute a rateable part of estate duty exigible on death of tenant for life—"Any express provisions to the contrary"—"Free of "duty"—Meaning—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 14 (1).

The second Earl of Lonsdale, who died in 1872, by his will gave power to a tenant for life of the hereditaments thereby settled to appoint to any woman he might marry a rentcharge by way of jointure "not exceeding in the whole for any one such woman the "yearly sum of £1,500" to be charged on such hereditaments. The third earl, who died in 1876, gave a similar power to jointure, the yearly sum in this case being £5,000. The sixth earl by his marriage settlement made in 1923 first in exercise of the power contained in the second earl's will irrevocably appointed to his wife in case she should survive him "during the residue of her life the "yearly rent charge of £1,000 by way of jointure" to commence from his death "to be paid without any deduction (except for "succession duty if any)," and secondly, in exercise of the power contained in the third earl's will, he appointed in similar terms in favour of his wife a rentcharge of £1,000 to be increased to £3,000 if (as happened) he succeeded to the Earldom of Lonsdale "to be paid without any deduction (except for succession duty if "any)." The sixth earl having died, the question arose whether the jointures of £1,000 and £3,000, which then became payable to his widow, had to bear a rateable part of the estate duty payable on his death in respect of the settled estates charged with such jointures under section 14 (1) of the Finance Act, 1894,[1] or whether there was an "express provision to the contrary" which exempted the jointures from the liability to contribute to the duty:—

[1] Finance Act, 1894, s. 14 (1): "In the case of property which does "not pass to the executor as such, "an amount equal to the proper "rateable part of the estate duty "may be recovered by the person, "who being authorised or required to "pay the estate duty in respect of "any property has paid such duty, "from the person entitled to any "sum charged on such property, "(whether as capital or as an "annuity or otherwise,) under a dis- "position not containing any express "provision to the contrary."

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Held, (1) that if in an appointment of a jointure the formula "free of duty," or similar words, were used that was "an express "provision to the contrary" within the last words of section 14 (1) of the Finance Act, 1894, and, accordingly, that the appointments in the settlement of 1923 were so worded as to free the jointures from any deduction for estate duty (post, pp. 894, 896).

(2) That the appointment constituted the "disposition" within section 14 (1) and that the sixth earl had power under the wills of the second and third earls to appoint jointures free from any liability to contribute to the estate duty payable on his own death and, accordingly, the jointress was not liable to contribute in respect of her jointures to such duty (post, pp. 895, 896).

Per Harman L.J. When the person exercising the power of appointment adds the words "free of duty" or similar words he is not exercising that power; the exercise of the dispensing power merely relieves the donee of the extra liability created by section 14 (1) (post, p. 897).

In re Smith-Bosanquet [1940] Ch. 954; 56 T.L.R. 960; [1940] 3 All E.R. 519 and *In re Sebright* [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547 applied.

In re Keele Estates (*No. 2*) [1952] Ch. 603; [1952] 2 T.L.R. 149; [1952] 2 All E.R. 164 distinguished.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

William, second Earl of Lonsdale (hereinafter called "the "second earl"), by his will dated February 18, 1871, settled certain hereditaments in strict settlement on his sons and their issue successively, and he provided that it should be lawful for every person thereby made tenant for life of the hereditaments thereby devised in strict settlement "to appoint to any woman "whom he may marry or have married for her life or for any less "period any yearly rent charge or rent charges by way of jointure "and in bar or without being in bar of dower and free bench not "exceeding in the whole for any one such woman the yearly sum "of £1,500 to be charged upon all or any of the said manors and "hereditaments hereinbefore devised in strict settlement as afore-"said and to be paid at such time and in such manner as to the "person for the time being exercising this present power shall "seem meet." The second earl died on March 4, 1872.

Henry, third Earl of Lonsdale (hereinafter called "the third "earl"), by his will dated February 7, 1876, devised in strict settlement certain hereditaments and he provided that it should be lawful for every person who was tenant for life of the hereditaments "either before or after he shall under this my will be "entitled to the possession or to the receipt of the rents and "profits of the same manors and hereditaments (but subject and "without prejudice to the uses and estates preceding the estate "of the person for the time being exercising this present power "and to the powers annexed to such preceding uses or estates and "to the uses or estates limited in exercise of such powers) by any "deed or deeds with or without power of revocation and new "appointment or by will or codicil to appoint to any woman whom "he may marry or have married for her life or for any less period

" any yearly rent charge or rent charges by way of jointure and in " bar or without being in bar of dower and free bench not exceed- " ing in the whole for any one such woman the yearly sum of " £5,000 to be charged upon all or any of the said manors and " hereditaments." The third earl died on August 13, 1876.

By a marriage settlement dated October 6, 1923, made by Lancelot Edward Lowther, who became the sixth Earl of Lonsdale (hereinafter called " the sixth earl ") in consideration of his then intended marriage to the defendant, Sybil Beatrix, Countess of Lonsdale, in exercise of the power conferred on him by the second earl's will appointed to her, should she survive him, " during the residue of her life the yearly rentcharge of £1,000 by " way of jointure to be charged upon all the manors hereditaments " and premises now subject to the subsisting limitations of the said " will of the said William Earl of Lonsdale and to commence " from his death " and to be paid without any deduction (except for " succession duty, if any)." Further, in exercise of the power conferred on him by the will of the third earl, the sixth earl appointed to Sybil Beatrix in case she should survive him " during " the residue of her life the yearly rent charge of £1,000 and also " if the said Lancelot Edward Lowther should himself succeed to " the Earldom of Lonsdale the additional yearly rent charge of " £2,000 by way of jointure (making with the yearly rent " charge of £1,000 appointed as aforesaid under the said will of " the said William Earl of Lonsdale a total yearly sum of £4,000 " in the event of the said Lancelot Edward Lowther so succeeding " to the said earldom and a total yearly sum of £2,000 in the " event of his not so succeeding but of some issue of his succeed- " ing thereto) the said rent charges of £1,000 and £2,000 " appointed by this present clause respectively to be charged upon " all the manors hereditaments and premises now subject to the " subsisting limitations of the said will of the said Henry Earl of " Lonsdale and to commence from " the death of the sixth earl.

The hereditaments settled by the wills of the second and third earls having been disentailed were by a settlement of October 5, 1936, resettled and were held, subject to prior interests, in the events which had happened, upon trust for the defendant, James Hugh William, seventh Earl of Lonsdale (hereinafter called " the " seventh earl "), for life, with remainder to his first and other sons in tail. The seventh earl had one son, the fourth defendant, Lord Lowther.

The sixth earl died on March 11, 1953, and estate duty at the rate of 50 per cent. became payable in respect of the settled properties.

By this summons the plaintiffs, as trustees of the wills of the second and third earls, asked (inter alia) whether, upon the true construction of such wills and of the appointments contained in the settlement of 1923, an amount equal to the proper rateable part of the estate duty payable on the death of the sixth earl on the property on which the rentcharge of £1,000 was charged,

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and on the property on which the rentcharge of £3,000 was charged was recoverable by the trustees of the wills from the jointress, the defendant, Sybil Beatrix, Countess of Lonsdale.

The defendants to the summons were the jointress, the seventh earl and Lord Lowther.

Vaisey J. held that the appointments in the settlement of 1923 were valid, and the jointress took her jointure free from any liability to contribute.

J. Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the appellants, the seventh earl and Lord Lowther.

J. L. Arnold Q.C. for the plaintiffs.

P. H. B. W. Foster Q.C. and *Michael J. Fox* for the jointress, Sybil Beatrix, Countess of Lonsdale.

The following cases were cited in argument, which are not referred to in the judgments: *Lady Londonderry* v. *Wayne* [2]; *In re Orford (Countess)*.[3]

Cur. adv. vult.

October 21. The following judgments were read:

LORD EVERSHED M.R. The question before the court in this case may be stated thus: Where a life-tenant has power under a settlement to appoint a jointure of £*x* in favour of a surviving wife, can he validly so appoint free of duty, with the result that the jointress takes the appointed sum without any liability for having deducted therefrom anything in respect of the interest on so much of the estate duty exigible at the appointor's death as is properly attributable to the jointure? The principle that in the case of settled property death duty is chargeable rateably on all interests in the settled fund, whether of a capital or income nature, is enshrined in the terms of the Finance Act, 1894; but that principle is subject to a qualification to be found in the last words of section 14 (1) of that Act. The subsection reads as follows: "In the case of property which does not pass to the executor as "such, an amount equal to the proper rateable part of the estate "duty may be recovered by the person, who being authorised or "required to pay the estate duty in respect of any property has "paid such duty, from the person entitled to any sum charged "on such property, (whether as capital or as an annuity or other-"wise,) under a disposition not containing any express provision "to the contrary."

In my judgment, the real question in this appeal in the end of all will, as I hope to show, be found to be whether the terms of the appointment here in question were an invocation of the dispensation contained in the last words of the subsection.

The relevant facts relating to the Lowther estates are elaborate, as may be seen from the substantial volume of

[2] (1763) Amb. 424. [3] [1896] 1 Ch. 257.

evidence; but for the purposes of this appeal it is not necessary to go at great length into those facts; and I turn at once to the deed of appointment whereby Lancelot Edward, the sixth Earl of Lonsdale, on the occasion of his second marriage exercised certain powers which he had under the wills of the second and third earls. The settlement on the second marriage is dated October 6, 1923. The sixth earl died in 1953, and the jointress, now represented by Mr. Foster, is the Dowager Countess of Lonsdale, who, as Sybil Beatrix Feetham, was a party to the deed of 1923.

The relevant clauses of the deed are as follows: " 1. In pur- " suance of the said agreement and in consideration of the said " intended marriage the said Lancelot Edward Lowther in exercise " of the power for this purpose conferred on him by the said will " of the said William Earl of Lonsdale "—that is, the second Earl of Lonsdale—" and of every other power enabling him and as " settlor hereby irrevocably appoints to the said Sybil Beatrix " Feetham in case the said marriage should be solemnized and " she should survive the said Lancelot Edward Lowther during " the residue of her life the yearly rent charge of £1,000 by way " of jointure to be charged upon all the manors hereditaments and " premises now subject to the subsisting limitations of the said " will of the said Earl of Lonsdale and to commence from the " death of the said Lancelot Edward Lowther and to be considered " as accruing from day to day but to be paid without any deduc- " tion (except for succession duty if any) by equal quarterly " payments the first payment thereof to be made " as there provided.

Clause 2 similarly invoked the power of jointuring contained in the will of the third Earl of Lonsdale. Its relevant language is the same. By that clause Lancelot Edward Lowther appointed a yearly rentcharge of £1,000 to be increased to £3,000 if (as happened) he succeeded to the earldom of Lonsdale. Again, we find the essential formula for our purposes " to be considered as " accruing from day to day but to be paid without any deduction " (except for succession duty if any)." The result, therefore, is, so far, that by the deed of 1923 the late sixth Earl of Lonsdale appointed a jointure of £1,000 free of duty by virtue of the power under the second earl's will and a jointure, in the events that happened, of £3,000 in favour of his widow free of duty under the powers contained in the will of the third earl.

It will be right for me to refer to the exact words of the relevant provisions of the wills of the second and third earls. The second earl made his will in 1871, and he died in 1872, in fact unmarried. The relevant language in the will was this. He gave power to a life-tenant of the estate by any deed or deeds or by will or codicil " to appoint to any woman whom he may marry " or have married for her life or for any less period a yearly rent " charge or rent charges by way of jointure and in bar or without " being in bar of dower and free bench not exceeding in the whole " for any one such woman the yearly sum of £1,500 to be charged

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" upon all or any of the said manors and hereditaments herein-
" before devised in strict settlement as aforesaid and to be paid
" at such time and in such manner as to the person for the time
" being exercising this present power shall seem meet."

The third earl made his will in the year 1876, the year in which he died; and he gave a similar power, in almost identical terms: " by any deed or deeds with or without power of revoca-
" tion and new appointment or by will or codicil to appoint to any
" woman whom he may marry or have married for her life or for
" any less period a yearly rent charge or rent charges by way of
" jointure and in bar or without being in bar of dower any one
" such woman the yearly sum of £5,000 to be charged upon all
" or any of the said manors and hereditaments hereinbefore
" devised in strict settlement as aforesaid and to be paid at such
" times and in such manner as to the person for the time being
" exercising this present power shall seem meet and to appoint
" to such woman usual powers and remedies for rent charge and
" rent charges by distress and entry upon and detention of the
" possession and perception of the rents and profits of the
" premises charged therewith and also to appoint the premises
" so to be charged to any person or persons for any term of years
" with or without impeachment of waste upon such trusts for
" better securing the payment of the same rent charge or rent
" charges respectively as to the person for the time being
" exercising this present power shall seem meet."

It will be observed that the sum named in the deed of appointment of 1923 was £1,000 in the case of the power under the will of the second earl, a figure (as such) less than the figure of £1,500 stated in that earl's will. Similarly, the figure of the jointure mentioned in exercise of the power under the third earl's will was £3,000 under the 1923 deed, less by £2,000 than the figure of £5,000 mentioned in the third earl's will. The significance of that fact is only, for present purposes, this. It has been conceded by Mr. Pennycuick, representing the inheritors, that, if the provision that the jointures should be free of duty is excessive, as he contends, it is so only to the extent that the total benefit received by the jointress is excessive. If I may illustrate it by reference to the second earl's will, Mr. Pennycuick concedes that the power is valid by exercise to the extent that the sum named, £1,000, plus the freedom from liability to pay interest on duty, does not exceed £1,500. The exact arithmetical result was a matter of some debate, but I need not go into it.

It was suggested during the course of the argument that Mr. Pennycuick's concession was or might be to some extent inconsistent with or even destructive of certain of his arguments; and I should add that before the judge below a problem had arisen, not dissimilar in general kind from that now before the court, relating to portions. The portions appointed were as regards the sums named so much below the actual maxima named in the wills as to give, so to speak, plenty of lee-room as regards the one

that was given free of duty; so that Mr. Pennycuick's admission there, if given its full effect, did not, on any view, make the appointment excessive. I, for myself, do not think that any concession made by Mr. Pennycuick in any way adversely affected his argument, or that those concessions need be further discussed, because they do not seem to me to contribute to the conclusion of the matter; and I therefore say no more about them. The question, put quite shortly, is, as stated by reference to the first appointment, whether, having regard to the terms of the second earl's will, which said nothing about freedom of any duty (as was, indeed, not surprising, since the will was dated 23 years before the Finance Act, 1894), it was competent for the sixth earl to make the appointment in the terms he did so as to give the jointress £1,000 clear and to relieve her, at the expense of the inheritance, of any obligation to pay or provide any sum for interest on a proportionate amount of the estate duty, exigible on the appointor's death.

We have been informed that the estate duty in this case was at the rate of 50 per cent., so that the benefit which the jointress receives if her claim is correct and the corresponding detriment to the inheritance is, as a matter of figures, likely to be appreciable.

During the course of the argument much has turned on the effect of the decision in this court in *In re Keele Estates*.[1] Though Mr. Foster, for the jointress, has said that the present case is wholly outside anything decided in *In re Keele Estates*,[1] Mr. Pennycuick's argument was largely based on that case, and, more particularly, on the inferences which he says should be drawn from the decision. I therefore turn at once to that case, which I must recite a little fully. There was another question involved before Roxburgh J. and this court, namely, whether persons entitled to portions of jointures had to bear any share of the estate duty which was exigible, not on the death which immediately preceded the case, but on an earlier life-tenant's death. That question had been answered in the negative by Roxburgh J., whose view upon it was affirmed by this court, and that question is irrelevant for present purposes. I therefore will read only so much of the headnote as relates to the point which does bear upon this case.

It concerned an appointment by one Major Henry Sneyd, a life-tenant of the estates under the devises of Walter Sneyd who had died in the year 1888. Walter had created a certain term in trustees; and the headnote, so far as relevant, proceeds now thus: "Subject to that term"—created by Walter—"Walter "devised the settled estates to the use of Major Henry Sneyd for "life, with remainder to the appellant, Major Henry Sneyd's "sons in tail. He empowered a tenant for life of the settled "estates, either before or after he became entitled in possession

[1] [1952] Ch. 603; [1952] 2 T.L.R. 149; [1952] 2 All E.R. 164.

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" to charge the same," and then follows a quotation from the will " ' with the payment of any sum or sums not exceeding in the " ' different events hereinbefore specified the different sums here- " ' inafter mentioned as and for the portions of his or her child or " ' children—that is to say . . . in the case of four or more " ' children ' "—which was the relevant number—" ' the sum of " ' £25,000.' "

The headnote goes on a little later: " Major Henry Sneyd by " deed poll, executed in 1931, appointed that the settled estates " should be held upon trust that after his death the trustees " should raise the sum of £15,000 clear of all death duties (or " such less sum as shall be the maximum principal sum charge- " able by the appointor under the power now being exercised) " with interest thereon at the rate of 4 per cent. in trust for each " of the daughters as shall be objects of the power. . . ."

The headnote then deals with the first question (i.e., of the death duty payable on an earlier death, that is the death of Colonel Sneyd) and it continues: " A second question raised was " whether, on the death of Major Henry Sneyd, the sum " appointed by the deed of 1931 for portions ought to be charged " with a rateable part of the estate duty payable on his death, and, " if the portions were so chargeable, whether the gross aggregate " amount was £15,000 or £25,000 or some other and what sum. " Roxburgh J. held that the gross aggregate sum which could be " raised was £25,000, and the portions must bear their own duty " to the extent that the sum raised must not exceed that sum."

There was an appeal on that point by the daughters, the portioners, and, as on the other question, this court affirmed the view of Roxburgh J., holding " That on the true construc- " tion of the appointment of 1931, the first appointment of " £15,000 clear of all death duties was an excessive appointment, " and the sum raisable thereunder was the sum of £25,000 " subject to its proportion of estate duty."

This part of the case is dealt with in a second judgment. I need not read the report of the argument, because in the leading judgment, which I delivered, I referred to what Mr. Wright said on behalf of the portioners. I said this[2]: " Mr. Wright has " argued that the power in Walter's will fairly can be and should " be construed as permitting the appointor to charge an amount " exceeding £25,000 by whatever is the necessary sum, so as to " produce the result that, when the sum charged has made what- " ever contribution towards estate duty it ought to make, there " will be a figure left of £25,000 (net) for the enjoyment of the " portioners. I agree with Roxburgh J. that such a result cannot " be fairly attributed to the sense of the language used, and I " agree with him also that some support for that view is to be " derived from the formula ' to charge the estates with payments " ' of sums as and for portions.' "

[2] [1952] Ch. 603, 622, 623.

Then, omitting one paragraph, I proceed to deal with the language of the document of appointment, the deed of 1931. I say: "I think that the proper approach in these cases must "always be to look first at the document and to see what it "means. The relevant words are found in clause 4 of the deed, "and are these: 'The trustees shall' at the date specified 'raise "'the sum of £15,000 clear of death duties (or such less sum "'as shall be the maximum principal sum chargeable by the "'appointor under the power now being exercised),' and so on.

"As a matter of plain terms, it seems to me that this "appointor is saying: 'I desire to charge the settled estates with "'either (i) a figure of £15,000 clear of death duties (meaning "'thereby a figure of such magnitude that there will remain "'£15,000 clear when all charges or contributions in respect of "'death duties are provided for), or (ii) if that is greater than "'the amount which the will of Walter tells me that I can "'charge, then the maximum sum that the will authorises.' As "a matter of plain English, it seems to me that that is what "it says.

"I am further unable to accept Mr. Wright's proposition that "this deed of appointment can be regarded as being a disposition "intending an express provision to the contrary within the mean-"ing of section 14 (1)"—that is the Finance Act, 1894—"so "as to take the case altogether out of that subsection and relieve "the sums so charged for portions of any liability to contribute "and also as to enable him to say that all that was charged was "£15,000."

In the course of the argument a good deal of reliance had been placed on *In re Smith-Bosanquet*,[3] a decision of Bennett J. in the year 1940. As I shall have to deal somewhat fully with that decision hereafter, I will not now read the passage in my judgment in *Keele Estates*[4] which deals with *Smith-Bosanquet*.[5] Suffice it at the moment to say that I expressed the view, though it was obiter, that the *Smith-Bosanquet*[5] decision was based upon the ground that, according to the terms there used, it was or amounted to the appointment of a jointure out of a figure called the net residuary estate which would have (supposedly) paid all the duty. On that view, I expressed no dissent from the validity of the *Smith-Bosanquet*[5] decision. Indeed, it may be said that I went further and said that on that ground the decision was justified.

Further discussion, as will appear, has led me on this occasion to feel at any rate a doubt whether what I said in *Keele Estates*[6] was a sufficient or proper analysis of Bennett J.'s decision in *Smith-Bosanquet*[7]; but I shall have to come back to that at a later stage.

[3] [1940] Ch. 954; 56 T.L.R. 960; [1944] 3 All E.R. 519.
[4] [1952] Ch. 603.
[5] [1940] Ch. 954.
[6] [1952] Ch. 603.
[7] [1940] Ch. 954.

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In my judgment, the decision in *Keele Estates* [8] is based on two conclusions: namely (1), that on the construction of the deed of appointment in that case, that is to say, the deed of 1931, the appointor, by the words he there used, appointed or purported to appoint in favour of the portioners a gross amount equivalent to the sum which, after the deduction of the amount of estate duty properly attributable to and repayable by the portioners, left a net sum of £15,000, and, in the alternative, a less sum; and that, if and so far as the first or gross sum exceeded £25,000, it was not effective; and, (2) that the appointor, by the deed of 1931 and the language which he used in it, did not purport to invoke the dispensing provision in the last two lines of section 14 (1) of the Finance Act, 1894.

Mr. Pennycuick's argument, however, goes considerably further. He says that the decision of this court in *Keele Estates* [8] necessarily involves this further proposition, namely, that all appointments of portions "free of duty" or "clear of "duty" or any similar formula must now be taken to be or to amount to appointments of gross sums so calculated that, after the appropriate amount of duty has been paid, the named net figure remains; that such appointments do not invoke the dispensing provisions of section 14 (1) of the Act of 1894; and that they are invalid in so far as the calculated gross figure exceeds the sum stated in the deed conferring the power. Any other view, says Mr. Pennycuick, would involve, in the case of portioners, unjustifiably fine distinctions.

Mr. Pennycuick further contended that as a matter of logic, of good sense and of principle the same rule of construction should apply to an appointment of a jointure, that is to say that the appointment of the jointure of £*x* free or clear of duty means the appointment of a gross annual sum so calculated as to leave £*x* per annum net after deduction from the gross sum notionally appointed of the appropriate interest charge for duty, and that such an appointment is not, and must not be taken to be, an invocation of the dispensing power under section 14 (1) of the Finance Act, 1894.

Mr. Pennycuick finally added that this court only expressed approval of *In re Smith-Bosanquet* [9] on grounds which I have briefly indicated and which do not conflict with the above propositions, and that we should in any case now hold the decision of *In re Smith-Bosanquet* [9] to have been erroneous.

The decision in *In re Keele Estates* [10] has been subjected to much analysis in the argument; but I conclude that the decision only did involve the two propositions which I have stated above, namely, first, that, as a matter of construction of the relevant deed of appointment, the appointor purported to appoint in favour of the portioners a gross sum equivalent to that amount which, after deduction of estate duty, left the figure

[8] [1952] Ch. 603.
[9] [1940] Ch. 954.
[10] [1952] Ch. 603.

named, and, second, that the terms of that appointment did not purport to invoke the last words of section 14 (1) of the Act of 1894.

I also conclude that, even if Mr. Pennycuick is right in his argument, so far as appointments of portions are concerned (as to which I express no opinion), the inference which he draws as regards appointments of jointures does not follow and is not inherent in the decision.

This last conclusion is, I think, supported by two considerations: First, if arithmetically the appointment of a capital sum of £*x* by way of portions free of duty should or can be taken as meaning an appointment of such a sum as leaves £*x* after payment of the appropriate capital amount of duty, a similar calculation should not, and perhaps cannot, properly be made as regards a jointure. In the case of portions you are, after all, making a calculation of a capital sum once and for all; but the decision in *In re Parker-Jervis*,[11] which has always been accepted and followed, shows that this method of calculation is inapplicable, or is at least not readily or necessarily appropriate, to a jointure; for, if the proportion of the duty expressed as a capital sum attributable to the jointure is arrived at by a process of capitalisation on the basis of the then average of the income of the estate as a whole, the amount of the interest charge actually made against the jointress depends on, or may depend on, different considerations, namely, the actual interest payable in respect of the duty; and that may vary; for example, until the actual payment of the duty, it would be the rate of interest payable to the Estate Duty Office and thereafter, if the duty is raised by mortgage, it will presumably be the rate of the mortgage interest. (See the examples given in Hanson on Death Duties, 10th ed., p. 492, and Green on Death Duties, 4th ed., p. 485.)

Other variations may occur to which I need not refer; but I should state that in the present case, though many assumed figures were mentioned during the course of the argument, there is no evidence, as I understand it, before the court of any of the relevant figures, either those of the average rate of income of the estate as a whole at any particular period or of the rate of interest payable in respect of the estate duty on any charge which may have been incurred in respect thereof.

The second ground which I think supports my earlier conclusion that the reasoning of the decision in *In re Keele Estates* [12] in any case does not carry with it a similar proposition with regard to jointures rests upon the case of *In re Smith-Bosanquet*.[13] I have stated the grounds upon which, as it then appeared to this court, we said in *In re Keele Estates*,[14] the decision could be justified; but I am far from clear, on further reflection, whether the ground there stated was the correct or at

[11] [1898] 2 Ch. 643.
[12] [1952] Ch. 603.
[13] [1940] Ch. 954.
[14] [1952] Ch. 603.

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any rate the only ground upon which Bennett J. based himself. It was a case, like the present, of an appointment of a jointure free of duty, and, as I read the case after the assistance we have had in the present argument, I think now that it is impossible to escape the conclusion that part at any rate of Bennett J.'s decision (to put it no higher) was based on the view that the appointor had invoked, and effectively invoked, the dispensing power under section 14 (1). Again, in view of the importance paid in the argument to the *Smith-Bosanquet* case,[15] I think I must refer to it at a little length now. I am bound to say at once that the matter is not made easier (though I am not saying this by way of criticism of the law reporter) by the report and particularly the report of the argument. I start by reading the headnote: "Under a settlement of real and personal estate made "by will in 1905, there was a power given to the tenant for life "to appoint for the benefit of his widow any part of the income "of the residuary trust estate not exceeding £2,000 a year for "the rest of her life.

"The tenant for life by his will made in 1934, appointed in "exercise of this power to his wife who survived him, an annuity "of £2,000 free of all deductions except income tax and sur-tax, "to be charged on and payable out of the income of the residuary "personal estate of the settlor"—not the appointor but the settlor. "On the death of the tenant for life in 1939 estate duty "upon the residuary estate became payable at the rate of 32 per "cent." I pause to observe that the appointor was making an appointment under a power in regard to estates settled in 1905, thirty years earlier, and was therefore ex faciae a case to which section 14 obviously applied.

The author of the headnote concludes that note as follows: "*Held*, that the appointment was within the terms of the power, "and that the widow was entitled to an annuity of £2,000 clear, "without any liability under section 14 (1) of the Finance Act, "1894, to contribute to the estate duty payable on the death of "her husband, the direction that it should be paid 'free of all "'deductions' being an express provision to the contrary within "that subsection." It is, of course, quite plain that, if that headnote correctly summarises the judgment, then Bennett J. based himself, and according to the headnote based himself exclusively, on the view that the dispensing power under section 14 had been intentionally and successfully invoked.

I need not read the facts, because they are sufficiently stated in the headnote. The argument by learned counsel for the widow is stated to be as follows: "The power to pay the annuity out "of the income of the residuary estate, means out of such income "after the estate duty has been paid. The annuity is not a "jointure but an apportioned part of a much larger total income. "The income of the residuary estate can only be ascertained

[15] [1940] Ch. 954.

" after the estate duty payable on the death has been paid. The " annual sum of £2,000 means the net sum of £2,000 after " deduction of income tax and sur-tax thereon, but free of all " other deductions. The appointment was within the terms of " the power." Then, in parenthesis, there are these six words: " Counsel were stopped by the court."

It is to be observed that that argument, on the face of it, goes entirely on the view that the appointment was the appointment of the net sum payable out of a total net residuary income and there is no reference to section 14 from first to last in it. I have already stated that the difficulty in apprehending that line of reasoning is that this was an appointment of settled properties settled under a will thirty years earlier than the making of the appointment.

There then follows the record of the argument of counsel for the infant tenant in tail: " The appointment is an excessive " execution of the power. The widow will get under it not " £2,000 only, clear of all deduction, but £2,000 plus her share " of the estate duty which she would otherwise have had to pay. " It is equivalent to an annuity of £2,620." I am bound to say that that last figure has defeated me. I can see that as a matter of arithmetic £640 would be 32 per cent. of £2,000, so that if the figure had been £2,640 it would have been more easily intelligible; but on any view that is the wrong way round to calculate it, I should have thought. But that is merely by the way. " The words ' without any deduction ' amount to an additional " grant, not justified by the power. Unless the power authorises " the appointment of an annuity free of all deductions, which it " does not in the present case, the appointment is not within the " terms of the power."

Then, after certain cases are cited, the report proceeds: " The " case comes within the rule laid down in *In re Parker-Jervis*.[16] " The widow should be treated as tenant for life of the capitalised " value of her annuity, and pay during her life interest on the " estate duty to which that value is liable." I need not read the last paragraph. Observe again that there is no reference whatever, in terms at any rate, to section 14.

Bennett J. begins his judgment by a recital of the facts and he sets out in full [17] section 14 (1) of the Finance Act, 1894, which, so far as I am aware, is the first time in the report that that Act is referred to or mentioned at all. The judge goes on as follows: " The case of the infant defendant is put in this way." That is the tenant in tail. " The appointment made in favour of the " widow is an appointment of the yearly sum of £2,000 free of " all deductions except income tax and sur-tax. The words " ' free of all deductions ' are words which amount to an express " provision to the contrary, within the meaning of section 14 (1) " of the Finance Act, 1894, and so exonerate the appointee from

[16] [1898] 2 Ch. 642.

[17] [1940] Ch. 954, 958.

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"the liability for the rateable proportion of the estate duty for "which she would be liable under the provisions of subsection (1) "of section 14 if the words had not been in the appointment."

I observe that the judge is there saying that the infant defendant's argument appears to concede that it is an invocation of section 14 but that, because it thereby increases the total amount of the benefits, it is excessive. If that was the argument for the infant defendant, it is not so reported.

However, Bennett J. proceeds [18]: "The argument is that, "because the appointee is exonerated from the estate duty, there- "fore the appointor, the donee of the power, has made an "appointment which is in excess of the authority conferred on "him by the terms of the power. The argument is that, unless "in the power there are words expressly enabling the donee of "it to make an appointment free of all deduction, appointment "so made is not warranted by the terms of the power.

"I do not accept the argument. It seems to me that, so long "as the appointment made in exercise of the power does not "charge the income of the residuary trust fund with a greater "annual sum than £2,000, the appointment is within the terms "of the power. The appointment which the donee of the power "has made does not have the effect of charging the annual "income of the residuary trust fund with a greater sum annually "than £2,000. The widow out of the income of the residuary "trust fund gets no more than £2,000. It is true she is absolved "from liability which otherwise might be imposed on her of "having to pay a proper rateable part of the estate duty "leviable, when her husband died, on the residuary trust fund "under the testator's will"—it is not the husband's will—"but "an appointment which has that effect does not, in my judgment, "exceed the authority which is conferred on the donee of the "power by the terms of the testator's will.

"I think, therefore, the answer to the question raised is that "the widow is entitled to a clear annuity of £2,000, and entitled "to such annuity without being liable to contribute towards estate "duty payable on the death of G. R. Bosanquet Smith- "Bosanquet," that is the appointor or the lady's husband.

I quite agree that there is language in the last paragraph which seems to some extent to reflect the reported argument put forward on behalf of the widow. But, reading the last paragraph with that which preceded, which, in turn, follows the citation of section 14 (1), I cannot now, I must say, resist the conclusion that the judge accepted (what may indeed have been conceded) that the words in the appointment did in terms constitute, if they were effective to do so, an invocation of the dispensing power of section 14 (1); and that, of course, is clearly reflected in the last two or three lines of the headnote.

I ought now to go back to see what was said about that case

[18] [1940] Ch. 954, 959.

in *Keele Estates*.[19] My judgment first consists of a recital, including a reference to the argument of counsel for the widow. I then pass on to consider a later case, *In re Sebright's Will Trusts*,[20] which came before Vaisey J., who, in fact, had been counsel for the widow in *Smith-Bosanquet*.[21] I do not propose to take up time by referring to *Sebright*.[22] Vaisey J. had felt some difficulty about it, but in the course of *Sebright's* case,[22] Sir Norman Touche is reported as having put the matter thus as regards the earlier decision in *In re Smith-Bosanquet*[23]: "The annuity was payable out of the income of a residuary trust "fund, the amount of which was only arrived at after payment "of estate duty." That, as I observed in my judgment, reflected Vaisey J.'s argument in *Smith-Bosanquet*.[23] The citation from Sir Norman Touche's argument proceeds: "That does not apply here. The judgment in that case does not make it clear on what "ground it was decided, but if it is indistinguishable from the "present case, it was not correctly decided."

I proceed in my judgment to say[24]: "We are in this case "concerned with a charge on the corpus and with the language of "these two instruments"; that is, of course, the enabling will and the deed of appointment. "I do not think that the decisions "in *In re Sebright*[25] or in *In re Smith-Bosanquet*[26] are of such a "character as to be indistinguishable in any event from the "present case; and I, therefore, feel at liberty to decide the present "case, as did Roxburgh J., without regard to the decisions in "those cases. But, if I comprehend the case aright, I think Sir "Norman Touche, in his argument in *In re Sebright*,[27] correctly "justified the decision in *In re Smith-Bosanquet*[28] on the ground "that the sum appointed was payable out of the income of a "residuary trust fund which would be arrived at after all relevant "deductions for death duties." I conclude: "But I need not "say more about those two cases for I think that they do not "cover a case such as the present, where in plain terms (as I "think) authority was given to charge the settled estates with a "capital sum of a limited amount, and where the necessary effect "of the language of the appointment or the first alternative in "the deed of appointment would inevitably be to charge the "settled estates with a larger figure than that figure."

I ought to add that my brother Romer expressed agreement with my judgment and said[29]: "In particular I should like to "associate myself with the observations which he has made with "regard to the cases of *In re Smith-Bosanquet*[30] and *In re* "*Sebright*."[31]

[19] [1952] Ch. 603, 624.
[20] [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547.
[21] [1940] Ch. 954.
[22] [1944] Ch. 287.
[23] [1940] Ch. 954.
[24] [1952] Ch. 603, 625.
[25] [1944] Ch. 287.
[26] [1940] Ch. 954.
[27] [1944] Ch. 287.
[28] [1940] Ch. 954.
[29] [1952] Ch. 603, 626.
[30] [1940] Ch. 954.
[31] [1944] Ch. 287.

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I apprehend that what was said about *Smith-Bosanquet* [32] is obiter, because I had already stated, and my brother agreed with me, that in any case *Keele Estates* [33] turned on the construction of the language used, and was not in pari materia with *Smith-Bosanquet.*[34] But, on further reflection, and after attending to the argument in this case, I am unable now to say that at any rate one ground, part of the basis of Bennett J.'s decision, was not this, that he thought that the appointment free of duty of the jointure was an invocation of section 14 (1) of the Finance Act, 1894, and as such was effective.

The result, therefore, is that I conclude that *Keele Estates* [35] does not carry Mr. Pennycuick home, because the inferences, and particularly the last of them, which he sought to draw from that decision do not follow. It therefore comes to this: that the question in the present case is open before this court and is, I think, two-fold, namely, first, are the words of appointment in the deed of 1923 apt as an invocation of the dispensing provision of section 14 (1) of the Finance Act; and, secondly, if so, was such a dispensation within the powers of the appointor, having regard to the terms which I have already read in the wills of the second and third Earls of Lonsdale?

As regard the first point I think the answer must plainly be in the affirmative, and I refer in support of that view to the decision in this court of *In re FitzHardinge.*[36] In that case the question arose not with regard to an exercise of the power of appointment but as regards the document conferring the power. That document, so far as relevant, is sufficiently cited in the headnote: "A testator, who died in October, 1857, by his will dated in "September, 1856, empowered any tenant for life to charge on "the estates thereby settled a jointure not exceeding £3,000 a "year, for his widow 'free from all taxes and deductions except "'property tax and legacy or succession duty.'"

It will suffice if I read a passage from the judgment of Sir Nathaniel Lindley M.R., where he says [37]: "That disposes of the "case, subject to one remark that has to be made on section 14 "of the Finance Act, 1894. Mr. Warrington has argued that "the expression 'free from all taxes and deductions except "'property tax or legacy or succession duty' is not an express "provision contrary to the enactment of section 14. In terms as "a matter of criticism it perhaps is not, but if you look at the "substance of it, it is as plain as a provision to the contrary as "can be. It is only by minute criticism of the words that Mr. "Warrington can say that this does not expressly provide for "deductions to made under section 14." It seems to me to follow that if in an appointment of a jointure you use the added

[32] [1940] Ch. 954.
[33] [1952] Ch. 603.
[34] [1940] Ch. 954.
[35] [1952] Ch. 603.
[36] (1899) 80 L.T. 376; 15 T.L.R. 225.
[37] 80 L.T. 376, 380.

formula "free of duty," then equally you must be taken to be referring to the last words of section 14 (1) of the Act of 1894.

There remains the second question, however: Was such a dispensation within the powers of the appointor, having regard to the terms of the wills of the second and third earls? I have thought this a more difficult question, since I feel that the result may, under modern conditions, work somewhat hardly or unfairly against the inheritor, and I also confess to some doubt what, in terms of conveyancing, a deed giving power to appoint a jointure should say if it is or is not intended to confer a dispensing power under the section. But, on the whole, I think that this question also should be answered in the affirmative. If there be unfairness, I think that must be properly attributable to the chances of the passage of time, and settlors today will no doubt fix the amount of any jointure which they give a tenant for life power to appoint in the light of the present-day rates of taxation, or use such words as may be appropriate to limit the dispensing power of the appointor.

I think, therefore, as a matter of English, that what the appointor has said here is within the terms of section 14 (1) on the ordinary meaning of its language. I think, in other words, that the instrument of appointment should constitute, and does constitute, a "disposition" within the language of the subsection. I read again the relevant terms of the section: "In the case of "property which does not pass to the executor as such, an "amount equal to the proper rateable part of the estate duty "may be recovered by the person, who . . . has paid such duty, "from the person entitled to any sum charged on such "property (whether as capital or as an annuity or otherwise,) "under a disposition not containing any express provision to the "contrary."

As a matter of strict law it is no doubt true to say that the widow in this case has the charge for her jointure by the joint effect of the wills of the second and third earls and the exercise by the sixth earl of the powers of appointment conferred on him by the second and third earls; but that does seem to me to exclude the proposition that the jointure is, as a matter of the fair use of words, charged "under a disposition" (namely under the appointment) which does contain a provision to the contrary. For, if for some purpose the deed of appointment must be read with, or as, on with the wills conferring the power, still it was the appointment which specified and created the charge.

Parliament in 1894 must surely have known when enacting this section that there would be many outstanding settlements which could not sensibly have conferred such a dispensing power upon the person having the right to appoint a jointure. Finally, I think we ought not in this court in 1959 to overrule the case of *In re Smith-Bosanquet*,[38] which has, after all, stood for

[38] [1940] Ch. 954.

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nineteen years. During that period it is likely to have been followed in practice, and although it may be said that the grounds attributed to Bennett J. were not there correctly or not completely stated in this court, the decision was approved, albeit obiter, in *Keele Estates*.[39] I therefore think that if the case of *In re Smith-Bosanquet*[40] is now to be said to be wrong that should be a matter to be dealt with on an appropriate occasion by the House of Lords, which will also, no doubt, consider this case and the case of *Keele Estates*[41] and do any necessary reconciliation.

For reasons which I have tried to state, I think that Vaisey J. correctly decided the present point, and I would therefore dismiss the appeal.

SELLERS L.J. The estate duty which the Finance Act, 1894, first imposed obviously had to fall for final payment or allocation on some part of the estate on which it was levied. Whatever might be thought to be fair now when taxation is heavy (and the argument that the burden of the tax should be borne rateably without qualification is not all one way) section 14 (1) of the Act of 1894, while making provision for the proper rateable part of the estate to be recovered in the appropriate circumstances, decreed that it could be recovered "from the person entitled to "any sum charged on such property, (whether as capital or as "any annuity or otherwise,) under a disposition not containing "any express provision to the contrary."

This seems to give a right to the person making the disposition to provide that the capital or annuity of which he is making a disposition should not bear the burden of the tax. His right with regard to the incidence of the tax is therefore given and recognised by statute and is independent of any prior deed or authority which gave the power to charge any property, at least where the deed placed no express restrictions to the contrary.

I agree with the judge that the appointments in this case were so worded as to free the payments from any deduction for estate duty, or, more accurately, so as to free a person entitled to any sum charged from any liability to contribute a rateable part of the estate duty. The disposition would appear to be the final disposition making the charge.

In this case the dispositions were not in excess of the powers granted and in my opinion they should stand unaffected by the state duty or any part thereof.

I agree with the conclusion of Bennett J. in *In re Smith-Bosanquet*,[42] summarised, I think accurately, in the headnote to that case.

Reliance was placed by the appellant on *In re Keele Estates*,[43] which in terms distinguished *Smith-Bosanquet*[44] and therefore,

[39] [1952] Ch. 603.
[40] [1940] Ch. 954.
[41] [1952] Ch. 603.
[42] [1940] Ch. 954.
[43] [1952] Ch. 603.
[44] [1940] Ch. 954.

as my Lord has indicated more fully, does not bind this court on the issues which are now before it.

I would dismiss the appeal.

HARMAN L.J. I agree. In my judgment the confusion, if there be confusion, into which the reporter in *Smith-Bosanquet* [44] fell arises from this, that section 14 of the Finance Act, 1894, was quite a novel and revolutionary piece of legislation. The estate duty on property not passing to the executor as such was charged on the corpus of the estate. The revolution effected by section 14 was to relieve the inheritance pro tanto of that burden by distributing it among the portioners and annuitants coming ahead of the inheritors. The effect of the section is to give a dispensing power to the disposer who created the charge. The disposer in this case, as in others of the sort, seems to me necessarily to be the person who exercises the power, be it a jointure or a portion, because it is he, after all, who makes the power effective. If he does not exercise the power, no charge is thrown upon the inheritance. He may exercise the power up to the limit of the figure he is given. When he adds the words "free of duty" or similar words he is not exercising the power at all. It is, in my judgment, a fallacy to treat it as if he were exercising further the power. It is true that he burdens the inheritance and frees the jointress; but that is a right given to him by the statute. You do not have to refer to the power at all. Therefore Vaisey J.'s observations are, in my view, right, that, provided the jointress gets no more than the donor of the power intended she should have, there is no question of an excessive exercise. Whether I should have construed the appointment in *Keele Estates* [45] as the Court of Appeal did is not to the point; so construed the appointment there was clearly in excess of the power. Therefore I regard it as a decision on the construction of the very peculiar words there used and not really ad rem in the present case.

I agree with my brethren in thinking that the contrary intention which must be expressed in the document must be contained not in the donor's words but in the donee's words, because he is the person who is creating the charge which is the necessary precondition of the dispensing power. The exercise of the dispensing power does not entitle the donee to a charge at all; it merely relieves him of this extra liability created by section 14 (1). It is a mistake, I think, to treat the exercise of the statutory dispensing power as a further exercise of the power of appointment.

I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Francis Miller & Steele for Dickinson, Miller & Turnbull, Newcastle-upon-Tyne; Crawley, Arnold, Ellis & Ellis; Ellis, Peirs & Co.*

B. A. B.

[44] [1940] Ch. 954.

[45] [1952] Ch. 603.

[HOUSE OF LORDS.]

H.L.(E.)* OUGHTRED . . . . . APPELLANT;

1959
Oct. 5, 6;
Nov. 4.

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue — Stamp duty — "Conveyance or transfer on sale" — Oral agreement for sale of reversionary interest to tenant for life — Subsequent deed of transfer—Effect of oral agreement—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 54 — *Law of Property Act*, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 53 (1) (*c*).

Assignment—Equitable—"Disposition" of equitable interest required to be in writing—Oral agreement to assign equitable interest—Whether disposer constructive trustee—Law of Property Act, 1925, *s.* 53 (1) (*c*), (2).

Under and by virtue of a settlement dated January 1, 1924, an appointment dated June 18, 1956, and a release of the same date, a mother was tenant for life of 100,000 preference shares and 100,000 ordinary shares in a company, and her son was absolutely entitled to the shares subject to her life interest. By an oral agreement made on June 18, 1956, it was agreed between them that on June 26 he would exchange his interest under the settlement and subsequent deeds for certain shares in the same company then owned by her to the intent that her life interest in the shares subject to the settlement should be enlarged into absolute ownership thereof. On June 28, by a deed of release between the mother, the son and the trustees, the mother and son gave a release to the trustees. The release, after recital of the facts down to and including the oral agreement, recited that the trust fund, consisting of the shares, "is accordingly now held in trust for [the mother] absolutely," and that it was intended to transfer them to her. The transfer was expressed to be the consideration for the release. On the same day, by a deed made between the mother, the son and the trustee, the shares in question were transferred to the mother in consideration of ten shillings:—

Held (Lord Radcliffe and Lord Cohen dissenting) that the transfer was assessable to ad valorem stamp duty. The transfer was an instrument whereby property in the shape of the settled shares or any estate or interest in that property was transferred "upon a sale thereof" to a purchaser in the person of the mother.

Per Lord Denning. By the transfer the mother acquired the son's reversionary interest as effectively as if he had conveyed it direct to her, and that was quite enough to attract stamp duty. Every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration (post, p. 906).

Per Lord Keith and Lord Jenkins. If the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract (post, p. 913).

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* *Present*: LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM, LORD DENNING and LORD JENKINS.

Semble, that on making the oral agreement on June 18, 1956, the son became a constructive trustee of his equitable reversionary interest in the settled funds for the mother, notwithstanding section 53 (1) (*c*) of the Law of Property Act, 1925, by virtue of section 53 (2), but that nonetheless section 53 (1) (*c*) applied and, accordingly, the son could not assign that equitable interest to the mother except by a disposition in writing (see *per* Lord Radcliffe, post, p. 901, *per* Lord Cohen, post, p. 904, *per* Lord Denning, post, p. 906).

Attorney-General v. *Brown* (1849) 3 Ex. 662 considered.

Decision of the Court of Appeal [1958] Ch. 678; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Morris and Ormerod L.JJ.).

This was an appeal from an order dated May 15, 1958, of the Court of Appeal allowing with costs an appeal by the respondents, the Commissioners of Inland Revenue, from an order dated December 3, 1957, of the Chancery Division (Upjohn J.) in favour of the appellant, Phyllis Brown Oughtred, on a case stated by the respondents under section 13 of the Stamp Act, 1891. The case was stated for the opinion of the court as to the stamp duty chargeable on an instrument of transfer of shares in common form dated June 26, 1956, and made between Norman Oughtred, John Alwyn Oughtred, Doris Strachan Oughtred, and the appellant, as transferors and the appellant as transferee.

The facts are fully stated in their Lordships' opinions.

Geoffrey Cross Q.C. and *Peter Whitworth* for the appellant.

Richard Wilberforce Q.C. and *E. B. Stamp* for the respondents.

Besides the authorities referred to in their Lordships' opinions, the following cases were cited in argument: *Fleetwood-Hesketh* v. *Inland Revenue Commissioners* [1]; *Parway Estates Ltd.* v. *Inland Revenue Commissioners* [2]; *Garnett* v. *Inland Revenue Commissioners* [3]; *Dearle* v. *Hall* [4]; and Williams on Vendor and Purchaser, 4th ed., vol. I, pp. 545–546.

Their Lordships took time for consideration.

November 4. LORD RADCLIFFE. My Lords, the facts of this case are very simple. Mrs. Oughtred and her son were respectively entitled to the life interest and absolute reversion in a settled fund consisting of shares in a limited company. They thus owned between them the whole equitable interest in those shares, which were vested in Mrs. Oughtred and two other persons as trustees of the settlement. On June 18, 1956, an oral agreement was made between Mrs. Oughtred and her son to the effect that on June 26 she would transfer to him certain other shares in

[1] [1936] 1 K.B. 351, 352–354, 357–358, 360–363, 364–365.
[2] (1858) 37 A.T.C. 167, 165–168.
[3] (1899) 81 L.T. 633.
[4] (1823) 3 Russ. 1.

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the same company which were her own absolute property, and in exchange he would make her the absolute beneficial owner of the settled shares by giving up to her his beneficial reversionary interest.

On June 26 three documents were executed. It is obvious that they were all part of the same transaction, though I will mention them in the order which gives them logical coherence. First, Mrs. Oughtred transferred her own shares to her son. Secondly, the two of them joined in giving a release to the trustees of the settlement in respect of any " act deed matter or thing done or omitted " by the trustees or any of them in or about the execution of " the trusts and provisions of the settlement," and the trust fund being (I quote from recital (F) of the deed of release) " now held " by the trustees in trust for Mrs. Oughtred absolutely as the " trustees hereby acknowledge," the trustees undertook to " transfer the settled shares to Mrs. Oughtred or as she should direct. Thirdly, the trustees executed a deed of transfer accordingly vesting the legal title to the shares in Mrs. Oughtred.

It is this last-mentioned deed which is claimed by the Commissioners of Inland Revenue to be a conveyance on sale of the son's equitable reversionary interest within the meaning of section 54 of the Stamp Act, 1891, and, as such, liable to ad valorem duty upon the value of the shares transferred by Mrs. Oughtred in exchange for it. The case stated, upon which this appeal arises, presents that claim as a question for decision by the court.

It is plain, of course, that ostensibly the transfer is not a conveyance of the equitable reversionary interest at all. It deals with the shares themselves, not with any beneficiary's particular interest in them. The commissioners, however, arrived at their opinion that the transfer was chargeable ad valorem by a process of reasoning which is set out in paragraph 12 of the case stated. They took the view that, having regard to paragraph (*c*) of subsection (1) of section 53 of the Law of Property Act, 1925 (a provision which requires that any " disposition " of an equitable interest subsisting at the time of the disposition must be in writing), they must treat the recital that the shares held by the trustees were " now held " in trust for Mrs. Oughtred as incorrect; and they appear to have concluded, without more, that, as, apart from the transfer now in question, no instrument in writing stamped with ad valorem duty transferring the son's equitable reversionary interest had been produced to them, they ought to treat the transfer of shares itself as constituting the necessary instrument.

This line of reasoning is, in my view, fallacious. It contains two false assumptions. One is that under English law it must have been wrong to describe the settled shares as held by the trustees on June 26 in trust for Mrs. Oughtred absolutely unless the son's reversion had been assigned to her in writing so as to satisfy section 53 (1) (*c*) of the Law of Property Act, 1925. The

other is that somehow there must exist as a result of the transaction covered by the recited facts an instrument of conveyance capable of being charged to duty ad valorem, since otherwise there would be no ad valorem duty payable. The second assumption is one which, I am bound to say, appears to me to be the foundation of the argument for the commissioners' claim, no matter in what form it is expressed.

Yet the law with regard to liability to stamp duty is clear enough. The duty is charged upon instruments, if they exist and come within any of the categories prescribed by the Act. It is not charged upon transactions. Thus property such as chattels, which by law pass on delivery, can be transferred from one owner to another without attracting duty. Again, though an agreement for sale may be chargeable ad valorem, since the Act has so required, an oral agreement for the sale of property involves no charge to duty because no instrument is brought into existence to effect or to record it. The whole point of the present appeal seems to me to turn on the question whether it is open to a court of law to deduce from the documents of this case that Mrs. Oughtred's title to her son's equitable reversionary interest rested upon anything more than the oral agreement which admittedly took place.

My Lords, on this short point my opinion is that such a deduction is not open to a court of law. The materials that would support it are simply not there. I think that the judgment of Upjohn J. in the High Court, which was in favour of Mrs. Oughtred, was correct, and I agree with his reasons. I am afraid that I do not agree with the judgment of the Court of Appeal, which was in favour of the commissioners, or with the conclusion which, as I understand, commends itself to a majority of your Lordships.

The reasoning of the whole matter, as I see it, is as follows: On June 18, 1956, the son owned an equitable reversionary interest in the settled shares: by his oral agreement of that date he created in his mother an equitable interest in his reversion, since the subject-matter of the agreement was property of which specific performance would normally be decreed by the court. He thus became a trustee for her of that interest sub modo: having regard to subsection (2) of section 53 of the Law of Property Act, 1925, subsection (1) of that section did not operate to prevent that trusteeship arising by operation of law. On June 26 Mrs. Oughtred transferred to her son the shares which were the consideration for her acquisition of his equitable interest: upon this transfer he became in a full sense and without more the trustee of his interest for her. She was the effective owner of all outstanding equitable interests. It was thus correct to recite in the deed of release to the trustees of the settlement, which was to wind up their trust, that the trust fund was by then held upon trust for her absolutely. There was, in fact, no equity to the shares that could be asserted against her, and it was open to her, if she so wished, to let the matter rest without calling for a

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written assignment from her son. Given that the trustees were apprised of the making of the oral agreement and of Mrs. Oughtred's satisfaction of the consideration to be given by her, the trustees had no more to do than to transfer their legal title to her or as she might direct. This and no more is what they did.

It follows that, in my view, this transfer cannot be treated as a conveyance of the son's equitable reversion at all. The trustees had not got it: he never transferred or released it to them: how then could they convey it? With all respect to those who think otherwise, it is incorrect to say that the trustees' transfer was made either with his authority or at his direction. If the recital as to Mrs. Oughtred's rights was correct, as I think that it was, he had no remaining authority to give or direction to issue. A release is, after all, the normal instrument for winding up a trust when all the equitable rights are vested and the legal estate is called for from the trustees who hold it. What the release gave the trustees from him was acquittance for the trust administration and accounts to date, and the fact that he gave it in consideration of the legal interest in the shares being vested in his mother adds nothing on this point. Nor does it, with respect, advance the matter to say, correctly, that at the end of the day Mrs. Oughtred was the absolute owner of the shares, legal and equitable. I think that she was: but that is description, not analysis. The question that is relevant for the purpose of this appeal is how she came to occupy that position; a position which, under English law, could be reached by more than one road.

Lastly, I ought perhaps to say that I do not myself see any analogy between the operations embraced by the oral agreement and documents and the common case of a sale of shares by an owner for whom they are held by a nominee or bare trustee. What is sold there is the shares themselves, not the owner's equitable interest. What is passed by the transfer executed by his nominee is the shares, according to the contract, without any incumbrance on the title, equitable or legal. It is, I think, a misunderstanding of the law to speak of the nominee as transferring his beneficiary's previous equitable interest to the purchaser.

For the reasons which I have given I am in favour of allowing the appeal.

LORD COHEN. My Lords, the question for your Lordships' decision is whether the Inland Revenue were entitled to claim ad valorem duty on a deed (to which I shall refer hereinafter as "the transfer") dated June 26 whereby four transferors (the trustees of the settlement hereinafter mentioned) were expressed to transfer 100,000 preference shares of 10s. each and 100,000 ordinary shares of 15s. each in a company called William Jackson & Son Ltd. to the appellant in consideration of ten shillings.

The commissioners upheld the claim of the Inland Revenue but, at the request of the present appellant, stated a case for the determination of the High Court. This came before Upjohn J.

on December 3, 1957. He answered the question in favour of the present appellant, directed that the ad valorem duty which had been paid should be repaid and fixed the duty at 10s. The commissioners appealed to the Court of Appeal, and on May 15, 1958, the Court of Appeal, holding that the transfer attracted ad valorem duty, allowed the appeal and ordered the present appellant to pay £662 10s., i.e., the agreed amount of the ad valorem duty (£663) less the 10s. paid under the order of Upjohn J. It is from that order of the Court of Appeal that the appeal now before your Lordships is brought.

My Lords, the facts have already been sufficiently stated by the noble and learned Lord on the Woolsack. I agree with him that to give logical coherence to what was done your Lordships should treat the three documents executed on June 26 as having been executed in the following order: (1) the transfer by the appellant to her son Peter of the shares which were the consideration for the oral agreement by Peter to make her the absolute beneficial owner of the settled shares; (2) the deed of release; (3) the transfer.

Before Upjohn J. the respondents argued that having regard to section 53 (1) (*c*) of the Law of Property Act no equitable interest passed to the present appellant under the contract and therefore Peter's beneficial interest in the settled shares must have passed under the transfer. The material portions of section 53 are as follows: "(1) Subject to the provisions hereinafter "contained with respect to the creation of interests in land by "parol— . . . (*c*) a disposition of an equitable interest or trust "subsisting at the time of the disposition, must be in writing "signed by the person disposing of the same, or by his agent "thereunto lawfully authorised in writing or by will. (2) This "section does not affect the creation or operation of resulting, "implied or constructive trusts." Upjohn J. rejected the respondents' argument. He held that subsection (2) afforded a complete answer to it saying [1]: "This was an oral agreement for "value, and accordingly, on the making thereof, Peter, the "vendor became a constructive trustee of his equitable reversionary interest in the trust funds for the appellant. No "writing to achieve that result was necessary, for an agreement "of sale and purchase of an equitable interest in personalty "(other than chattels real) may be made orally, and section 53 "has no application to a trust arising by construction of law." The Court of Appeal did not accept Upjohn J.'s conclusion as to the effect of subsection (2) but did not find it necessary to express a concluded opinion as to the effect of section 53.

Before your Lordships Mr. Wilberforce was prepared to agree that on the making of the oral agreement Peter became a constructive trustee of his equitable reversionary interest in the settled funds for the appellant, but he submitted that none the

[1] [1958] Ch. 383, 390; [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252.

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less section 53 (1) (*c*) applied and accordingly Peter could not assign that equitable interest to the appellant except by a disposition in writing. My Lords, with that I agree but it does not follow that the transfer was a conveyance of that equitable interest on which ad valorem stamp duty was payable under the Stamp Act, 1891. It might well be that there has been no document transferring the equitable interest. The appellant may have been content to rely on getting in the legal interest by the transfer and on the fact that it would be impossible for Peter to put forward successfully a claim to an equitable interest in the settled shares once the consideration shares had been transferred to him or his nominees by the appellant.

In the Court of Appeal Mr. Wilberforce argued that ad valorem duty was payable on the transfer since immediately before the execution of the transfer Peter's equitable reversionary interest remained in him and since the transfer vested in the appellant in full legal and beneficial title to the settled shares, the transfer must have operated both to assign to the appellant Peter's reversionary interest and also the legal estate. The Court of Appeal did not accept this argument as they could see no answer to the objection that Peter was not a conveying party and his equitable reversionary interest was never vested in the transferors.

Mr. Wilberforce argued alternatively that the transfer, read in the light of the contemporary transfer of the consideration shares to Peter's nominees, and of the deed of release, was in truth nothing other than the completion and the contemplated method of completion of the oral contract and so was a "conveyance or transfer on sale of property" within the meaning of section 54 of, and Schedule I to, the Stamp Act, 1891. This alternative argument the Court of Appeal accepted, saying[2]: "The distinction between the two alternative presentations of the Crown's case may be a fine one, but it is real. It is of the essence of the former alternative that the transfer operated to convey two separate and distinct 'properties,' viz., the legal estate and Peter's reversionary equitable interest, the Crown claiming duty in respect of each 'conveyance.' Though the vendor under the contract need not be a conveying party, the latter must, as we conceive, be in a position to convey the property alleged to pass. The second alternative treats the three documents of June 26 (being the date fixed by the contract for completion) as contemporaneous, and deduces—particularly from the terms of the release—that the trustees were thus enabled and entitled to transfer to Mrs. Oughtred (as the transfer on the face of it purports to do) the shares themselves with all rights and benefits attached thereto."

My Lords, the distinction is too fine for me. The Stamp Act, 1891, imposes stamp duty on documents, not transactions. The

[2] [1958] Ch. 678, 690; [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443.

transfer does not attract ad valorem duty unless, to use the language of section 54 of the Act, it is an "instrument . . . "whereby any property or any estate or interest in any property "upon the sale thereof is transferred to or vested in a pur- "chaser." The words "upon the sale thereof" must, in relation to this case, mean "on the sale of Peter's equitable interest." It is, as the Court of Appeal recognise, impossible to say that the transfer had the effect of transferring the equitable interest since the transferors never had that interest to transfer, nor, in my opinion, can it be said that by the transfer Peter's equitable interest was vested in the appellant. The appellant as a result of what was done on June 26 was, as the release recognised, absolutely entitled to the settled shares, but that was not because the equitable interest was transferred to or vested in her by the transfer but because Peter, having become a constructive trustee for her of his equitable interest, could not, after his nominees had received the consideration shares, as they did on June 26, 1956, dispute the appellant's title to the settled shares.

I, too, would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, I have had the advantage of reading the opinion which will be delivered by my noble and learned friend, Lord Jenkins. I agree with it and have nothing to add.

LORD DENNING. My Lords, stripped of all trimmings, the case is simply this: The trustees of a settlement held the legal title in 200,000 shares in trust for Mrs. Oughtred for life, and after her death for her son Peter. Mrs. Oughtred also owned 72,700 shares which were her very own. On June 18, 1956, Peter and his mother agreed by word of mouth that they would, on June 26, 1956, effect an exchange: he would make over to her his reversionary interest in the 200,000 shares, and she in exchange would make over to him the entire interest in the 72,700 shares. On June 26, 1956, the exchange was implemented in this way: (i) By a simple transfer Mrs. Oughtred transferred her 72,700 shares direct to Peter, or rather to nominees for Peter. It was said to be "in consideration of 10s." (ii) Peter did not transfer his reversionary interest in the 200,000 shares direct to his mother, but he authorised the trustees of the settlement to transfer the 200,000 shares to her *to the intent that her life interest should be enlarged into absolute ownership of them*: The authority so given by Peter was implicit in the recitals of a deed of release executed by himself and his mother, which was said to be "in consideration of "the premises and of the transfer so to be made as aforesaid." (iii) By a simple transfer the trustees transferred the 200,000 shares to Mrs. Oughtred. It was said to be "in consideration "of 10s." There is no doubt that the transfer was intended to, and did, vest in Mrs. Oughtred the absolute ownership of the 200,000 shares both in law and in equity. No interest was left in

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Peter or anyone else. His reversionary interest was squeezed out. The trustees would not have dreamed of executing this transfer unless Peter had authorised them to do it.

Was this transfer "a conveyance or transfer on sale, of any "property" such as to attract stamp duty on the value of the consideration? I have no doubt it was. Peter had agreed to sell his reversionary interest in the 200,000 shares to his mother for a stated consideration (the 72,700 shares). He did not convey this reversionary interest direct to her, nor did he convey it to the trustees of the settlement. But he authorised the trustees to convey it to her—not in the shape of a reversionary interest as such—but by way of enlarging her life interest into absolute ownership. It is clear to me that, by the transfer so made by his authority, she acquired his reversionary interest as effectively as if he had conveyed it direct to her. And that is quite enough to attract stamp duty. In my opinion, every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration. It is not necessary for the instrument of implementation to be between the same parties as the agreement for sale, nor for it to relate to the self-same property as the agreement for sale. Suffice it that the instrument is the means by which the parties choose to implement the bargain they have made. It is then a "conveyance or transfer "on sale" of any property—which I take to mean a conveyance or transfer consequent upon the sale of the property and in implementation of it. Such is, I think, clearly borne out by *Attorney-General* v. *Brown*,[3] and by the illustrations given in the course of the argument. Thus, when an equitable owner of shares (registered in the name of a nominee) agrees to sell them to a purchaser, and it is implemented by a transfer by the nominee to the purchaser, the transfer is a conveyance upon sale of any property—although, of course, the parties to the agreement are different from the parties to the transfer. And when two people are equitable co-owners of shares—and one of them agrees to sell his interest to the other—and it is implemented by a transfer of the shares by the trustees (with the authority of the one) to the other, the transfer is a conveyance upon sale of any property—although, of course, the property which is transferred is different from the property in the agreement.

I do not think it necessary to embark upon a disquisition on constructive trusts: because I take the view that, even if the oral agreement of June 18, 1956, was effective to transfer Peter's reversionary interest to his mother, nevertheless, when that oral agreement was subsequently implemented by the transfer, then the transfer became liable to stamp duty. But I may say that I do not think the oral agreement was effective to transfer Peter's reversionary interest to his mother. I should have thought that the wording of section 53 (1) (*c*) of the Law of Property Act, 1925,

[3] (1849) 3 Ex. 662.

clearly made a writing necessary to effect a transfer: and section 53 (2) does not do away with that necessity.

For these reasons, which are in substance the same as those given by the Master of the Rolls, I would dismiss this appeal.

LORD JENKINS. My Lords, the question in this case is whether a transfer under seal dated June 26, 1956, whereby the trustees of the settlement hereinafter mentioned transferred to the appellant, Mrs. Phyllis Brown Oughtred, 100,000 ordinary and 100,000 preference shares of 10s. each in a company called William Jackson & Son Ltd., attracted ad valorem stamp duty as a conveyance or transfer on sale within the meaning of the head of charge "conveyance or transfer on sale of any property" in Schedule I to the Stamp Act, 1891, or was liable only to the fixed duty of 10s. as a "conveyance or transfer of any kind not hereinbefore "described."

The matter came before Upjohn J. on an appeal by way of case stated under section 13 of the Act of 1891 at the request of the appellant by the Commissioners of Inland Revenue, who had assessed the stamp duty chargeable on the transfer in question at £663 10s. made up of £663 ad valorem transfer on sale duty together with the fixed duty of 10s.

Upjohn J. by an order dated December 3, 1957, allowed the appeal, stated the opinion of the court to be that the transfer in question was not chargeable with ad valorem duty, declared that it was chargeable with the fixed duty of 10s. only, and ordered the £663 ad valorem duty paid on the transfer to be repaid.

The commissioners appealed to the Court of Appeal and by an order of that court (the Master of the Rolls and Morris and Ormerod L.JJ.) dated May 15, 1958, the appeal was allowed, the transfer in question was held to be chargeable with the ad valorem duty of £663 but not with the fixed duty of 10s., and the present appellant was ordered to repay to the commissioners the sum of £662 10s., being the amount of the ad valorem duty held to be payable, less the fixed duty of 10s. held not to be payable.

From that order the appellant now appeals to your Lordships' House.

The facts leading up to the execution of the disputed transfer are fully set out in the stated case and I need not repeat them at length.

Immediately before the making of the oral agreement to which I am about to refer, the shares later transferred by the disputed transfer (which I will call "the settled shares") were under and by virtue of a settlement dated January 1, 1924, a deed of appointment dated June 18, 1956, and made by the appellant, and a deed of release also made by the appellant and dated June 18, 1956, and in the events which had happened, held by the trustees of the settlement in trust for the appellant for life with remainder to her only child, Peter Bentham Oughtred (whom I will call "Peter") absolutely.

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By an oral agreement made on June 18, 1956, between the appellant and Peter it was agreed that Peter would, on June 26, 1956, exchange his interest under the settlement and the above-mentioned deed of appointment and deed of release for 28,510 preference shares and 44,190 ordinary shares in William Jackson & Son Ltd. then owned by the appellant (which I will call "the "free shares") to the intent that the life interest of the appellant in the trust fund (which consisted wholly of the settled shares) should be enlarged into absolute ownership thereof.

The oral agreement was followed by the execution of three documents, all dated June 26, 1956, viz.: (1) a deed of release (which I will call "the release") made between the appellant of the first part, Peter of the second part, and the trustees of the settlement of the third part, which appears in fact to have been executed only by the appellant and Peter. (2) A transfer by the appellant of the free shares to nominees for Peter, expressed to be made in consideration of 10s. (3) The disputed transfer, likewise expressed to be made in consideration of 10s.

The release, after recital of the facts to which I have already referred down to and including the oral agreement, the terms of which are fully stated in recital (F), continued in the same recital as follows: "(F) . . . The trust fund which now consists "of [the settled shares] is accordingly now held by the trustees "in trust for [the appellant] absolutely as the trustees hereby "acknowledge and it is intended that the same shall forthwith "be transferred to [the appellant] or as she shall direct."

After a further recital (G) to the effect that the appellant and Peter, being satisfied with all matters and things relating to the execution of the trusts of the settlement, had agreed to make the release thereinafter contained, the release by its operative part was expressed to witness that "in consideration of the "premises and of the transfer to be made as aforesaid" the appellant and Peter—to put it shortly—gave the trustees a general release in respect of their trusteeship of the settlement. The transfer of the free shares and the disputed transfer were common form share transfers, the terms of which call for no special comment.

As to the order in which the three documents of June 26, 1956, were executed, it seems clear from the terms of recital (F) and from the phrase "and of the transfer to be made as aforesaid" in the operative part of the release, that this document must have been executed before the disputed transfer, but there is no means of telling whether the execution of the transfer of the free shares preceded or followed the execution of the release or, in the latter case, whether it preceded or followed the execution of the disputed transfer. In my view, nothing turns on this, inasmuch as the three documents were interdependent parts of the same transaction, all executed on the same day. I am, however, prepared to assume in the appellant's favour that the transfer of the free shares to Peter preceded the transfer of the settled shares to the

appellant, so that when the transfer of the settled shares was executed the appellant had already performed her part of the bargain.

Ad valorem duty was not claimed on the release or on the transfer of the free shares, but only on the disputed transfer.

The provisions of the Stamp Act, 1891, directly relevant to the claim are these:

Section 1 (which contains the charge of stamp duties) provides that the stamp duties " upon the several instruments specified in " Schedule I to this Act shall be the several duties in the said " Schedule specified . . ."

Section 54 provides as follows: " For the purposes of this Act " the expression ' conveyance on sale ' includes every instru- " ment . . . whereby any property, or any estate or interest in " any property, upon the sale thereof is transferred to or vested " in a purchaser, or any other person on his behalf or by his " direction."

Schedule I imposes under the head of charge " conveyance or " transfer on sale of any property (except as therein mentioned) " ad valorem duty upon " the amount or value of the consideration " for the sale "; and under the head of charge " conveyance or " transfer of any kind not hereinbefore described " a fixed duty of 10s.

Reference should also be made to section 53 of the Law of Property Act, 1925, which (so far as material for the present purpose) provides as follows: " (1) Subject to the provisions " hereinafter contained with respect to the creation of interests " in land by parol . . . (*c*) a disposition of an equitable interest " or trust subsisting at the time of the disposition must be in " writing signed by the person disposing of the same, or by his " agent thereunto lawfully authorised in writing or by will. (2) " This section does not affect the creation or operation of result- " ing, implied or constructive trusts."

The question, then, is whether upon the true construction of section 54 of the Act of 1891, and having regard to the terms and effect of the oral agreement and the nature of the interests with respect to which that agreement was made, the disputed transfer was an instrument whereby property in the shape of the settled shares or any estate or interest in that property was transferred " upon the sale thereof " to a purchaser in the person of the appellant.

To revert to the terms of the oral agreement, it was made on June 18, 1956, and provided that on a fixed future date, viz., June 26, 1956, Peter should exchange his interest under the settlement (i.e. his absolute interest in the settled shares subject to the appellant's life interest therein) for the free shares belonging to the appellant to the intent that the life interest of the appellant in the trust fund (i.e., in the settled shares) should be enlarged into absolute ownership thereof. The effect of the agreement, according to the expressed intention of the parties, thus

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was that on June 26 the appellant should become absolutely and beneficially entitled in possession to the settled shares discharged from the trusts of the settlement, subject to her obligation to make over to Peter the free shares which formed the consideration for the exchange, or in other words the consideration for the sale to her by Peter of his reversionary interest in the settled shares. By way of corollary to the oral agreement, recital (F) of the release after stating its terms went on to acknowledge that the trust fund, consisting of the settled shares, was accordingly held by the trustees in trust for the appellant absolutely and that it was intended that the same should forthwith be transferred to the appellant or as she should direct.

It is not open to doubt that the oral agreement as above described amounted to an agreement for the sale by Peter, for a purchase consideration consisting of the free shares, of his reversionary interest in the settled shares to the appellant. It is also plain that the parties intended that the sale should have the effect of enlarging the appellant's life interest in the settled shares into absolute ownership thereof and should accordingly be completed on June 26 by an immediate out-and-out transfer of the settled shares by the trustees to the appellant for her own absolute use and benefit, against the satisfaction by her of the consideration due to Peter in the shape of the free shares. The expressed intention of the parties that the appellant's life interest should be enlarged into absolute ownership appears to me to be indistinguishable in its effect from an intention that the appellant's life interest should merge in the reversionary interest, so as to convert that interest into an immediate absolute interest in possession, discharged from the life interest.

Such being the nature of the transaction in connection with which the disputed transfer was executed, the appellant's case is put in this way.

It is said, and said truly, that stamp duty is imposed on instruments, not transactions, and that a transaction of sale carried out without bringing into existence an instrument which has the effect of transferring to or vesting in the purchaser the property sold attracts no duty. See *per* Lord Esher M.R. in *Inland Revenue Commissioners* v. *G. Angus & Co.*,[4] where he said: "The first thing to be noticed is, that the thing which is "made liable to the duty is an 'instrument.' If a contract of "purchase and sale, or a conveyance by way of purchase and "sale, can be, or is, carried out without an instrument, the case "is not within the section, and no tax is imposed. It is not "the transaction of purchase and sale which is struck at; it is "the instrument whereby the purchase and sale are effected "which is struck at. And if anyone can carry through a pur-"chase and sale without an instrument, then the legislature "have not reached that transaction. The next thing is that it

[4] (1889) 23 Q.B.D. 579, 589; 5 T.L.R. 697.

" is not every instrument which may be brought into being in " the course of a transaction of purchase and sale which is struck " at. It is the instrument ' whereby any property upon the sale " ' thereof is legally or equitably transferred.' The taxation is " confined to the instrument whereby the property is transferred. " The transfer must be made by the instrument. If a transfer " requires something more than an instrument to carry it " through, then the transaction is not struck at, and the instru- " ment is not struck at because the property is not transferred " by it."

It is said further that in the present case the disputed transfer transferred nothing beyond a bare legal estate, because, in accordance with the well-settled principle applicable to contracts of sale, between contract and completion the appellant became under the oral agreement beneficially entitled in equity to the settled shares, subject to the due satisfaction by her of the purchase consideration, and accordingly the entire beneficial interest in the settled shares had already passed to her at the time of the execution of the disputed transfer, and there was nothing left upon which the disputed transfer could operate except the bare legal estate.

The Commissioners of Inland Revenue seek to meet this argument by reference to section 53 (1) (*c*) of the Law of Property Act, 1925. They contend that as the agreement of June 18, 1956, was an oral agreement it could not, in view of section 53 (1) (*c*), effect a disposition of a subsisting equitable interest or trust, and accordingly that Peter's subsisting equitable interest under the trusts of the settlement, in the shape of his reversionary interest, remained vested in him until the execution of the disputed transfer, which in these circumstances operated as a transfer on sale to the appellant of Peter's reversionary interest and additionally as a transfer not on sale to the appellant of the legal interest in the settled shares. It was by this process of reasoning that the Commissioners arrived at the opinion expressed in the case stated that the disputed transfer attracted both the ad valorem duty exigible on a transfer on sale of the reversionary interest and also the fixed duty of 10s.

This argument is attacked on the appellant's side by reference to subsection (2) of section 53 of the Act of 1925, which excludes the creation or operation of resulting, implied or constructive trusts from the provisions of subsection (1). It is said that inasmuch as the oral agreement was an agreement of sale and purchase it gave rise, on the principle to which I have already adverted, to a constructive trust of the reversionary interest in favour of the appellant subject to performance by her of her obligation to transfer to Peter the free shares forming the consideration for the sale. It is said that this trust, being constructive, was untouched by section 53 (1) (*c*) in view of the exemption afforded by section 53 (2), and that the appellant's primary argument still holds good.

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I find it unnecessary to decide whether section 53 (2) has the effect of excluding the present transaction from the operation of section 53 (1) (*c*), for, assuming in the appellant's favour that the oral contract did have the effect in equity of raising a constructive trust of the settled shares for her untouched by section 53 (1) (*c*), I am unable to accept the conclusion that the disputed transfer was prevented from being a transfer of the shares to the appellant on sale because the entire beneficial interest in the settled shares was already vested in the appellant under the constructive trust, and there was accordingly nothing left for the disputed transfer to pass to the appellant except the bare legal estate. The constructive trust in favour of a purchaser which arises on the conclusion of a contract for sale is founded upon the purchaser's right to enforce the contract in proceedings for specific performance. In other words he is treated in equity as entitled by virtue of the contract to the property which the vendor is bound under the contract to convey to him. This interest under the contract is no doubt a proprietary interest of a sort, which arises, so to speak, in anticipation of the execution of the transfer for which the purchaser is entitled to call. But its existence has never (so far as I know) been held to prevent a subsequent transfer, in performance of the contract, of the property contracted to be sold from constituting for stamp duty purposes a transfer on sale of the property in question. Take the simple case of a contract for the sale of land. In such a case a constructive trust in favour of the purchaser arises on the conclusion of the contract for sale, but (so far as I know) it has never been held on this account that a conveyance subsequently executed in performance of the contract is not stampable ad valorem as a transfer on sale. Similarly, in a case like the present one, but uncomplicated by the existence of successive interests, a transfer to a purchaser of the investments comprised in a trust fund could not, in my judgment, be prevented from constituting a transfer on sale for the purposes of stamp duty by reason of the fact that the actual transfer had been preceded by an oral agreement for sale.

In truth, the title secured by a purchaser by means of an actual transfer is different in kind from, and may well be far superior to, the special form of proprietary interest which equity confers on a purchaser in anticipation of such transfer.

This difference is of particular importance in the case of property such as shares in a limited company. Under the contract the purchaser is no doubt entitled in equity as between himself and the vendor to the beneficial interest in the shares, and (subject to due payment of the purchase consideration) to call for a transfer of them from the vendor as trustee for him. But it is only on the execution of the actual transfer that he becomes entitled to be registered as a member, to attend and vote at meetings, to effect transfers on the register, or to receive dividends otherwise than through the vendor as his trustee.

The parties to a transaction of sale and purchase may no doubt choose to let the matter rest in contract. But if the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract.

On this part of the case, reference may be made to *Inland Revenue Commissioners* v. *G. Angus & Co.*[5] in which the converse question whether an agreement for sale of property in the shape of goodwill amounted to a conveyance of the property for stamp duty purposes under section 70 of the Stamp Act, 1870, was discussed by the Court of Appeal and answered in the negative; and to the observations of Lord Somervell in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners.*[6]

In the present case recital (F) of the release plainly shows the intention of the parties to the oral contract to have been that the transaction should be completed by the disputed transfer, and this seems to me hardly possible to reconcile with the view that nothing passed under it.

A further argument raised on the appellant's side is to the effect that, in any case, the disputed transfer was not a transfer of the property sold, but was a transfer of the settled shares, whereas the property sold was Peter's reversionary interest. It is said that the disputed transfer was accordingly outside the definition in section 54 of the Act of 1891 because it was not an instrument whereby property or any estate or interest therein was transferred on a sale thereof.

I cannot accept this argument, in considering which I adhere to the assumption made above as to the exclusion of section 53 (1) (*c*) of the Act of 1925. It appears to me that in transferring the settled shares to the appellant the disputed transfer was transferring to her the property then representing the reversionary interest, which under the oral contract had been converted into an immediate interest in possession by virtue of the expressed intention that the sale to the appellant of the reversionary interest should have the effect of enlarging her life interest into absolute ownership, which, as I have said above, appears to me to be indistinguishable from an intention that the appellant's life interest should merge in the absolute reversionary interest.

It is obvious that the sale of an absolute interest in remainder such as this includes the absolute interest in possession in the property comprised in it when it falls into possession. Here, as it seems to me, the reversion was brought into possession in the hands of the appellant by the merger of her life interest, which was necessary if she was to be put in a position to call for an

[5] 23 Q.B.D. 579.

[6] [1958] A.C. 549, 563; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.

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immediate transfer of the settled shares, as it was intended she should be; and accordingly the settled shares as transferred to her actually represented the reversionary interest which she had bought and which had been converted into an immediate interest in possession by the terms of the oral agreement.

One may take by way of illustration the simple case of an agreement for the sale of a reversionary interest in a trust fund subject to a life interest. Suppose in such a case that the life-tenant dies while the matter rests in contract, and that after the life-tenant's death the trustees of the settlement, by the direction of the vendor and purchaser, transfer to the purchaser by appropriate instruments the investments then representing the trust fund. In such a case it would, I should have thought, be impossible to maintain that such instruments did not constitute transfers whereby the investments were transferred to the purchaser on a sale thereof, on the ground that what he purchased was the reversionary interest whereas the property conveyed to him consisted of the investments.

This, it appears to me, would also have been the position here if the appellant had died between June 18 and 26, 1956, and her personal representatives had called for a transfer of the settled shares to implement the oral agreement.

In that event it would, in my view, have been impossible to contend that the transfer of the settled shares was not a transfer of property on a sale thereof within the meaning of section 54. The property sold would have been the reversionary interest and the property transferred would have consisted of the property comprised in the reversionary interest upon its falling into possession.

I do not see why there should be any difference in result between the imaginary case of the reversionary interest falling into possession by the death of the life-tenant and the actual case now before your Lordships, in which the reversionary interest was brought into immediate possession by merger of the life interest.

It can at all events safely be said that the life interest and the reversionary interest either continued in existence as separate items of property or they did not. I think the terms of the oral agreement were consistent only with the merger of the life interest and the consequent acceleration of the reversionary interest sold, so as to bring it, and the shares which it comprised, into immediate possession. But if I am wrong in this, and the life and reversionary interest are to be considered as having remained in existence as separate items of property, then it appears to me that the disputed transfer, made by the direction of both beneficiaries (as shown by the release), and apt as it was to transfer the entire beneficial ownership of the shares at law to the appellant, must be taken to have included two estates or interests in the settled shares, viz., (a) the appellant's life interest and (b) Peter's absolute interest in remainder expectant on the

appellant's life interest. If that was the position, then, as it seems to me, the disputed transfer must have operated to transfer to the appellant an estate or interest in property (viz., in the settled shares) consisting of Peter's interest in the shares in remainder expectant on the death of the appellant, which interest had undeniably been sold to the appellant by Peter.

I should next refer to the point taken on the appellant's side that the disputed transfer was made not by the vendor, namely Peter, but by the trustees. In my view there is no substance in this. Where property sold is outstanding in some person other than the vendor, being a trustee for or nominee of the vendor so as to be bound to transfer the property according to the vendor's direction, then in my view a transfer by such person at the direction of the vendor is for the present purpose equivalent to a transfer by the vendor himself. See, for example, *Attorney-General* v. *Brown*,[7] and consider the common case of sub-sales of land in which the vendor conveys by the direction of the original purchaser to the sub-purchaser. It is plain enough from the release in the present case that the disputed transfer was made in effect by the direction of both beneficiaries.

I cannot accept Upjohn J.'s view that the disputed transfer was not stampable ad valorem because it was a transfer not on sale but on the winding up of the trust. This seems to me to beg the question. The fact that the disputed transfer was made on the winding up of the trust does not, in my view, prevent it from being also a transfer on sale.

Let a case be supposed in which trustees hold a net fund in trust for some person who, before the fund is distributed, orally agrees to sell his interest to a purchaser, and upon the conclusion of this agreement the original beneficiary and purchaser from him direct the trustees to transfer the investments representing the fund to the purchaser against a proper release, and the trustees execute the appropriate transfers accordingly. In such a case it appears to me that the resulting transfers would plainly be transfers on sale although they also effected the winding up of the trust.

For the reasons I have endeavoured to state I am of opinion that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Moeran, Oughtred & Co., Edgware, for Robinson, Sheffield & Tull, Beverley; Solicitor of Inland Revenue.*

F. C.

[7] 3 Ex. 662.

[CHANCERY DIVISION.]

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Oct. 13, 14.
Danckwerts J.

In re COHEN, DECD.
NATIONAL PROVINCIAL BANK LTD. *v.* KATZ AND OTHERS.

[1950 C. 3865.]

Administration of Estates—Payment of debts—Property liable—Mortgaged property—Part specifically devised and part falling into residue—Whether specifically devised realty exonerated from debt—"Whether . . . deceased . . . by will . . . signified a contrary "or other intention"—Executor's sale of properties to discharge testator's liabilities—Whether debts defrayed out of sale to be borne by all beneficiaries—Sale of property at more than probate value—Whether contribution and abatement on basis of probate value or of amount realised on sale—Administration of Estates Act, 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 35 (1).

Judicial Precedent—Decision at first instance—Whether binding on other judge—Question affecting rights of property—Prior decision doubted in dissenting judgment in Court of Appeal.

Equity—Equality—Beneficiaries under will—Sale of some bequests to pay testator's debts.

A testator, having appointed a bank and his wife executors and trustees, devised to them a freehold property, a house, on trust for one of his daughters absolutely, another on trust for his other daughter absolutely, and his residuary estate on trust for his wife for her own absolute use and benefit. At his death both those houses, together with four out of six houses forming part of his residuary estate, were mortgaged to the bank to secure an overdraft. After the testator's death his wife, the testatrix, by her will appointed the bank her trustee and made a number of specific devises including, inter alia, the six houses forming part of the testator's residuary estate, to the two daughters and their children. After her death the bank, on the footing that section 35 of the Administration of Estates Act, 1925,[1] applied, apportioned the debts comprised in the testator's overdraft equally among the mortgaged properties according to their respective values; it had, however, to have recourse to some of the six freehold properties comprised in his residuary estate, and sold four of them, two for more than their probate value at his death. Subsequently, the bank sold another of the houses, also for more than the probate value, for the benefit of the devisee under the testatrix's will, and, later, to pay the debts of the testatrix, it sold the sixth house.

On a summons to determine whether, inter alia, all six of the properties comprised in the testator's residuary estate should have contributed rateably to satisfy his liabilities and whether the specific devises and bequests made by the testatrix should abate

[1] Administration of Estates Act, 1925, s. 35 (1): "Where a person "dies possessed of . . . an interest "in property, which at the time of "his death is charged with the pay-"ment of money, whether by way of "legal mortgage, equitable charge or "otherwise . . . and the deceased "has not by will deed or other "document signified a contrary or "other intention, the interest so "charged shall, as between the "different persons claiming through "the deceased, be primarily liable "for the payment of the charge; and "every part of the said interest, "according to its value, shall bear a "proportionate part of the charge on "the whole thereof."

according to the amount at which they had been valued for probate or the amount for which they were sold:—

Held, (1) that, as the testator had given the two houses to his daughter by specific bequest as opposed to residuary devise, he had "... by will ... signified a contrary ... intention ..." within section 35 of the Administration of Estates Act, 1925, sufficient to exclude the provisions of that section, and that, therefore, those two houses were not liable to bear proportionate parts of the mortgage debt which ought to have been discharged out of the testator's residuary estate.

In re Biss [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89 followed.

In re Cole [1958] Ch. 877; [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102; and *In re Smith* [1933] Ch. 847 considered.

(2) That the bank as executor was entitled to sell any of the six properties which the testatrix had purported to devise of which the proceeds of sale were required to pay the testator's debts, but that the beneficiaries under her will did not lose all right to the proceeds of sale, and that, on the principle that equity will attempt to do justice among all beneficiaries on an equal footing, the burden of the debts which were paid out of the proceeds of sale of some only of the properties ought to be borne equally among all the beneficiaries, whose benefits should likewise abate rateably for the purposes of claiming under the testatrix's estate.

Attorney-General v. *Sudeley* [1896] 1 Q.B. 354; 12 T.L.R. 224; *Tombs* v. *Roch* (1846) 2 Collyer 490; and *Aldrich* v. *Cooper* (1803) 8 Ves. 381 considered.

(3) That for purposes of paying the testator's and the testatrix's debts the contribution of the specific devisees must be on the basis of the probate values of the properties; and that the specific devises must, likewise, abate on the basis of the probate values.

Fielding v. *Preston* (1857) 1 De G. & J. 438 and *In re John* [1933] Ch. 970 followed.

ADJOURNED SUMMONS.

A testator, Max Cohen, by his will dated June 21, 1944, provided, inter alia: "... I appoint National Provincial Bank Ltd. "... and my wife Rebecca Cohen ... to be executors and "trustees of this my will and to be trustees hereof for all the "purposes of the Settled Land Act, 1925 ... I give devise "and bequeath to my said wife the business of a costumier as "now carried on by me at 55 Dalston Lane London and at any "other address at which the said business may be carried on for "the time being and I declare that this gift shall include all "goods manufactured and unmanufactured and all stock in trade "belonging to me in connection with or used for the purposes of "my said business and the benefit of all contracts subsisting in "relation thereto at my death and also all book debts which shall "then be owing to me in connection with the said business and "all money at the Bank to the credit of my business account at "the National Provincial Bank Aldersgate and my said wife shall "take over and discharge all my liabilities in connection with "my said business existing at my death and shall indemnify my "estate against the same ...

"I bequeath to my daughters Lily Rosen the wife of Dr.

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" Joseph Rosen 37 Warwick Square Clapton London and Edith " Katz the wife of Karl Kodish Katz the sum of one thousand " pounds each free of legacy duty and I direct that such legacies " and duty thereon shall be paid to them out of my said business " in exoneration of my residuary estate and be contingent on my " said business still being in existence at the date of my death " and contingent also upon there being sufficient funds in the " said business to discharge the legacies and duty thereon . . .

" I devise my freehold property known as No. 10 Cavendish " Place Brighton in the County of Sussex unto my trustees upon " trust for my said daughter Edith Katz free of duty absolutely " . . .

" I devise my freehold property known as No. 7 Cavendish " Place Brighton in the County of Sussex unto my trustees upon " trust for my said daughter Lily Rosen free of duty absolutely " . . .

" And as to all the rest residue and remainder of my estate " . . . I give devise and bequeath the same unto my trustees upon " trust to sell call in and convert into money such part thereof " as shall not consist of money with power in their absolute dis- " cretion to postpone such sale calling in and conversion . . . and " to pay and transfer the same both as to capital and income to " my said wife for her absolute use and benefit . . ."

On April 30, 1948, the testator died. At that date Number 7 and Number 10 Cavendish Place, and also 3 Cavendish Place, 37 Hampton Place, Brighton, 41 Brunswick Terrace, Hove, and 61 Holders Hill Avenue, Hendon, all four of which were part of the testator's residuary estate, were mortgaged to the National Provincial Bank to secure the testator's overdraft, then amounting to £3,159 7s. 1d. Also in his residuary estate were 252 Kingsland Road, London, and 198 Portland Road, Hove.

By her will dated August 3, 1948, his widow, Rebecca Cohen, the testatrix, provided, inter alia: " . . . 1. I appoint National " Provincial Bank Ltd. (hereinafter called ' the Bank ') to be exe- " cutors and trustees of this my will and to be trustees hereof for " all the purposes of the Settled Land Act, 1925 . . . 3. I give " devise and bequeath the following freehold properties (free of " all death duties) to the following persons absolutely namely:— " (a) To my daughter the said Lily Rosen the properties known " as Number 3 Cavendish Place Brighton aforesaid and Number 5 " Brunswick Square Hove . . . (b) To my grandson Maurice " Rosen the property known as 252 Kingsland Road, London, " E.2 . . . (c) To my grandson Stanley Cohen the property " known as Number 14 Rectory Road, London, N.16 . . . (d) To " my daughter the said. Edith Katz the properties known as " Number 41 Brunswick Terrace Hove aforesaid and Number 197 " Portland Road Hove aforesaid (e) To my daughters the said " Lily Rosen and Edith Katz the factory and premises known as " Number 14a Rectory Road London N.16 (and all stock and

" contents therein) in equal shares as tenants in common . . .
" (f) To my grandson Lionel Katz the property known as Number
" 19 Montpelier Villas aforesaid . . . (g) To my daughter the
" said Lily Rosen the property known as Number 61 Holders Hill
" Avenue Hendon (h) To my granddaughter Pamela Katz the
" property known as Number 37 Hampton Place Brighton . . .
" 4. I give and bequeath to Kodish Katz and his son the said
" Lionel Katz in equal shares and interest in (*sic*) the goodwill
" plant machinery fixtures and fittings and any other fixed assets
" and stock in the business carried on at 14a Rectory Road afore-
" said . . . with the direction that they shall rent the factory at
" the said premises from my two daughters the said Lily Rosen
" and the said Edith Katz at a rental of £24 weekly . . . 5. I
" give devise and bequeath all the rest residue and remainder of
" my estate . . . unto my said daughters Lily Rosen and Edith
" Katz in equal shares or to the survivor of them . . ."

The testatrix died on August 18, 1948. The National Provincial Bank took the view that section 35 of the Administration of Estates Act, 1925, applied to the testator's overdraft, and apportioned that debt rateably among the various mortgaged properties in accordance with their respective values. The bank had, however, to have recourse to some of the six freehold properties specifically devised by the testatrix to discharge his liabilities, and in 1953 sold 3 Cavendish Place, 198 Portland Road, 41 Brunswick Terrace and 61 Holders Hill Avenue, the two last mentioned for sums greater than the amount of their probate value at the date of the testator's death; in 1954 they sold, for Maurice Rosen's benefit, 252 Kingsland Road, also for a sum greater than the amount of that value, and in 1956, to pay the testatrix's debts, 37 Hampton Place. The bank treated the testatrix's specific devises of 3 Cavendish Place, 198 Portland Road, 41 Brunswick Terrace and 61 Holders Hill Avenue as having wholly failed and those of 252 Kingsland Road and 37 Hampton Place as having taken effect.

Proceedings with regard to both estates were before the courts over a long period and, inter alia, the bank's action in resorting to only four out of the six properties to satisfy the testator's liabilities was challenged on behalf of Lily Rosen, the contention being that all six ought to have contributed rateably to satisfy those liabilities, either to the amounts at which they were respectively valued for probate or to those for which they were respectively sold.

On March 26, 1957, the bank took out a summons to which the defendants were Kodish Katz, Lionel Katz, Lily Rosen, Edith Katz, Stanley Cohen, Maurice Rosen, Pamela Katz and Harry Cohen, son of the testator and testatrix, asking, inter alia: 2. Whether on the true construction of the testator's will the properties thereby respectively specifically devised to Lily Rosen and Edith Katz were liable to bear proportionate parts of the

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moneys owing by the testator at the date of his death under five mortgages made between the testator and the bank or whether those moneys ought to have been discharged wholly out of the testator's residuary estate: 5. Whether the bank, as executor and trustee of the testator's will, was entitled at its discretion to sell all or any of 3 Cavendish Place, 252 Kingsland Road, 41 Brunswick Terrace, 198 Portland Road, 61 Holders Hill Avenue and 37 Hampton Place to discharge the liabilities of the testator's estate or whether those liabilities ought to be treated as charged on those respective properties rateably (a) in proportion to the sums at which they were respectively valued to obtain a grant of probate of the testator's will, or (b) in proportion to the sums for which they were respectively sold, or (c) in some other and what proportions: 6. Whether for the purposes of abatement the respective values of the properties respectively specifically devised or bequeathed by the testatrix's will ought to be ascertained by reference to (a) the amounts at which they were respectively valued to obtain a grant of probate of her will, or (b) the amounts for which they were respectively sold, or how otherwise those respective values ought to be ascertained.

Question 1 in the summons dealt with legacies given to Lily Rosen and Edith Katz, and does not call for report; question 3, which dealt with the rental of £24 weekly mentioned in clause 4 of the testatrix's will, and question 4, which asked that the bank be directed to refrain until further order from taking steps to recover from Kodish and Lionel Katz moneys owing by them to the testatrix's estate, were dealt with after judgment had been given on questions 5 and 6.

Michael Albery Q.C. and *B. S. Tatham* for the bank.
R. O. Wilberforce Q.C. and *A. Campbell* for Lily Rosen.
Michael Browne for Stanley Cohen.
James Mitchell for Harry Cohen.
The defendants Kodish Katz, Edith Katz, Lionel Katz, Pamela Katz and Maurice Rosen were not represented.

After the decision on question 1, argument was addressed to the court on question 2, the cases therein cited being referred to in the judgment.

Danckwerts J. I have now to decide a question which arises in connection with section 35 of the Administration of Estates Act, 1925, which, shortly, says that where a mortgage is charged on property or properties, those properties should bear the burden of the mortgage unless a contrary intention is shown in the will.

In the present case the mortgages to the bank were charged not only on the two properties specifically devised to Mrs. Katz and Mrs. Rosen, but also on other properties which formed part of the residue. The question is whether the properties specifically devised to Mrs. Lily Rosen and Mrs. Edith Katz are liable to

bear proportionate parts of the mortgages, or whether they should be discharged out of the residuary estate of the testator.

This matter is subject to an express decision in extremely similar circumstances by Harman J. in *In re Biss*,[1] in which he held that the circumstances were sufficient to show a contrary intention. On the other hand, Harman J.'s decision has been doubted, although not overruled, in a dissenting judgment of Lord Evershed M.R. in *In re Cole*.[2] It appears that probably all the relevant authorities were not cited to Harman J., particularly *In re Smith*,[3] but it seems to me that, in the circumstances, I am bound to apply the decision of Harman J. to the present case and to decide, in fact, that the two houses were given to the two ladies by specific bequest as opposed to a residuary devise, and that that is sufficient evidence of a contrary intention to take the case out of section 35 of the Administration of Estates Act, 1925; if this produces any other result the matter must be dealt with by the Court of Appeal.

Argument was then addressed to the court on question 5, the cases cited being referred to in the judgment.

DANCKWERTS J. This question ought really to be divided into two. The question is: "Whether the plaintiffs as executors and "trustees of the said will of the testator were entitled at their "discretion to sell all or any of the following properties," and then are set out six properties which formed part of the residuary estate of the testator, Max Cohen: "(. . . each of which was "specifically devised by the said will of the testator) for the "purpose of discharging the liabilities of the estate of the "testator . . ."

It appears from an affidavit sworn on behalf of the plaintiff bank that, by reason of the insufficiency of the other assets, it became necessary to dispose of the debts by selling some of these properties, and, accordingly, the bank sold No. 3 Cavendish Place, Brighton, No. 41 Brunswick Terrace, Hove, No. 198 Portland Road, Hove, and No. 61 Holders Hill Avenue, Hendon, in 1953, and the proceeds of sale were used to pay the debts of the testator. All six of the properties had been specifically bequeathed by the will of Mrs. Rebecca Cohen to various beneficiaries. No. 3 Cavendish Place, Brighton, and No. 61 Holders Hill Avenue, Hendon, were devised to Lily Rosen; No. 252 Kingsland Road, London, to Maurice Rosen; No. 41 Brunswick Terrace, Hove, and No. 198 Portland Road, Hove, to Edith Katz; and No. 37 Hampton Place, Brighton, to Pamela Katz.

I have read the first half of the question, and it seems to me there is no doubt whatever that the executors were entitled, in the course of administration, to sell any of those properties the

[1] [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89.

[2] [1958] Ch. 877; [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102.

[3] [1933] Ch. 847.

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proceeds of sale of which were required for the payment of the testator's debts, but there is another, and, it seems to me, quite distinct, question: The properties having been sold in this way, do the beneficiaries under Rebecca's will lose all right to receive anything from the proceeds of sale, or does some equitable right arise? The bank seem to have taken the view that they lost all their rights, and the question is whether that was a correct view.

The second half of the question is: "... or whether such "liabilities ought to be treated as charged upon such respective "properties rateably ...," and then there is a question of value which remains to be considered later.

It would obviously be very hard on the persons whose properties were given to them by the will of Rebecca if the effect of some of the properties being sold by the executors was to deprive them of all rights, whilst leaving the other two properties available to the beneficiaries to whom they were bequeathed. There is another matter which arises and which slightly complicates the matter, and that is that by reason of the insufficiency or absence of any residuary estate of Rebecca all these properties will have to contribute to her debts and will have to abate. The properties which were sold by the bank, the executors of Max Cohen, were sold in 1953, and the other two properties were sold in 1954 and 1956. No. 252 Kingsland Road, London, apparently was not sold to pay debts of any sort, but it was merely sold at the time for the benefit of Maurice Rosen and because the property was in bad repair. The remaining properties which were sold in 1956 were apparently sold for the purpose of paying the debts of Rebecca Cohen.

The position is that the course of events which has happened may deprive some of the beneficiaries of any benefit under Rebecca's will unless there is some adjustment out of the funds which are available so that the burden falls equally upon all the persons who stood and stand to benefit not only under the will of the testator but also under the will of the testatrix, Rebecca, on exactly the same footing, and it certainly seems hard on those who will lose everything while others might get a reduced amount under the will of Rebecca. It seems to me this is a case in which the principles of equity ought to be applied. The matter is complicated by the fact that the bank were executors both of the testator's will and of Rebecca's will, and, of course, there is this observation to be made, that at the actual time when the properties were sold the individual properties were regarded as part of the estate of Rebecca Cohen contrary to the principle which was stated in the well-known case of *Attorney-General* v. *Sudeley*[4] decided by the House of Lords. Strictly speaking, Rebecca had no definite interest in any of the properties which she attempted to dispose of by her will, and a very curious, novel and unusual position arises for that reason. As I have said, this is a case in

[4] [1896] 1 Q.B. 354; 12 T.L.R. 224.

which equity ought to try and do justice by equality, and I can find authority which will justify me in applying that rule.

Mr. Wilberforce has called my attention to *Tombs* v. *Roch*,[5] decided in 1846: the facts were not the same as the facts in this case, but Knight-Bruce V.-C., came to the conclusion in that case that the amount necessary to complete the payment of the specialty debts must be contributed rateably by the specific legatees and devisees. After saying[6] that this was a question of "... contribution, which, if it differs from marshalling, does "so in species rather than generically, in form rather than in "nature," the Vice-Chancellor went on to say[6]: "I should thus "express myself had *Aldrich* v. *Cooper*[7] not existed; but I may "add, that, cautious and measured as was the language in which, "generally, and in that case especially, Lord Eldon spoke, he "would not, in my judgment, have used the words, 'they shall "'not disappoint another person, who the testator intended "'should be satisfied,' 'as strong an inclination of the testator,' "and 'that denotation of intention,' had he taken a different "view. It is equally unnecessary, I think, to refer to what Lord "Hardwicke (in 1751) is reported as saying: 'The court will order "'it so that everybody may have satisfaction, and the whole "'intention complied with.'"

There is a note in volume 14 of Halsbury's Laws of England, 3rd ed., at p. 611, note (*g*), which seems to me to support the same principle. I am referring to the authority quoted in the note rather than to the article in the volume. In note (*g*) it is stated: "*Aldrich* v. *Cooper*,[8] *per* Lord Eldon L.C. ('A person having two "'funds shall not by his election disappoint the party having only "'one fund; and equity, to satisfy both, will throw him, who has "'two funds, upon that which can be affected by him only, to "'the intent that the only fund to which the other has access "'may remain clear to him')." That, of course, is not this case.

The next passage, which is a quotation from the book written by the famous American jurist, Professor Story, is in these terms: "'... In the sense of a court of equity, the marshalling of "'assets is such an arrangement of the different funds under "'administration as shall enable all the parties having equities "'thereon to receive their due proportion, notwithstanding any "'intervening interests, liens, or other claims of particular per-"'sons to prior satisfaction out of a portion of those funds' "(Story's Equity Jurisprudence, s. 558)."

Therefore, it seems to me, the principle which I ought to apply in the present case, namely, that equity will attempt to do justice among all the beneficiaries on an equal footing, is clearly recognised both by Lord Hardwicke and by Professor Story, and supported by Lord Eldon and by Knight-Bruce V.-C. Consequently, in the present case, the beneficiaries ought to bear the

[5] (1846) 2 Collyer 490.
[6] Ibid. 502.
[7] (1803) 8 Ves. 381.
[8] Ibid. 395.

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burden of the debts which were taken out of the proceeds of sale of some only of the properties equally and rateably among them, and in the same way they will have to abate rateably for the purpose of claiming under the testatrix's estate.

Argument was then addressed to the court on question 6, the cases therein cited being referred to in the judgment.

DANCKWERTS J. I have dealt with question 5; and question 6 raises a similar question of contribution, really, as between the specific devisees under the testatrix's will, and the question of contribution for payment of the debts of the testatrix.

The authorities seem to be inclined one way, so far as I can see, so far as the question of contribution for the purpose of paying debts is concerned, namely, *Fielding* v. *Preston*[9] and *In re John.*[10] The answer seems to be that the probate value, the value of the property to the testator, must be taken. Consequently, it seems to me that, for the purpose of paying debts, their contribution, in the case of the estates of both the testator and the testatrix, must be on the basis of the probate value.

These properties were sold, of course, for certain sums, and the question which arises under question 6 is whether they should abate for the purpose of the funds which the beneficiaries receive in the form of cash according to the probate values of the properties in question, or whether they should abate having regard to the sums at which the properties were, in fact, sold. That does not appear to be covered by any authority, but it seems to me that if they contribute on the basis of the probate value they ought to abate on the basis of the probate value; otherwise very odd results would occur, and, accordingly, it seems to me that I ought to answer question 6 in the same way—probate value.

As to questions 3 and 4, question 3 appears to me now to be put an end to, and it will be only question 4 that will go back to chambers.

Order accordingly.

Solicitors: *Haslewoods for Bosley & Co., Brighton; Alfred Bieber & Bieber; Gilbert Samuel & Co.*

K. R. A. H.

[9] (1857) 1 De G. & J. 438. [10] [1933] Ch. 370.

[CHANCERY DIVISION.]

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Oct. 13.

HARRIS *v.* YARM.

Roxburgh J.

Solicitor—Costs—Taxation—Charging order—Application for order on funds in court—Application more than twelve months after delivery of bill of costs—Jurisdiction to order taxation—Whether taxation

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

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may be ordered at any time—Whether special circumstances—"At "any time"—Solicitors Act, 1957 (5 & 6 *Eliz.* 2, *c.* 27), *ss.* 69 (2) *proviso* (*i*), 72.

A summons was taken out by the solicitors to the plaintiff in a partnership action for a charging order upon a moiety of the funds in court to the credit of the action for the balance of a bill of costs delivered to the plaintiff. More than twelve months had expired since the delivery of the bill. The master made the charging order as asked but, notwithstanding the provisions of section 72 of the Solicitors Act, 1957,[1] did not order that the costs should be taxed, as he did not think the plaintiff had shown any special circumstances for the granting of such an order as provided by section 69 (2) proviso (i) of the Act[1]:—

Held, that section 72 of the Act was not subordinate to section 69 but that the words "at any time" in section 72 meant that the court might make an order for taxation at any time and, provided that the right to recover the costs was not barred by any statute of limitation, the jurisdiction to make such an order was not restricted, in the absence of special circumstances, to twelve months after the delivery of the bill.

ADJOURNED SUMMONS.

The plaintiff in a partnership action, Mrs. Betty Harris, and the defendant, Mrs. Paulette Yarm, carried on a business under the name of "The Can Can Coffee Bar." During negotiations for the sale of the defendant's interest in the partnership to the plaintiff a sum of £100 was handed by the plaintiff to her solicitors for the special purpose of paying to the defendant the deposit on the proposed sale. The proposed sale miscarried and a receiver was appointed who eventually sold the business to two persons named Chapman and Maclean. As from May 19, 1955, the date of the completion statement in relation to the sale, the special purpose for which the £100 was entrusted to the solicitors was at an end and they held the money to the order of the plaintiff. The solicitors retained the £100; they did not write to the plaintiff and tell her that they were going to retain it as security for their costs, although, in a subsequent letter to the Law Society, they

[1] Solicitors Act, 1957, s. 69: "(1) On the application, made within "one month of the delivery of a "solicitor's bill, of the party chargeable therewith, the High Court "shall, without requiring any sum to "be paid into court, order that the "bill shall be taxed and that no "action shall be commenced thereon "until the taxation is completed. "(2) If no such application is made "within the period mentioned in the "last foregoing subsection, then, on "the application either of the solicitor "or of the party chargeable with the "bill, the court may, . . . order— "(*a*) that the bill shall be taxed; ". . . Provided that—(i) if twelve "months have expired from the "delivery of the bill, . . . no order "shall be made on the application of "the party chargeable with the bill "except in special circumstances. ". . ."

S. 72: "Any court in which a "solicitor has been employed to "prosecute or defend any suit, "matter or proceeding may at any "time declare the solicitor entitled to "a charge on the property recovered "or preserved through his instrumentality for his taxed costs in "reference to that suit, matter or "proceeding, and may make such "orders for the taxation of the said "costs . . . as they think fit . . . "Provided that no order shall be "made if the right to recover the "costs is barred by any statute of "limitations."

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stated that they had agreed with the plaintiff that the £100 should be treated as security for costs.

The solicitors' costs in relation to the sale were included in the receiver's account but were disallowed by the master on March 16, 1956. The solicitors did not render to the plaintiff a bill of costs in relation to the sale, but prepared a bill in relation to the partnership action which they sent to the plaintiff on September 27, 1956, with a letter which read: "Dear Madam, "Yourself *v.* Yarm. Having regard to the series of unpleasant "incidents to which we have been subjected, we have taken the "trouble of having drawn by an independent costs draftsman a "detailed bill of costs on a solicitor and client basis as against "yourself in the above proceedings. We enclose it to you here-"with. You will observe that it totals £244 19s. 2d. The bill, "you will note, does not take into account any costs to us in "connection with the sale of the business, and we reserve the "right in due course to carry in a bill to you in respect thereof. ". . . At the same time may we take the opportunity of remind-"ing you that in the Theodorou matter you have ignored our "most recent communication. . . . We did offer, we think "generously, to meet you substantially on agreement of costs. "We are still willing to renew our offer, but it must be upon the "basis that you will guarantee to us that we will not be subjected "either by you, your son-in-law, your husband or any other party "to the insults and embarrassments of the nature which has been "our experience in the past. You are entitled to credit for the "sum of £100 received by us from you at the outset of this "litigation."

The plaintiff took out a summons asking that the funds in court to the credit of the action be paid as to one-half to each of the parties; and the solicitors took out a summons asking for a charging order on the plaintiff's moiety of the funds for the balance of the bill delivered to her on September 27, 1956, after allowing for the £100. Master Hawkins made a charging order in the solicitors' favour, but did not think it necessary to order taxation, and the summons was adjourned to the judge at the plaintiff's request.

The plaintiff appeared in person.

E. J. T. G. Bagshawe for the solicitors.

The following cases, other than that referred to in the judgment, were cited in argument: *Higgs* v. *Higgs* [2]; *In re Clayton*.[3]

ROXBURGH J. referred to the facts and read the letter dated September 27, 1956, and continued: In my view, there are two special circumstances. There is the £100 and there is the reservation of the right to carry in a bill in relation to a matter

[2] [1934] P. 95; 50 T.L.R. 313.

[3] [1940] Ch. 539; 56 T.L.R. 512; [1940] 2 All E.R. 233.

intimately connected with the action. The bill has not yet been delivered, but the right is still being kept on foot.

I do not know whether the guarantee referred to in the letter is limited to the Theodorou matter or whether it is not, nor would it sound unreasonable if it was limited to the plaintiff or her husband and possibly her son-in-law; but how could it possibly be right to expect her to give some indemnity against any other party, which I suppose means anybody in the whole world? I do not think that a solicitor ought ever to ask for anything in those wide terms. I am not concerned with professional misconduct or with negligence, and I am not saying that to do that is either of those things, but I do not think that that is the normal way in which solicitors conduct their business, and, therefore, it would be a special circumstance.

The story can be told in the words of the master: "On April "28, 1959"—I am now reading from the master's note to me— "the plaintiff filed a notice of intention to act in person in place "of Messrs. Bieber & Bieber, who had been her solicitors through- "out the proceedings. Shortly after this the plaintiff issued a "summons asking that the funds in court"—those, of course, were what was realised in the partnership action—"be paid as "to one-half to each of the parties and that the proceedings be "stayed. That summons came before me on May 27, 1959. At "the same time I had before me the present summons issued "by Messrs. Bieber & Bieber, asking for a charging order upon "a moiety of the funds for the sum of £144 19s. 2d., being "the balance of a solicitor and client bill of costs of this action "delivered to the plaintiff on September 27, 1956, after allowing "for £100 received at the beginning of the litigation. . . . The "plaintiff eventually filed the evidence sent herewith, but it "appeared to me that Messrs. Bieber & Bieber were entitled to "the order asked for, and I accordingly proposed to make a "charging order in their favour in the terms of the summons."

The master then referred to section 69 (2) (*b*) (i) of the Solicitors Act, 1957, and said: "I did not think that the plaintiff "had shown any special circumstances." He then cited section 72, and said: "I did not think it necessary, notwithstanding a "reference to 'taxed costs' in section 72, to have the costs taxed "having regard to the provisions of section 69."

Therefore, the question before me is whether the master ought to have directed a taxation of the costs of the action as between a solicitor and his client, or whether he ought to have directed that the specified sum of £144 19s. 2d. should be charged on a moiety of the fund in court, which is a pure question of law, except in so far as the question of what are special circumstances does depend, as many judges have said hitherto, on the facts of each case.

I regret to say that I think that the master was wrong. Section 72 of the Solicitors Act, 1957, provides: "Any court in

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" which a solicitor has been employed to prosecute or defend any " suit, matter or proceeding may "—a great many judges have held that that word means " may " and imports a complete discretion, and so far as that is concerned the law is quite clear; but now come some very important words, on which I think there is no existing authority—" at any time declare the solicitor entitled " to a charge on the property recovered or preserved through his " instrumentality "—and I am quite prepared to treat this moiety of the fund in court as answering that description—" for his taxed " costs in reference to that suit, matter or proceeding, and may " make such orders for the taxation of the said costs and for " raising money to pay, or for paying, the said costs out of the " said property as they think fit, and all conveyances and acts " done to defeat, or operating to defeat, that charge shall, except " in the case of a conveyance to a bona fide purchaser for value " without notice, be void as against the solicitor: Provided that " no order shall be made if the right to recover the costs is barred " by any statute of limitations."

Though there is no authority on the point, there is nothing anywhere to suggest that section 72 is in any way subordinate to section 69. There is nothing in the Annual Practice nor in any of the reported cases to suggest that. The words " at any time " were not in the Act of 1860 and were introduced into the Solicitors Act, 1932. In my view, they must mean what they say—at any time—provided that the right to recover the costs is not barred by any statute of limitations, and that operates both for and against solicitors. In one of the reported cases [*In re Born* [1]] it operated for solicitors who had been very dilatory; in another case (indeed, in this case) it will operate in favour of a client who undoubtedly has been very dilatory.

I cannot see how section 69 could be paramount to section 72, because section 72 says that the court " may make such orders " for the taxation of the said costs," and those costs are the costs of the action. To say that the court may make orders for taxation of the costs of the action at any time, provided that the statute of limitations does not intervene, is quite inconsistent with the hypothesis that it cannot make them after 12 months " except in special circumstances." The two things cannot stand together. The point really seems to me to be clear.

This is a point of law affecting the whole of the profession of solicitors. I have had a very careful argument from Mr. Bagshawe; it is a short point, and I cannot see it. It seems to me that it is entirely a matter of discretion.

Looking at the case as a whole, taking into account those things which I have already said are special circumstances, and taking into account a great many things which may or may not be special circumstances, but certainly afford a background to the picture, the general way in which the solicitor has conducted

[1] [1900] 2 Ch. 433.

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the matter, not yet having delivered his final bill of costs for something which was finished many years ago, his obvious distaste for the client, her obvious distaste for him, and every possible feature showing how unfortunate the relations between the solicitor and his client were, I certainly exercise my discretion (which I believe to be quite unfettered, except by those rules by which every judicial discretion is fettered) in favour of ordering the charge to be for such sum as shall be found on taxation to be due to the solicitor.

What I propose to do is to declare that the solicitor is entitled to a charge on the moiety of the fund in court for his taxed costs in reference to the partnership action, and order taxation accordingly.

I have already said that in my judgment section 69 has nothing whatever to do with the matter, but if I am wrong in that, in my judgment there are special circumstances in this case, and I have endeavoured to indicate what, in my opinion, the special circumstances are; in other words, even if section 69 does apply, I consider that, in the special circumstances, I am entitled to make the order which I have made.

Order accordingly.

Solicitors: *Alfred Bieber & Bieber.*

[COURT OF APPEAL.]

LONDON LIBRARY *v.* CANE (VALUATION OFFICER) AND OTHERS.

C. A.

1959 *Oct.* 12, 13, 14; *Nov.* 4.

Hodson and Ormerod L.JJ. and Wynn-Parry J.

[LVC/1583/1957.]

Rates and Rating—Science, literature or fine arts—Exemption—Library incorporated by Royal Charter—Subscribing members entitled to borrow books for private study—Annual receipt of donations of money and books and of legacies—Whether instituted for purposes of literature exclusively—"Annual voluntary contribution"—Meaning—Whether supported in part by voluntary contributions—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The London Library, which was founded in 1841 and incorporated by Royal Charter in 1933, was a collection of books of literary merit or of value to scholars and students. The members, who paid an annual subscription, were entitled to take books away for perusal at home. The rights conferred on members in general were strictly personal and could not be assigned, but certain members were permitted to act as representatives of certain interested bodies, such as government departments or educational establishments, and the books borrowed by such members might be perused in such establishments by persons interested. The bulk of the library's income was provided by the members' annual subscriptions, but in each year there were extraneous receipts in the form of cash donations, legacies, and gifts of books, amounting in recent years to from $2\frac{1}{2}$ per cent. to 6 per cent. of the total

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receipts. Since 1877 the library had enjoyed the benefit of de-rating under section 1 of the Scientific Societies Act, 1843, as a body "instituted for purposes of science, literature, or the fine arts "exclusively," and "supported wholly or in part by annual "voluntary contributions."

The Lands Tribunal held that the library did not qualify for exemption under either limb of the section; in particular, it was held that legacies received in different years from different testators were not "annual" contributions, while gifts of books must be excluded from consideration. On appeal:—

Held, dismissing the appeal, (1) that the library was not instituted for the purposes of literature exclusively, as the whole scheme was for the supply of books to members for such use as members chose to make of them, whether for their own instruction or enjoyment or the passing on of the fruits of their study to the public at large.

Birmingham Churchwardens v. *Shaw* (1847) 10 Q.B. 868 not followed.

Inland Revenue Commissioners v. *Forrest* (1890) 15 App.Cas. 334 and *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 434, 462; 65 T.L.R. 103, 183; [1949] 1 All E.R. 21 applied.

(2) (post, p. 937). That annual voluntary contributions are voluntary contributions which the society may reasonably expect to receive year by year and upon which it may reasonably rely wholly or in part for the provision of the necessary annual expenditure. In considering whether contributions are annual, it is the receiver who must be considered, and legacies may come to a society with sufficient frequency to justify it in looking to them year by year as probable revenue. In the case of a society such as the library, gifts of books, which helped it year by year to fulfil its purpose, could properly be regarded as contributions within the section (post, p. 938).

Dictum in *Mayor of Liverpool* v. *West Derby Union* (1905) 69 J.P. 277 disapproved.

(3) That the receipts from donations, legacies and gifts of books, though qualifying as "annual voluntary contributions," were in the material years before the proposal too small in proportion to the total receipts to justify consideration as a partial contribution to the support of the library.

Metropolitan Borough of Battersea v. *British Iron and Steel Research Association* [1949] 1 K.B. 434; 65 T.L.R. 183 applied.

Appeal from the Lands Tribunal.

The London Library was founded in 1841 by Thomas Carlyle and other literary persons for the purpose, as stated in the Royal Charter of Incorporation granted in 1933, of supplying "the great "want in London of a library embracing every department of "literature and philosophy and from which books might be taken "for use by members in their own homes."

Some 5,000 members paid annual subscriptions, and were permitted to remove books to their own homes; their rights were personal, and could not be assigned or shared, except that certain members were permitted to act as representatives of bodies, such as government departments or educational establishments, and were permitted to allow the books which they borrowed to be used by the bodies which they represented.

Since 1877 the library had enjoyed exemption from rating under section 1 of the Scientific Societies Act, 1843, but in January, 1957, the local valuation officer made a proposal that the library's premises in St. James' Square, Duke Street, and Mason's Yard should be rated. This proposal was resisted on the ground that the library was a " society instituted for the purposes " of literature exclusively," and was " supported wholly or in part " by annual voluntary contributions."

Ever since its inception the library had restricted itself to the purchase of serious books. The purchasing was initially in the hands of the librarian, himself a professional man of letters, who could have recourse to the views of a committee of eminent scholars and men of letters. The emphasis was on the purchase of books of literary merit or of value to scholars; books of ephemeral interest were not purchased, nor were textbooks on specialised subjects unless they had literary qualities and were intelligible to well-educated laymen. The bulk of the subscribing members were scholars, students, university professors, and the like. The president of the library, the well-known author T. S. Eliot, testified to the benefit which he had received when a young man from his membership of the library, which enabled him to study literature at home in the evenings after a day's work in business.

There were put in evidence accounts in respect of a number of years before the date of the proposal; these indicated that while the bulk of the income was provided by the annual subscriptions, a certain amount was received each year from cash donations, legacies, and gifts of books; such books, if suitable for the library, were retained; if unsuitable, they were sold. Over the five years preceding the proposal the sum of these receipts varied from 2½ per cent. to 6 per cent. of the total annual receipts.

The proposal was confirmed by the Local Valuation Court; an appeal to the Lands Tribunal was dismissed. The tribunal held that the library was not " instituted for the purposes of literature " exclusively " as the whole scheme was to supply books to members for such purposes as they thought fit, whether literary or otherwise; the tribunal further held that the library was not " supported in part by annual voluntary contributions " in that legacies, received in different years from different testators, could not be regarded as " annual," while gifts of books, as opposed to gifts of money, must also be excluded from consideration.

The library appealed.

Geoffrey Lawrence Q.C. and *Frank Stockdale* for the library.

J. P. Widgery Q.C. and *Patrick Browne* for the valuation officer.

Reginald W. Bell for the local rating authority, the Westminster City Council.

The following cases which were cited in argument are not

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referred to the judgment: *Russell Institution* v. *Vestry of St. Giles* [1]; *Purchase* v. *Churchwardens of Holy Sepulchre* [2]; *Bradford Library* v. *Bradford Churchwardens* [3]; *Liverpool Library* v. *Liverpool Corporation* [4]; *Plymouth Proprietary Library* v. *Blackman (Valuation Officer)* [5]; *Overseers of the Savoy* v. *Art Union of London* [6]; *Royal Academy of Dancing* v. *Kerridge* [7]; *Moss' Empires Ltd.* v. *Inland Revenue Commissioners* [8]; *In re Duty on Estate of New University Club*.[9]

Cur. adv. vult.

November 4. HODSON L.J. The judgment that I am about to read is the judgment of the court.

The question in this appeal is whether the London Library is liable to be assessed for the purpose of rating or whether it is exempt from rates under the provisions of the Scientific Societies Act, 1843. Section 1 of the Act, so far as material to this appeal, is as follows: "No person or persons shall be assessed or rated, "or liable to be assessed or rated . . . in respect of any land, "houses, or buildings . . . belonging to any society instituted for "purposes of science, literature, or the fine arts exclusively . . . "provided that such society shall be supported wholly or in part by "annual voluntary contributions . . ."

The proposal for rating of the London Library was made on January 24, 1957, and the assessment was confirmed on August 21, 1957, by the local valuation court for Central London. The appeal by the London Library to the Lands Tribunal was dismissed on July 29, 1958, by the president, from whose decision this appeal is brought.

The history of the library is fully set out in the decision of the Lands Tribunal and need not be repeated. It has, in fact, for many years been exempt from rates on the ground that it is instituted for the purposes of literature exclusively and fulfils the other requirements of the Act of 1843.

The appellants contend that while it is clear that the object of the library must be exclusively for the enhancement, promotion and dissemination of literature, the fact that the members pay an annual subscription does not destroy the exclusiveness of the objects. They submit that the means employed by the library for attaining those objects do not disqualify provided the means, as they say is the case of those employed by the library, do not amount to a distinct collateral object.

A number of cases decided in the middle of the last century were cited in support of the contention that the London Library was not disqualified by reason of its having a collateral object in addition to the object of the promotion of literature. These

[1] (1854) 3 E. & B. 416.
[2] (1855) 4 E. & B. 156.
[3] (1858) 1 E. & E. 88.
[4] (1860) 5 H. & N. 526.
[5] (1957) 50 R. & I.T. 334.
[6] [1896] A.C. 296; 12 T.L.R. 377.
[7] (1958) 51 R. & I.T. 267.
[8] [1937] A.C. 785; [1937] 3 All E.R. 381.
[9] (1887) 18 Q.B.D. 720.

authorities begin with *Birmingham Churchwardens* v. *Shaw*,[1] where the question at issue was never challenged, followed expressly in 1851 in *The Queen* v. *Overseers of Manchester*.[2] In the same volume of the Queen's Bench reports there are also *The Queen* v. *Brandt*[3]; *The Queen* v. *Gaskell*[4]; and *The Queen* v. *Cockburn*.[5] In the same year there was the case of *Earl of Clarendon* v. *Churchwardens of the Parish of St. James*,[6] which related to the London Library itself.

In all these cases (except that of *Brandt*) the court found itself bound by the *Birmingham* case, which is scarcely distinguishable from the present, to come to a conclusion which would be favourable to the appellants here.

On the other hand, there are passages in the earlier cases which lead one to the conclusion that the attention of the court was not always focused on the word "exclusively" in the statute. Compare Lord Campbell's observations in the *Manchester* case[7] to the effect that the members seemed not to have for their "chief" object their own recreation and amusement. In the *Brandt* case[8] he referred to the "principal" object which the members had in view, although in *Cockburn's* case,[9] the last of the series, he referred to the fact that the statute had anxiously introduced the word "exclusively" both into the preamble and the enactment.

If there was any misconception about the effect of the statute it was laid at rest by the House of Lords in *Inland Revenue Commissioners* v. *Forrest*.[10] Lord Watson, referring to section 1 of the Act of 1843, said: "Then it is not sufficient compliance with "the plain language of the Act that a society be established "chiefly for the purpose of promoting science, literature or the "fine arts. One or other of these must be its exclusive object; "so that an institution which also contemplated some other, "though altogether subsidiary object, could not claim the benefit "of the exemption."

The principle there stated has been enunciated clearly in this court in the case of *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[11] where Denning L.J. used the following words: "There is one thing which is clear both on "the wording of the statute and on the cases. The word "'exclusively' must be given its full effect. It is not sufficient "that the society should be instituted 'mainly' or 'primarily' "or 'chiefly' for the purposes of science, literature or the fine "arts. It must be instituted 'exclusively' for those purposes. "The only qualification—which, indeed, is not really a qualifica- "tion at all—is that other purposes which are merely incidental

[1] (1847) 10 Q.B. 868.
[2] (1851) 16 Q.B. 449.
[3] Ibid. 462.
[4] Ibid. 472.
[5] (1852) Ibid. 480.
[6] (1851) 10 C.B. 806.
[7] 16 Q.B. 449, 458.
[8] Ibid. 462, 468.
[9] Ibid. 480, 491.
[10] (1890) 15 App.Cas. 334, 348; 6 T.L.R. 456.
[11] [1949] 1 K.B. 434, 467; 65 T.L.R. 183; [1949] 1 All E.R. 21.

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" to the purposes of science and literature or the fine arts, that is, " merely a means to the fulfilment of those purposes, do not " deprive a society of the exemption. Once, however, the other " purposes cease to be merely incidental but become collateral; " that is, cease to be a means to an end, but become an end in " themselves; that is, become additional purposes of the society; " then, whether they be main or subsidiary, whether they exist " jointly with or separately from the purposes of science, litera- " ture or the fine arts, the society cannot claim the exemption. " That is, I think, made quite clear by the opinions of Lord " Watson and Lord Macnaghten in *Inland Revenue Commis-* " *sioners* v. *Forrest.*" [12]

There is no real dispute between the parties as to the approach to the problem, and it is recognised that in so far as the society serves individual members, it must do so incidentally and not as an end in itself in order to claim exemption.

The only question is whether on the true construction of the charter the appellants can contend that the object of the library is literature exclusively, for no question here arises of activities of the society outside the scope of the charter. The charter recites: " That the association or society now existing and known " as the ' London Library ' was established in the year 1841 by " Thomas Carlyle and other eminent persons under the patronage " of H.R.H. the late Prince Consort to supply the great want in " London of a library embracing every department of literature " and philosophy and from which books might be taken for use by " members to their own homes."

Reference to the by-laws, which again are set out in full in the decision of the president, shows that the advantages of the society are restricted to members. No doubt, since many of the members are corporate bodies, through those bodies a large number of persons other than individual members may have access to the volumes of literature contained in the library, but the tangible benefits of the library are restricted to the members themselves. The relevant findings of fact contained in the president's decision are as follows: " What then is the true purpose of this library? " I think the answer is to be found in the first paragraph of the " charter: ' . . . a library embracing every department of litera- " ' ture and philosophy and from which books might be taken for " ' use by members to their own homes.' And the provision " imposed by the library ' A member's rights are personal and " ' cannot be assigned or shared.' All the evidence confirms that " in their use of the hereditament the society has rigorously " adhered to the terms of their charter and has ensured the prac- " tical application of those terms by their by-laws and circulars " to members and prospective members. In no place in either " the by-laws or circulars is any concern displayed by the society " as to what use the members should make of those books except

[12] 15 App.Cas. 334, 348, 354.

" of course to return them in good condition. In the hands of " some members the books may be the means of disseminating " the priceless gifts of literature to the general public. That " may be, indeed probably is, the pious hope of the committee " but it is not the main aim of the committee; that aim, as I see " it, is to supply the books to the members for use as those " members see fit, be that use their own personal gratification or " the passing on of the fruits of their literary genius to the general " public. If I have thus correctly interpreted the charter and by- " laws, and the actual activities of the society as disclosed by the " evidence, how can I say that the primary purpose is not the " convenience of its members? "

As the president pointed out, the books may, in the hands of some members, be the means of disseminating literature to the public. At the same time, this is not the object of the society, which, though it may be said to be instituted for the purposes of literature, cannot be said to have been instituted for this purpose exclusively, when the whole scheme of the charter and by-laws made thereunder from which the society has never strayed is that the books of the library are to be supplied to members for such use as the members choose to make of them, whether it be their own instruction or enjoyment, or the passing on of the fruits of their study to the public at large. In view of the president's findings of fact as to the activities of the society, which are, we think, plainly within the terms of the charter correctly construed by him, the appellants cannot succeed.

We find ourselves in agreement with Eve J. in the case of *In re Prevost*,[13] in a passage which was material to the conclusion which he reached in the matter under his consideration, when he said of the London Library " that the library is not a charity but " an institution for mutual benefit."

Accordingly, we cannot hold that the benefits to the members are not the object of the library, and can be treated as if they were no more than incidental to the object of literature.

The president has held further that the London Library was not supported wholly or in part by " annual voluntary contribu- " tions," and we have been asked to deal with this topic also, although we agree with his view on the first part of the case.

If a society is to be exempt from rating under section 1 of the Scientific Societies Act, 1843, it must satisfy the court that it is supported wholly or in part by annual voluntary contributions. This society has submitted that it is so supported, and has submitted figures of its income from all sources for the 10 years prior to January 28, 1957, the material date. The president was of the opinion that only a small part of the amount submitted could be regarded as derived from annual voluntary contributions, and that the proportion of these to the total income of the library was too small to be considered to be partly supporting the society.

[13] [1930] 2 Ch. 383, 386.

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There was really no dispute between the parties as to whether the sums contended for by the society supported the society, provided that they were sufficiently large, or whether they were voluntary. For the law on these matters reference was made to *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association*,[14] where Denning L.J. said: "A society is "only supported in whole or in part by voluntary contributions "if it has to rely on them for the continuance of its work. The "sum of £2,000 is too small a proportion of the whole income "(£99,474) to enable that inference to be drawn." Jenkins J. in the same case said[15]: "The substance of each case must be "looked at to see whether the payments claimed to be voluntary "contributions are in substance made as a matter of business or "as a matter of bounty." Later on the same page he goes on to say: "A reasonable construction must be placed on the section, "and I think it requires that the association should be dependent "for its support either wholly or to something more than a "merely nominal extent on voluntary contributions." Somervell L.J., in *Nonentities Society* v. *Linley*,[16] cited these passages and went on to say: "I am not saying that that, or perhaps any "possible construction of the statute, leaves a very easy or "satisfactory issue of fact to be determined by the tribunal of "fact, but it does, I think, decide that the voluntary contribu-"tions must be a substantial element in the finance of the under-"taking, and it also lays down that it is to be decided prima "facie by a comparison between the amount of the voluntary "contributions and the gross income of the undertaking." Whether such a proportion is "substantial" may again be a difficult question of fact. Mr. Lawrence has submitted that the proviso is satisfied if the contributions are not so small as to come within the "de minimis" rule, and we think that a reasonable statement of the principle laid down by Denning L.J. and Jenkins J., and accepted by Somervell L.J.

The chief discussion on this part of the case was whether many of the payments, for example legacies, submitted for consideration by the appellants could come within the description of "annual." It was submitted by the appellants, both before this court and before the tribunal, that the word "annual" should be interpreted as applying to the receiver as well as to the giver. Mr. Widgery, on behalf of the valuation officer, accepted this view to some extent, but submitted that annual contributions must have the quality of being recurrent, or be capable of being recurrent, although not necessarily from the same source. He submitted that legacies, for instance, described by the president as "once "for all" payments, could not come within the definition if his submission was right. Mr. Bell, on behalf of the respondent authority, supported the stricter view that "annual" should apply to the giver only, that a contribution should be one the

[14] [1949] 1 K.B. 434, 462; 65 T.L.R. 183; [1949] 1 All E.R. 21.
[15] [1949] 1 K.B. 434, 457.
[16] (1954) 47 R. & I.T. 426, 428.

annual recurrence of which from the same source might reasonably be expected. The president accepted this last view. He said: "It seems to me that where the section refers to 'annual voluntary contributions' it means annual by the contributor." We do not feel able to accept this view.

In our judgment, the receiver must be considered when deciding whether contributions are annual. There are many ways in which a society may be voluntarily supported. It may, in the first place, be founded and endowed by the provision of a fund, by a single benefactor or otherwise, the interest on which is enough to provide for its continued support. Such support, in our view, would be outside the scope of the definition. On the other hand, it may look for support, not only to regular annual subscriptions, but to the proceeds of street collections, and the many other ways of raising money for charities and similar organisations. It may well be that legacies of varying amounts are left to the society from time to time. Clearly, a legacy will come only once from a particular person, but legacies may come to a society with sufficient frequency to justify it in looking to them year by year as probable revenue. We are not, of course, considering legacies of large sums which the tribunal might think should properly be regarded as capital endowment. Annual voluntary contributions are, in our judgment, voluntary contributions which the society may reasonably expect to receive year by year, and upon which it may reasonably rely wholly or in part for the provision of the necessary annual expenditure of the society.

The appellants produced to the tribunal a schedule showing the sums which it was contended should be treated as annual voluntary contributions. The figures produced were for the 10 years prior to the material date, and a yearly average was taken and compared with the yearly average of the total revenue. This showed a percentage which the appellants contended was sufficient to show that they relied on these payments for partial support. It was submitted by Mr. Widgery that to take an average was not the method best designed to give a true picture of the position. He contended that the figures should be examined for the years immediately prior to the material date to see whether in each of these years there were voluntary contributions sufficient to be taken into consideration, and that, unless there were such payments, the society should not have the benefit of the section. It did appear from the figures submitted by the appellants that the five years prior to the material date showed a reasonably consistent pattern, and we were of the opinion that the proper way to approach the matter was to consider the figures for these five years in the manner submitted by Mr. Widgery.

There were, however, three other items of figures which the appellants contended should be included in the calculation of

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annual voluntary contributions. One item was a proportion of investment income attributable to funds created by legacies, and the second was for a proportion of rental relief attributable to donations and legacies of members applied to building costs. Neither of these items could, in our view, be included, as they could not in any way be regarded as annual contributions. The third item, however, was in a different category. It appears that the society receives annually gifts of books from publishers and other persons. These are considered by the librarian, and the ones he thinks suitable for the library are retained and the remainder sold. The estimated average value of these gifts for the three years prior to the material date was £700, and the appellants claimed that this sum should be included in the sum of annual voluntary contributions. The president said that he found it difficult to distinguish between a gift of books and annual sums of money for the purchase of books, but considered himself bound by the decision of the Divisional Court in the case of *Mayor of Liverpool* v. *West Derby Union*,[17] where Kennedy J. said: "To treat a "gift of books to an institution as a voluntary contribution would "hardly seem to me to come within the fair meaning of the Act." We do not feel able to accept that view. The library exists, as its name implies, as a collection of books for use in the manner prescribed by its charter. In order properly to fulfil its purpose it must be kept up to date by buying new books as they are published, provided, of course, that they come within the classification of books with which the library is concerned.

We are unable to see why gifts of this kind, which help the library year by year to fulfil its purpose, should not be regarded as contributions because they are gifts in kind and not in money. It may be, of course, that a gift might be made to the library of a rare book of great value. It is not suggested that this has occurred in the years under consideration, and it is unnecessary, therefore, to express a view upon it, except to say that a gift in such a case might in certain circumstances be regarded rather in the nature of a capital endowment than a contribution to which the society might look for its partial support year by year.

It appears then on the facts before the court that the sums the appellants are entitled to regard as annual voluntary contributions are (a) donations of money, (b) legacies, and (c) gifts of books. Treating the sum of £700 as the average sum to add to the income of the years 1952–53 and 1953–54 as well as to the three following years, the approximate percentages of the annual voluntary contributions for the five years from 1952–53 to 1956–57, both inclusive, appear to be 2½ per cent., 4 per cent., 3 per cent., 3 per cent. and 6 per cent. respectively. In our view, these sums, looked at year by year, are not sufficiently large to enable us to

[17] (1905) 69 J.P. 277, 279.

come to the view that they contribute partially to the support of the society.

The appeal, therefore, is dismissed.

Appeal dismissed; appellant to pay half the costs to each respondent; leave to appeal.

Solicitor: *Gedge, Fiske & Co.; Solicitor of Inland Revenue; Allen & Son.*

F. R. D.

[CHANCERY DIVISION.]

In re MORITZ, DECD.

1959
Nov. 3.

[1959 M. No. 1558.]

Wynn-Parry J.

Trust and Trustee—Proceedings by trustee against beneficiary—Practice—Application for directions whether to take proceedings against beneficiary—Whether proposed defendants entitled to be heard—Claim to see evidence—Bank executor.

The executor of a will took out an originating summons, to which all the residuary beneficiaries under the will were defendants, asking the court for directions whether they should take certain proceedings against two of the beneficiaries. The proposed defendants were supplied with copies of the affidavits filed on the originating summons but not with copies of the exhibits thereto. On an application by those defendants for an order on the executors' solicitors to supply them with copies of certain of the exhibits:—

Held, that where a trustee found himself compelled to ask for directions whether or not proceedings should be taken against a beneficiary, while it was proper and indeed necessary to join the parties against whom the proposed relief was sought, it was not the practice in the Chancery Division that those parties should be present in chambers when the matter was debated, and they should not be furnished with the evidence upon which the court was asked to act.

In re Kay's Settlement Trusts [1939] Ch. 329; 55 T.L.R. 332; [1939] 1 All E.R. 245 distinguished.

PROCEDURE SUMMONS.

On June 22, 1959, the Midland Bank Executor and Trustee Co. Ltd., the executor of the will of Martin Rudolph Moritz, deceased, took out an originating summons asking, inter alia, for directions whether it should or should not institute and prosecute an action against Ralph Gosler and Hilda Gosler, his wife, two of the beneficiaries under the will. All the beneficiaries under

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[Reported by Miss V. A. MOXON, Barrister-at-Law.]

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the will, including the proposed defendants, were joined as defendants to the summons. The proposed defendants were supplied with copies of the affidavits sworn on the originating summons but not with copies of the exhibits thereto. On October 22, 1959, the proposed defendants took out a summons asking that the plaintiff's solicitors be ordered to supply to them copies of certain of the exhibits. This summons was adjourned into court by the master for argument.

A. J. Balcombe for the proposed defendants.
John L. Knox for the trustee.
The other defendants did not appear and were not represented.

The following case, not referred to in the judgment, was cited in argument: *Sloane* v. *British Steamship Co. Ltd.*[1]

WYNN-PARRY J. This is a summons brought by two of the defendants to the originating summons, namely, the eighth and ninth defendants, that they should have an order on the plaintiff's solicitors to supply copies of certain exhibits forming part of the evidence in the case. The originating summons is taken out by the Midland Bank Executor and Trustee Co. Ltd. as plaintiff against nine defendants, of whom those who apply before me are the eighth and ninth, to put it shortly, to resolve a number of disputes which have arisen in the administration of the estate of the deceased. One of the questions which is asked by the bank in the originating summons is for directions as to whether certain proceedings, which I need not particularise, should be brought by the bank against the eighth and ninth defendants, who have, of necessity, been joined in the originating summons. In support of that particular application an affidavit has been sworn on behalf of the bank, and indeed certain allegations have been made against the eighth and ninth defendants. In support of those allegations a volume of exhibits has been filed.

Putting it shortly, the application of the eighth and ninth defendants is that at this stage they ought to be furnished with copies of those exhibits in order, as they say, to be put in a position to argue before the court whether or not the bank should be allowed to proceed with the action against them as to which the bank seeks directions. Speaking for myself, so far as I know, it has been the practice of this court, without exception, over a great many years, that where, in such a case as this, application is made by a trustee, ex necessis where there are disputes, for directions from the court as to whether or not proceedings should be brought against the defendants, those defendants are not entitled to be heard upon that application. The court acts upon such evidence as is placed before it and it expresses itself one way or the other.

[1] [1897] 1 Q.B. 185; 13 T.L.R. 124.

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Wynn-Parry J.

My attention, however, was drawn to the case of *In re Kay's Settlement*,[1] a decision of Simonds J., where the court decided in limine that proceedings should not be brought. But that was a case in which it appears quite clearly upon the facts that there was no dispute whatsoever as to the evidence in question. It all turned upon the right view to be taken of the voluntary settlement and the court was armed upon the face of it with all the evidence required to decide the question once and for all; and in that event Simonds J. decided that the action should not proceed. That appears to me quite a different case from the present case.

My attention was also drawn to the case of *In re Hinchliffe*,[2] in which the Court of Appeal laid down as a general rule that, if a document is made an exhibit to an affidavit, any person who has the right to take copies of the affidavit has a similar right in the case of the exhibits also. With that proposition one could not, of course, properly quarrel, but that does not deal in the least with the practice in Chambers in this Division. As I understand it, the practice in this Division is that where a trustee finds it is compelled to ask for the directions of the court as to whether or not certain proceedings should be taken, while it is proper and indeed necessary to join the parties against whom the proposed relief is sought, those parties should not be present in Chambers when the matter is debated; and they should not be furnished with the evidence upon which the court is asked to act. The court in these circumstances is appealed to by the trustee to say "Aye," or "No," in view of the circumstances put before it; should the action proceed, and, if so, how far? Very frequently, the leave to proceed is limited, for instance, up to discovery, but it would seem to me to be a quite unjustified inroad upon what I conceive to be a very useful practice if I were to allow this application and to allow the two defendants not merely to be present at the beginning of the proceedings when the originating summons is heard, but to remain there throughout those proceedings and to have all the evidence on which the trustees are asking the court for its directions. I know of no precedent for it, and, in my view, it is completely against the established practice.

I say nothing about the final incidence of costs. It was pressed upon me that the eighth and ninth defendants stand substantially to lose if I hold against them because they are interested in one-third of the estate. That appears to me to be a matter which can be adequately dealt with by the court, either when the originating summons comes before it, or, indeed, if an action is brought, when the action is heard. But, upon the facts which have been opened to me, I do not feel justified in interfering with the practice which, in my own experience, has been

[1] [1939] Ch. 329; 55 T.L.R. 332; [1939] 1 All E.R. 245.

[2] [1895] 1 Ch. 117.

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followed for many years, and I think in the experience of my brethren, and, therefore, I refuse this application.

Application refused. The bank's costs and expenses of and incidental to the application to be taxed and paid out of the estate. Final incidence of costs as between the beneficiaries reserved.

Solicitors: *Kingsford, Dorman & Co., for Dawe & Co., Kingston-upon-Thames; Wild, Collins & Crosse.*

[PROBATE, ETC., DIVISION.]

1959
Oct. 21.

Stevenson J.

HOBBS *v.* HOBBS AND COUSENS.

Practice — Discovery — Privilege — Professional privilege — Taxation of costs—Privilege attaching to brief—Divorce.

On the taxation of the petitioner's bill of party and party costs in a suit in which he had been awarded costs against the co-respondent, the co-respondent asked to be allowed to inspect the brief in order to be able the better to contest the item in the bill relating to "instructions for brief." On a reference by the taxing registrar to the judge for directions:—

Held, (1) that the co-respondent was not entitled to inspect the brief upon taxation, for the document remained protected by legal professional privilege.

(2) That it was, however, the duty of the taxing registrar closely to scrutinise the contents of the brief; and the co-respondent was not prevented from contending before him that the sums claimed were excessive.

Per curiam. If someone in the position of the co-respondent were permitted to see the contents of the petitioner's proof it would have the most intolerable consequences in the Divorce Division in view of the ancillary matters which often remain to be determined after decree absolute.

SUMMONS (adjourned into court).

The husband by his petition, in which he prayed for the discretion of the court in his favour, had alleged adultery between his wife and the co-respondent. That adultery had been denied; and the wife, who also asked for the exercise of the court's discretion to grant her a decree, alleged cruelty in her answer. On February 10, 1959, Mr. Commissioner Edgedale granted the husband a decree nisi, and made an order that the co-respondent should pay the costs of the suit.

The petitioner's bill of costs was lodged for taxation in the usual way and it included two substantial items, namely, £228, which was the expense of the petitioner coming to this country from Dar-es-Salaam for the trial, and an item of "instructions for brief," amounting to two hundred guineas.

The taxation took place on various days in May and June, 1959; and in the course of it the co-respondent, who was by that time acting in person and who appeared before the registrar to resist the taxation of costs against him, asked to be allowed to inspect the brief which had been delivered to counsel for the petitioner in order that he might contest items in the bill, particularly the two hundred guineas to which I have referred. Mr. Registrar Townley Millars referred the question whether a litigant in the position of the co-respondent should be permitted to inspect the brief on the other side, to the judge.

The assistance of the Queen's Proctor was invoked in argument.

J. G. Wilmers for the petitioner.
James Comyn for the Queen's Proctor.
The co-respondent in person.

The following cases were referred to in argument: *Curtis* v. *Beaney* [1]; *Jones* v. *Great Central Railway* [2]; *Walsham* v. *Stainton* [3]; *Nicholl* v. *Jones* [4]; *Wilson* v. *Rastall* [5]; *Seabrook* v. *British Transport Commission* [6]; *Longthorn* v. *British Transport Commission* [7]; *Anderson* v. *Bank of British Columbia* [8]; *Minet* v. *Morgan* [9]; *Mostyn* v. *West Mostyn Coal & Iron Co.* [10]; *Knight* v. *Marquis of Waterford* [11]; *Bolton* v. *Liverpool Corporation* [12]; *Bullock* v. *Corry* [13]; *Calcraft* v. *Guest* [14]; *Pearce* v. *Foster* [15]; *Schneider* v. *Leigh*.[16]

STEVENSON J. stated the facts and continued: At first sight it seems not unreasonable that the co-respondent should ask to be allowed to inspect the contents of the brief for which he is going to be required to pay something by way of party and party costs. The co-respondent argues that he must see and become familiar with the contents of that document in order to qualify himself to present his contention that the fees which he is required to pay are excessive, and, in the ordinary course of events, a litigant is entitled to see and learn all he can about the matters in possession of the other side which are relevant to the issue between them. But there is no doubt that legal professional privilege, which has a sure and unshakable foundation in our law, protects from disclosure not only documents which embody communications between a client and his legal adviser which come into existence in the course of litigation,

[1] [1911] P. 181; 27 T.L.R. 462.
[2] [1910] A.C. 4.
[3] (1863) 2 Hem. & M. 1.
[4] (1865) 2 Hem. & M. 588.
[5] (1792) 4 Term. 753.
[6] [1959] 1 W.L.R. 509; [1959] 2 All E.R. 15.
[7] [1959] 1 W.L.R. 530; [1959] 2 All E.R. 32.
[8] (1876) 2 Ch.D. 644.
[9] (1873) 8 Ch.App. 361.
[10] (1876) 34 L.T. 531.
[11] (1836) 2 Y. & C.Ex. 22.
[12] (1833) 1 My. & K. 88.
[13] (1878) 3 Q.B.D. 356.
[14] [1898] 1 Q.B. 759.
[15] (1885) 15 Q.B.D. 114; 1 T.L.R. 502.
[16] [1955] 2 Q.B. 195; [1955] 2 W.L.R. 904; [1955] 2 All E.R. 173.

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Stevenson J.

or in anticipation of litigation, but even documents which without contemplation of any litigation at all come into existence in order to enable the client to obtain the legal advice which he requires.

As this case has been argued by a litigant in person it is perhaps desirable that I should say that that privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor, or when he goes to his counsel, that that which he there divulges will never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisers that litigation and the business of the law can be carried on satisfactorily.

That is the principle with which the co-respondent in the present case finds himself faced when he says that he ought, as a matter of justice and common sense, to be allowed to inspect and closely examine the contents of the brief which has been delivered to counsel on behalf of his adversary. I am satisfied that he is not entitled to inspect that brief or its contents; and I so determine the question that has been submitted to me on this reference.

It has been pointed out to the co-respondent, and rightly pointed out, that the fact that the taxing registrar and nobody else is permitted to see that document does not in the least prevent him, the co-respondent, from contending that the sums which he is invited to pay by way of costs are excessive having regard to the brief and its contents; and it is, of course, the duty of the taxing registrar closely to scrutinise the contents of this or any other brief to see that it is not overloaded with surplus matter which exceeds what is reasonably necessary for the presentation of the petitioner's case. The co-respondent can, and I doubt not will, make that request; and I have no doubt that that duty, which rests upon the taxing registrar, will be faithfully performed.

The co-respondent has also made the point that this litigation is now concluded and the decree made absolute; and he therefore submits that no harm will be done now by permitting him to see this document. There is, however, an abundance of authority in support of the proposition that once legal professional privilege attaches to a document, of which a brief to counsel such as this is only one example, that privilege attaches for all time and in all circumstances. A number of cases which demonstrate that proposition have been cited, in particular the judgment of Cockburn C.J. in *Bullock* v. *Corry*,[1] and also the judgment of Brett M.R. in *Pearce* v. *Foster*,[2] the particular passage in point being at p. 119 of the report.

Even if that were not plain, as I am satisfied it is, it is, of course, a feature of litigation in this Division that even after the

[1] (1878) 3 Q.B.D. 356.

[2] (1885) 15 Q.B.D. 114; 1 T.L.R. 502.

1959

HOBBS v. HOBBS AND COUSENS.

Stevenson J.

litigation has achieved the degree of finality marked by a decree absolute dissolving a marriage, more often than not a number of questions remain to be decided relating to the custody of the children and to maintenance in which the conduct of the parties may have a significance. Even if there were any doubt as to the view which I have expressed about the area covered by legal professional privilege, it is quite plain that in litigation in this Division it would have the most intolerable consequences if someone in the position of the present co-respondent were permitted to see the inside of the brief which was delivered on behalf of the petitioner.

I have been greatly assisted by a most careful argument on behalf of the Queen's Proctor conducted by Mr. Comyn, and by an admirable argument from Mr. Wilmers on behalf of the petitioner, in which they have been good enough exhaustively to analyse a number of authorities which deal with this matter; but I do not think that it is necessary for the purpose of determining this question to burden my judgment with a long analysis of those authorities, because I am quite satisfied that the answer to the question "Can the co-respondent see this brief?" is: "No, he "cannot."

Order accordingly.

Solicitors: *Jaques & Co.; The Treasury Solicitor.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

KENSINGTON BOROUGH COUNCIL *v.* WALTERS.

1959
Oct. 30.

Lord Parker C.J., Cassels and Edmund Davies JJ.

Local Government—Property—Damage to—Recovery of expense of making good — Against person who "carelessly or accidentally "damages"—Involuntary act—London Government Act, 1939 (2 & 3 *Geo.* 6, *c.* 40), *s.* 181 (3).

Metropolis—London Government Act—Damage to corporation property —Recovery of expense from him who damaged it—Involuntary act—London Government Act, 1939, *s.* 181 (3).

Words and Phrases—"Accidentally or carelessly damages"—London Government Act, 1939, *s.* 181 (3).

Causation—Statutory liability—Irrelevance—Liability for involuntary act—London Government Act, 1939, *s.* 181 (3).

Trespass—Involuntary—Statutory liability—Damage to corporation property—London Government Act, 1939, *s.* 181 (3).

The respondent, while driving his car along a road, was involved in a collision with another car whereby the respondent's car came into contact with a street refuge vested in the local authority, as a result of which the refuge was damaged. The driver of the other car was responsible for the collision. The respondent was not. The local authority demanded payment of the cost of

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

1959

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repair from the respondent under section 181 (3) of the London Government Act, 1939,[1] and he, having failed to pay the sum demanded, was summonsed before the justices, who dismissed the complaint. On appeal by the local authority:—

Held, allowing the appeal, that section 181 (3) provided a speedy remedy for a local authority to recover expenses incurred in repairing damage without having to consider who was blameworthy and it entitled the authority to recover such expenses from the person whose hand or vehicle had actually come into contact with and damaged their property whether voluntarily or, as in this case, involuntarily; accordingly, the respondent was liable for the cost of repair.

Dictum of Wills J. in *Harding* v. *Barker* (1888) 53 J.P. 308, 309 applied.

CASE STATED by County of London justices sitting at Kensington.

On February 10, 1959, a complaint was preferred by the appellants, the Kensington Borough Council, through their town clerk, against the respondent, Henry Stanley Walters, that he, having on June 19, 1958, damaged a street refuge, in the Cromwell Road, London, S.W.7, when driving a motor-car, and having failed to pay the sum of £25 0s. 1d., being the expenses incurred by the appellants in repairing the damaged refuge, after demand by them, owed that sum to the appellants in accordance with section 181 (3) of the London Government Act, 1939.

On March 17, 1959, the justices heard the information and found the following facts: A street refuge in the Cromwell Road, London, S.W.7, was part of the property vested in the appellants as a local authority for the purpose of the London Government Act, 1939. The respondent on June 19, 1958, was driving his car along the Cromwell Road when he was involved in a collision with another car turning into the Cromwell Road on his left-hand side. Immediately before the collision the refuge was in good order. Just after the collision the respondent's car came into contact with the refuge with such force that the concrete base to its guard post was completely destroyed. Within a short time after the collision, the respondent described to a police constable what had happened in these words: "I was coming west along Cromwell "Road. I swerved to avoid another car, hit the island and turned "over." While the respondent was taking avoiding action, the other car hit the side of the respondent's car with such force that it drove his car into the refuge, and but for the collision the respondent's car would not have come into contact with the refuge. The person responsible for the collision was the driver of the other car and not the respondent. The refuge was repaired by the appellants at a cost of £25 0s. 1d., which sum represented the expenses incurred by the appellants in making good the

[1] London Government Act, 1939, s. 181: "(3) If any person accident- "ally or carelessly damages any pro- "perty vested in a local authority, "the authority may recover from him "summarily as a civil debt the "expenses incurred by it in making "good the damage."

damage to the refuge. On September 26, 1958, the appellants sent an invoice to the respondent demanding payment of £25 0s. 1d. and the respondent had failed to pay that sum.

It was contended by the appellants that the respondent was liable to pay the sum of £25 0s. 1d. in any event by virtue of section 181 (3) of the London Government Act, 1939, whether or not the respondent's driving involved any degree of negligence.

It was contended by the respondent that the person really at fault was the driver of the other car, that the respondent was not responsible for his own car coming into contact with the refuge, that the damage to the refuge was caused by the respondent's car being driven onto it by the other car concerned, and that he was, accordingly, not liable to pay the sum demanded.

The justices were of the opinion that the respondent's contentions were correct and dismissed the complaint.

The local authority appealed.

Paul Wrightson for the appellants.

The respondent appeared in person.

The following cases were cited in argument in addition to that referred to in the judgment: *Burgess* v. *Morris* [2]; *Ashton* v. *Eccles Corporation*.[3]

LORD PARKER C.J. stated the facts and continued: In my judgment, this case depends entirely on the correct interpretation to be placed upon section 181 of the London Government Act, 1939. By subsection (1) it is provided that a person who has charge of any property vested in a local authority who fails to deliver up such property shall be guilty of an offence and liable to be fined and also be liable to pay the value of the property. Subsection (2) provides: "If any person wilfully damages any "property vested in a local authority, he shall in respect of each "offence be liable on summary conviction to a fine not exceeding "40 shillings and to pay to the authority the expenses incurred "by it in making good the damage." By subsection (3) it is provided: "If any person accidentally or carelessly damages any "property vested in a local authority, the authority may recover "from him summarily as a civil debt the expenses incurred by "it in making good the damage." Observe that the damage referred to in subsection (3) does not create any offence at all; it is merely saying that the expenses of making good that damage may be recovered summarily as a civil debt.

Mr. Wrightson has referred us to a number of cases. I think it is unnecessary to refer to them in detail. The words "acci- "dentally or carelessly damages" do not appear in the London Government Act, 1939, for the first time. They were to all intents and purposes the same in the Metropolis Management

[2] (1897) 61 J.P. 553.

[3] (1906) 71 J.P. 55.

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Act, 1855, and in the Gas Works Clauses Act, 1847; indeed, I think the only difference was that the word "carelessly" came before the word "accidentally" in those two statutes. It is clear from the authorities that the words corresponding to subsections (2) and (3) have been treated as providing, first, in regard to the words of subsection (2), for wilful or negligent damage for which there is a penalty as well as a right to recover the expenses, and, secondly, in regard to the words of subsection (3), for something which is not wilful and not negligent, namely, accidentally or carelessly, in which case there is no penalty. In one of the cases it is said that "carelessly" is something akin to "accidentally."

The real point, as I see it, is whether subsection (3) is aimed at the person who is responsible for the damage and who as a matter of causation has caused it, or whether it is aimed at the person whose hand or vehicle has come in contact with the property and caused damage to that property thereby. In my judgment, the latter is the correct view. I think that this subsection is providing a speedy remedy for a local authority to recover expenses incurred in repairing damage without having to consider who is blameworthy in that respect. They are entitled under this subsection to recover from the person whose hand or vehicle has actually come in contact with and damaged their property. I get some support for that view from the judgment of Wills J. in *Harding* v. *Barker*.[1] That was a case which arose under the Metropolis Management Act, 1855. It was a case in which a driver had accidentally caused damage to a street lamp and the complaint was made against his employer. Wills J. said[2]: "I am of the same opinion. I think the 207th section "does not relate to anybody but the person who is actually doing "the careless act. But here it was not even a careless act, for "the justices found that it was a mere accident. Therefore, there "is no satisfactory ground for holding that the master here would "be liable." I think that section 181 (3) does not relate to anybody but the person who actually does the accidental or careless act, whether voluntarily or involuntarily, as in this case, where he was forced into the street refuge. If the owner of the car who had forced the respondent's car into the refuge had been summoned, I think his answer would be: "It was not my hand, "not my car, that came into contact with the street refuge. It "may have been my negligence that caused it but for that I "cannot be summoned under the subsection although I could be "proceeded against at common law."

I think that this appeal should be allowed and that the case should go back to the justices with an intimation that the complaint was proved.

CASSELS J. I agree. The respondent may well feel he has a grievance in the matter because he can quite reasonably and

[1] (1889) 53 J.P. 308. [2] Ibid. 309.

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rightly say that he was in no way to blame, but this is not a case of blameworthiness at all. So far as the respondent was concerned, it was a pure accident for which no one can say anything against him, but, on the other hand, the words of the statute are very plain: "If any person accidentally or carelessly damages "any property vested in a local authority, the authority may "recover from him summarily as a civil debt the expenses "incurred by it in making good the damage."

This is just one of those cases in which it may well seem strange to the individual who is called upon to put his hand into his pocket and pay for damage for which he was in no way responsible, merely because it happens to be his motor-car which caused the actual damage. I was impressed somewhat by the illustrations the respondent put before us, quite properly. It does seem strange that if a pedestrian walking along the High Street, Kensington, should be pushed through a window belonging to the local authority, that the local authority receiving him through the broken window can put out their hands and say: "The damage "is so much." Nonetheless, that is the position in which the respondent here finds himself. I agree that the appeal should be allowed and the case remitted to the justices to make an order for the recovery of the debt.

EDMUND DAVIES J. I agree. One cannot but sympathise with the respondent for the position in which he finds himself, for £25 is no small sum to find, and, if I may say so, he has put forward his argument with eminent clarity and ability. But the subsection, unlike subsection (2), without importing blame or penalty provides a simple remedy for the recovery of the cost of damage done to property vested in the local authority. It renders liable the person whose person or property actually, accidentally or wilfully, damages such property, leaving him to enforce any claim he may have over against a third party. I accordingly agree that this appeal should be allowed.

Appeal allowed with costs.

Solicitors: *J. Waring Sainsbury, Town Clerk, Kensington.*

[QUEEN'S BENCH DIVISION.]

LAYTON *v.* SHIRES.

1959
Oct. 7, 22, 23.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

Road Traffic—Notice of intended prosecution—Service of notice—Notice sent by registered post to defendant's usual residence—Defendant away on holiday—Notice received and signed for by member of defendant's family, or by "nanny" in his employ—Defendant not aware of notice until more than 14 days after commission of alleged

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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offences—Whether "sent by registered post to him"—Interpretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 26—*Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

Statute — Construction — Service of document by post — Meaning of "sent by registered post"—Road Traffic Act, 1930, *s.* 21 (*c*).

The defendant was charged with driving without due care and attention, alternatively without reasonable consideration for other persons using the road, contrary to section 12 of the Road Traffic Act, 1930. Pursuant to section 21 of the Act [1] notice of intended prosecution was within fourteen days addressed to him and sent by registered post to his home address. When the notice arrived at this address the defendant had left for a holiday abroad and the registered packet was received and signed for by a member of his family or by a "nanny" in his employ. The defendant first became aware of the notice when he opened the packet on his return, more than fourteen days after the date of the alleged offences:—

Held, that the sending of the notice by registered post to the defendant's address within fourteen days of the alleged offences and its acceptance by a person authorised to accept letters on his behalf was a compliance with section 21 of the Act although the notice did not reach the defendant's hands within the statutory period.

Beer v. *Davies* [1958] 2 Q.B. 187; [1958] 2 W.L.R. 920; [1958] 2 All E.R. 255 distinguished.

CASE STATED by Dorking justices.

On October 27, 1958, informations were preferred by the appellant prosecutor against the defendant, Wellburn Bertram Shires, that he on August 31, 1958, on a road in Bears Green, Surrey, drove a motor-car without due care and attention, alternatively without reasonable consideration for other persons using the road, in each case contrary to section 12 of the Road Traffic Act, 1930. The respondent was both the owner and the driver of the motor-car.

The justices heard these informations on December 10, 1958, when the defendant contended that the provisions of section 21 of

[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for "an offence under any of the provisions of this Part of this Act "relating respectively to the maximum speed at which motor vehicles "may be driven, to reckless or "dangerous driving, and to careless "driving he shall not be convicted "unless either—(*a*) he was warned "at the time the offence was committed that the question of prosecuting him for an offence under some "one or other of the provisions aforesaid would be taken into consideration; or (*b*) within fourteen days of "the commission of the offence a "summons for the offence was "served on him; or (*c*) within the "said fourteen days a notice of the "intended prosecution specifying the "nature of the alleged offence and "the time and place where it is "alleged to have been committed was "served on or sent by registered post "to him or the person registered as "the owner of the vehicle at the time "of the commission of the offence: "Provided that—(i) failure to comply "with this requirement shall not be a "bar to the conviction of the accused "in any case where the court is "satisfied that—(1) neither the name "and address of the accused nor the "name and address of the registered "owner of the vehicle, could with "reasonable diligence have been "ascertained in time for a summons "to be served or for a notice to be "served or sent as aforesaid: or "(2) the accused by his own conduct "contributed to the failure: and "(ii) the requirement of this section "shall in every case be deemed to "have been complied with unless and "until the contrary is proved."

the Act had not been complied with. The justices tried this issue as a preliminary matter and found the following facts. At the time of the alleged offences the defendant was informed by a police officer that he would be reported for failing to keep to the left when meeting oncoming traffic. The summonses, which were served upon the defendant in respect of the alleged offences, were served more than 14 days after August 31, 1958. On September 11 a notice of intended prosecution made in accordance with the provisions of section 21 of the Act was sent by registered post to the defendant at his home address. On September 12 the registered packet containing the notice was delivered at this address and was received and signed for either by a member of the defendant's family or by a "nanny" in his employ. On September 11, however, the defendant, in accordance with arrangements made some time before the date of the alleged offences, had gone abroad for a holiday. He first became aware of the notice when he opened the packet on the date of his return, October 1, 1958. He had not informed the police of his intention to go abroad.

It was conceded by the prosecutor that the oral warning given at the time of the alleged offences did not satisfy the provisions of section 21, but he contended that the notice was sent by registered post to the respondent within 14 days within the meaning of the section.

It was contended on behalf of the prosecutor that the notice was in fact sent by registered post to the respondent within the meaning of the section, being taken in by someone authorised to receive letters on his behalf.

On behalf of the defendant it was contended that the section required that the notice should reach the defendant personally.

The justices were of opinion that the provisions of the section had not been complied with, and that the respondent had not contributed to the failure to serve the notice within 14 days. They accordingly decided the preliminary issue in favour of the respondent. The prosecutor appealed.

A. C. L. Lewisohn for the prosecutor.
Raymond Stock for the defendant.

The following cases, in addition to those which were referred to in the judgment, were cited in argument: *Sandland* v. *Neale* [2]; *Retail Dairy Co. Ltd.* v. *Clarke* [3]; *Martin* v. *Brooman.*[4]

Cur. adv. vult.

October 23. ASHWORTH J. read the following judgment of the court: This is an appeal by way of case stated by justices for the

[2] [1956] 1 Q.B. 241; [1955] 3 W.L.R. 689; [1955] 3 All E.R. 571.

[3] [1912] 2 K.B. 388; 28 T.L.R. 361.

[4] (1909) 25 T.L.R. 783.

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petty sessional division of Dorking, sitting at Reigate, before whom informations were preferred by the appellant against the respondent that he on August 31, 1958, did drive a motor-car on a road without due care and attention, alternatively that he drove it without reasonable consideration for other persons using the road, in each case contrary to section 12 of the Road Traffic Act, 1930.

This is yet another case raising the question whether the provisions of section 21 of the Act had been complied with. At the trial the solicitor for the respondent took the preliminary point that there had been no compliance with the section, and the justices upheld that contention.

[His Lordship read section 21 of the Act and continued:] It is agreed that there was no sufficient warning at the time when the alleged offences were committed, and the summonses were not served until the statutory period of 14 days had expired. The sole question, therefore, is whether the provisions as to the service of a notice of intended prosecution were complied with, subject, of course, to the proviso.

[His Lordship stated the facts and continued:] The question is as to the meaning of the words "sent by registered post to "him," bearing in mind section 26 of the Interpretation Act, 1889, which provides: "Where an Act passed after the com- "mencement of this Act authorises or requires any document to "be served by post, whether the expression 'serve,' or the "expressions 'give' or 'send,' or any other expression is used, "then, unless the contrary intention appears, the service shall "be deemed to be effected by properly addressing, prepaying, and "posting a letter containing the document, and unless the con- "trary is proved to have been effected at the time at which the "letter would be delivered in the ordinary course of post." It is, we think, clear, since the decision of this court in *Beer* v. *Davies*,[1] that the requirement of section 21 of the Act of 1930 is not complied with if the registered letter is not taken in at the address to which it is sent and is returned. That decision, which is binding on this court, followed the decision of the Court of Appeal in *Reg.* v. *County of London Quarter Sessions Appeals Committee, Ex parte Rossi*,[2] and on this point departed from the interpretation put upon the words in previous decisions.

In the present case, however, the letter was in fact taken in and signed for and was not returned. It is true that the letter did not reach the hands of the respondent until after the statutory period of 14 days had expired but, in our judgment, the decisions in *Ex parte Rossi* [2] and *Beer* v. *Davies* [3] do not compel us to hold that in such circumstances the section was not complied with. If a notice under section 21 (*c*) of the Act is sent by registered post

[1] [1958] 2 Q.B. 187; [1958] 2 W.L.R. 920; [1958] 2 All E.R. 255.

[2] [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; sub nom. *Reg.* v. *Appeal Committee of County of London Quarter Sessions, Ex parte Rossi* [1956] 1 All E.R. 670

[3] [1958] 2 Q.B. 187.

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to a defendant, and delivery of it is accepted either by him or by someone authorised to accept delivery of letters on his behalf, we are of opinion that the section is complied with, even if the letter does not reach his hands within the statutory period. This view is in accordance with the decision of this court in *Money* v. *Bicknell*,[4] which was decided in April, 1959, that is to say after the decisions in *Ex parte Rossi*[5] and *Beer* v. *Davies*.[6] Moreover, it is to be noted that section 21 (*c*) provides that a notice may be served on or sent to the proposed defendant or, alternatively, the person registered as the owner of the vehicle at the time of the commission of the offence. If the latter alternative be adopted, there is no certainty that the proposed defendant will himself become aware of the intended prosecution within the statutory period. The existence of this alternative method of complying with the section serves to confirm our opinion that actual receipt within the period of a notice addressed to a proposed defendant is not required. This is enough to decide this case and it is unnecessary to consider provisos (1) and (2).

In these circumstances the case must go back to the magistrates with an intimation that the requirement of the section has been complied with.

Appeal allowed.
Costs.

Solicitors: *Wontner & Sons; J. B. Izod.*

[4] Unreported, April 10, 1959.
[5] [1956] 1 Q.B. 682.
[6] [1958] 2 Q.B. 187.

[COURT OF CRIMINAL APPEAL.]

REGINA *v.* LONG.

C. C. A.

1959
Oct. 19.

Lord Parker C.J., Ashworth and Edmund Davies JJ.

Criminal Law—Sentence—Preventive detention—Notice of intention to prove previous convictions—Service on defendant—Time of service—Meaning of "three days before the trial"—Whether three clear days must elapse — Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 23 (1).

Criminal Law—Sentence—Probation order—Breach—Charge of—Procedure on arraignment—Necessity for putting breach to defendant in clearest possible terms.

Words and Phrases—"Before."

The appellant was to be sentenced in respect of his breach of a probation order. On July 18 notice was given to him under section 23 of the Criminal Justice Act, 1948, of intention to prove convictions which would render him liable to a sentence of preventive detention. On July 21 he was brought before the court, when the clerk put the breach of the probation order to the appellant in general terms, asking him only whether he admitted committing a further offence, and he was sentenced to a term of eight years' preventive detention. He appealed:—

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

C. C. A.

1959

REGINA v. LONG.

Held, that the requirement in section 23 that the notice should be given three days before the trial meant that three clear days must elapse and that, accordingly, the appellant did not qualify for preventive detention and his sentence must be set aside.

Rex v. *Turner* [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103 applied.

Per curiam. The breach alleged must be put to the defendant in the clearest possible terms.

APPEAL AGAINST SENTENCE.

On January 27, 1959, the appellant, Dennis John Long, pleaded guilty at Southampton Borough Quarter Sessions to store-breaking and was placed on probation for three years. On May 27, 1959, he was convicted at Grimsby Quarter Sessions of larceny and was sentenced to three years' imprisonment, nine other offences being taken into consideration. He was returned to Southampton Borough Quarter Sessions for the breach of the probation order to be dealt with. On July 18, notice was given to him under section 23 of the Criminal Justice Act, 1948,[1] of intention to prove convictions which would render him liable to a sentence of preventive detention. The recorder (Ewen Montagu, Esq., Q.C.) adjourned the trial from July 20, when it was to have taken place, to July 21. The appellant was then sentenced to eight years' preventive detention. He appealed against this sentence on the ground, inter alia, that the notice was not given to him three days before the trial within the meaning of section 23 of the Act.

Patricia Coles for the appellant.

The following case, in addition to those which are referred to in the judgment, was cited in argument: *Young* v. *Higgon*.[2]

LORD PARKER C.J. stated the facts, observed that the appellant fully deserved his sentence, referred to section 23 of the Criminal Justice Act, 1948, and continued: The appellant himself, in his notice of appeal, raises the point and, as far as we know, it has never come before the court before. The ordinary rule applicable in these cases is that the day of service is not included but the date of the later event is, and, accordingly, if the general rule applied here, July 18 would not be included but the date of the trial, July 21, would be. Accordingly, the trial would have taken place three days after the service of the notice. On the other hand, there are clear exceptions to that general rule. It is, I think, well stated in Halsbury's Laws of England, 2nd ed., vol. 32, p. 140, where it is said: "When a period is fixed before "the expiration of which an act may not be done, the person

[1] Criminal Justice Act, 1948, s. 23: "(1) For the purpose of determining "whether an offender is liable to be "sentenced to . . . preventive deten-"tion . . . no account shall be taken "of any previous conviction or sen-"tence unless notice has been given "to the offender . . . at least three "days before the trial that it is "intended to prove the conviction or "sentence; . . ."

[2] (1840) 6 M. & W. 49.

" for whose benefit the delay is prescribed has the benefit of the " entire period, and accordingly, in computing it the day from " which it runs as well as the day on which it expires must be " excluded." In other words, in those circumstances the time of so many days is treated as so many clear days.

One of the cases to which Miss Coles has referred us is *Rex* v. *Turner*.[1] There the question arose whether a notice of intention to charge a man with being an habitual criminal had been given not less than seven days before the offender was to be tried, pursuant to section 10 of the Prevention of Crime Act, 1908. It is to be observed that it was there argued that the ordinary rule applied, and that if the ordinary rule applied, that is excluding the first date and including the later one, the notice had been validly served. Channell J., in giving the judgment of the court, said[2]: " Section 10 (4) (*b*) of the Prevention of Crime Act, " 1908, provides that ' not less than seven days' ' notice must be " given to the proper officer of the court and to the offender. The " question whether the words ' not less than seven days ' mean " clear days is a troublesome one to answer, as there have been " decisions upon similar words which are not exactly in accord. " Those decisions depend upon particular statutes, and may " therefore all be right and yet bring about apparently conflicting " results. We have come to the conclusion that the decision most " nearly in point is that in *Chambers* v. *Smith*,[3] referred to by " Chitty J. in *In re Railway Sleepers Supply Co.*,[4] where he " reviewed the authorities. In *Chambers* v. *Smith*[5] the words " were ' not being less than fifteen days,' and the court in the " first instance held that what I may call the ordinary rule " applied, namely, that where a certain number of days are " specified they are to be reckoned exclusive of one of the days " and inclusive of the other unless clear days are expressed. But " although that is the rule, the difficulty is to ascertain whether " clear days are expressed by the language of the particular " statute. In *Chambers* v. *Smith*[5] the court, after having in the " first instance thought that the words ' not less than fifteen days ' " were to be construed according to what I have called the " ordinary rule, namely, inclusive of one of the days and exclusive " of the other, on reconsideration came to the conclusion that " they were to be construed as meaning fifteen clear days. The " words upon which that decision was based are the nearest to be " found in the authorities to those which we have to construe in " the present case, and we therefore come to the conclusion that " the provision that ' not less than seven days' ' notice has to be " given means ' seven clear days' ' notice, and we so answer the " question."

In the judgment of the court the same interpretation should

[1] [1910] 1 K.B. 346; 26 T.L.R. 112; 3 Cr.App.R. 103.
[2] [1910] 1 K.B. 346, 359.
[3] (1843) 12 M. & W. 2.
[4] (1885) 29 Ch.D. 204; 1 T.L.R. 399.
[5] 12 M. & W. 2.

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be put upon the words in section 23 of the Criminal Justice Act, 1948, and the reference to three days there should be read as a reference to three clear days. Accordingly, this man did not qualify for preventive detention in that evidence of his previous convictions could not have been given. Accordingly, the sentence of preventive detention must be set aside.

The court has carefully considered this man's previous history and also the offence of which he was found guilty, namely, store-breaking but without taking anything, and will substitute a sentence of five years' imprisonment, which will, of course, overlap the sentence of three years' imprisonment imposed at Grimsby Quarter Sessions.

Before leaving this case, I should draw attention to the fact that the procedure laid down for the proof of a subsequent offence when a man is brought up for breach of probation was not observed. The matter was put by the clerk to the appellant in the most general terms. He said: "Do you admit that at "Southampton Borough Quarter Sessions on January 27, 1958, a "probation order for three years was made against you on your "conviction for storebreaking with intent?"—so far, so good—then he went on: "and that having committed a further offence "you have been produced at these sessions for sentence?" The court would like to draw attention again to the necessity for following the procedure which was laid down by this court in *Reg.* v. *Devine*,[6] where the court emphasised that[7] "Where a defen-"dant is brought before a court for breach of a probation order, "when he is arraigned before the court the breach should be put "to him in the clearest possible terms, and he should be asked to "say whether he admits it or not."

Appeal allowed.

Solicitor: *Registrar, Court of Criminal Appeal.*

[6] [1956] 1 W.L.R. 236; 40 Cr. App.R. 45; [1956] 1 All E.R. 548.

[7] [1956] 1 W.L.R. 236, 237; [1956] 1 All E.R. 548n.

[QUEEN'S BENCH DIVISION.]

1959
Oct. 30.

ELLIOTT *v.* GREY.

Lord Parker C.J., Cassels and Edmund Davies JJ.

Road Traffic—Third party insurance—"Use . . . a motor vehicle on a "road"—Car not used—Whether "used"—Car immobilised in road—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 35 (1).

Statute—Construction—Mischief aimed at—"Use" of a motor-vehicle—Road Traffic Act, 1930, *s.* 35 (1).

The owner of a motor-car which had broken down left it in the road outside his house until it could be repaired. He suspended

[Reported by A. H. Bray, Esq., Barrister-at-Law.]

the third party insurance in the meantime. The car could not be mechanically propelled because, inter alia, the engine would not work, the battery had been removed, and there was no petrol in the tank. At the material time the owner had no intention of driving it or of moving it from its position in the road. The owner was convicted of unlawfully using the car without there being in force a third party insurance, contrary to section 35 (1) of the Road Traffic Act, 1930.[1] On appeal:—

Held, that the word "use" in section 35 (1) was equivalent to "have the use of a motor-vehicle on the road," and as the car could be moved, albeit not driven, the owner had the use of it on the road within the meaning of the section and was guilty of an offence.

CASE STATED by South Shields borough justices.

On March 6, 1959, an information was preferred by the respondent, Stanley Grey, against the appellant, Elijah Elliott, that he on February 7, 1959, unlawfully used on Belloc Avenue, South Shields, a motor-car, there not being in force in relation to him as user of such a motor-vehicle by him such a policy of insurance or such a security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to section 35 (1) of that Act.

The justices heard the information on March 23, 1959, and found the following facts: The appellant at 10.30 p.m. on February 7, 1959, was the owner of a motor-car which was standing parked outside his house at 54, Belloc Avenue, South Shields. The appellant was the person responsible for the car being on that road and clearly intended to use the vehicle when it suited his purpose. On December 20, 1958, the car broke down and could not be driven because its carburettor broke, its self-starter would not work and its starting handle would not fit into the starting handle hole because its worm end would not fit. Immediately after the breakdown, the appellant decided to lay the car up outside his house and accordingly prior to February 7, 1959, he had placed the car in Belloc Avenue outside his house by manhandling it into position, as it could not be driven at all, jacked the car up so that its wheels were off the ground and removed the battery of the car. From the date of the purchase of the car until a date in the middle of January, 1959, the appellant had a policy of insurance in relation to his user of the car which complied with the requirements of Part II of the Road Traffic Act, 1930. In the middle of January, 1959, the appellant caused this policy to become suspended, intending to make it effective again as soon as he had put his car into running order and so no longer had it laid up. When the police

[1] Road Traffic Act, 1930, s. 35 (1): "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

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had required the appellant to produce a certificate of insurance for the use of the car on the road, he had been unable to produce such a certificate or other security in respect of third party risks, stating that he had sent the insurance back saying he had laid the vehicle up from December, 1958. On February 7, 1959, another motor-car had collided with the appellant's car stationary in Belloc Avenue. On that day the appellant had been working on the car and had cleaned it, oiled its locks and lowered it to the ground, sent its batteries to be recharged, removed the broken carburettor and fitted a new carburettor into the car, examined the self-starter and found, as was the fact, that its solenoid needed renewing. At all times on February 7, 1959, the car could not be mechanically propelled because its engine would not work and by that date the petrol in its tank had evaporated away. The appellant had no intention of driving the car on February 7, 1959, or of moving it from its position on the roadway.

It was contended by the appellant that the car was not being used by him on February 7, 1959, because user of a motor-vehicle did not include putting it onto a road and maintaining it in one position in a condition where physically it could not be driven and was not available for use as a motor-vehicle; if it had been in a garage, it would not have been "used"; if a motor-vehicle was immobilised in a yard and was pushed into the street to be taken away as scrap, it could not be said to have been "used"; that the legislature used careful words; for example, in the offence of causing a motor-car to stand on the road without the necessary lights, the word "cause" was used and not the word "use" and this word "cause" would cover a laid-up vehicle, whereas the word "use" would be inappropriate. The appellant accepted that a stationary vehicle could be used if it was available for use at the time and the only question was whether or not the vehicle was being used on February 7, 1959.

It was contended by the respondent that the purpose of section 35 of the Road Traffic Act, 1930, was to ensure that when a motor-vehicle was on the road there should be proper cover against such third party risks as might occur in consequence of the motor-vehicle being on the road. Throughout the Road Traffic Act, 1930, the word "drive" was constantly used in connection with offences involving driving, whereas in section 35 the word "use" was used and obviously the legislature had intended to cover a motor-vehicle both when it was being driven and when it was not being driven on the road. A motor-vehicle left standing could run away and cause injury or damage to a third party, or a stationary motor-vehicle could be walked into or run into in such circumstances as to give rise to third party injury or damage, or a motor-vehicle could be stationary on the road and be used to carry goods or keep property in, and in all these circumstances the vehicle was being used. In the event

of the appellant's argument being correct, if a motor-vehicle was parked on a road and the insurance expired at 12 noon and the owner was required to produce to the police a certificate of insurance at 12.5 p.m. without the vehicle having been driven, he would have a defence to a similar charge merely by stating that he was not using the vehicle.

The justices were of the opinion that when a motor-vehicle was standing on the road and was not being driven, it could be said to be used, and they convicted the appellant. Owing to the mitigating circumstances, the justices ordered that the appellant be discharged absolutely and ordered him to pay 4s. court costs and £3 3s. towards the legal costs of the prosecution.

The appellant appealed.

James W. Miskin for the appellant.

Frank Whitworth for the respondent.

The following cases were referred to in argument: *Gifford* v. *Whittaker* [2]; *Lawrence* v. *Howlett*.[3]

LORD PARKER C.J. stated the facts, and continued: The short question in this appeal is what is meant by the words "use . . . a "motor vehicle on the road" within the meaning of section 35 (1) of the Road Traffic Act, 1930. [His Lordship read section 35 (1), and continued:] One thing seems to be clear, and that is that "use" there is used in contradistinction to the word "drive," which appears in other sections, such as section 11 and section 12, dealing with dangerous and careless driving. Prima facie, it is a wider term and includes something more than driving and certainly would include moving.

The other thing which I think is clear and, indeed, it is conceded by Mr. Miskin, who has argued this case with great care, is that an offence may well be committed under this section in the intervening periods between driving or between moving. But he says that the ordinary use of the word to "use" a motor-car does contemplate some active movement either in driving it or taking part in a journey in it or moving it, and that the word is quite inapt to describe a motor-car which cannot be used because it is out of action, not merely because it needs a little petrol but because the machine cannot work at all. I am influenced by the fact that this section appears in Part II of the Act under the heading of "Provision against third-party risks arising out of "the use of motor vehicles." If one goes on to section 36 it provides the form of policy of insurance which is required, which is: "insures such person, persons or classes of persons as may be "specified in the policy in respect of any liability which may be "incurred by him or them in respect of the death of or bodily "injury to any person caused by or arising out of the use of the

[2] [1942] 1 K.B. 501; 58 T.L.R. 195; [1942] 1 All E.R. 604.

[3] (1952) 1 T.L.R. 1476; [1952] 2 All E.R. 74.

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Lord Parker C.J.

"vehicle on a road." It is something for the protection of third parties. Approached in that way, it seems to me that the word "use" there is, as Mr. Whitworth suggests, really equivalent to "have the use of a motor-vehicle on the road." Indeed, Mr. Miskin's suggested definition, which I think was that "use" means to have the advantage of a vehicle as a means of transport, including any period or time between journeys, itself suggests availability. In other words, it is really equivalent to what Mr. Whitworth suggests by the expression "have the use of."

In the present case, as I have said, though this car could not be driven, there is nothing to suggest that it could not be moved. As I pointed out in argument, for all we know it was on the top of a hill and a little boy could release the brake and the car could go careering down the hill. In the absence, at any rate, of a finding that it was immovable as, for instance, the wheels were removed or something of that sort, I cannot bring myself to think that this car was not fairly and squarely within the words which I have used, "have the use of a motor-vehicle on the road."

Mr. Whitworth further contended that even if the car was completely immobilised, an offence would be committed, but I find it unnecessary in the present case to go so far. Here was a car which could be moved, albeit not driven, and, in those circumstances, I think the owner had the use of it on a road within the meaning of the section. I come to the conclusion that the justices were right and I would dismiss this appeal.

CASSELS J. I agree.

EDMUND DAVIES J. I agree.

Appeal dismissed with costs.

Solicitors: *Amery-Parkes & Co.; Speechly, Mumford & Soames for Robert S. Young, Town Clerk, South Shields.*

[QUEEN'S BENCH DIVISION.]

1959
Oct. 7, 22.

SCHNEIDER *v.* DAWSON.

Lord Parker C.J., Ashworth and Hinchcliffe JJ.

Revenue—Customs and Excise—Duty free goods—Knowingly keeping and dealing with uncustomed goods — Goods imported duty-free for use of American servicemen — Unauthorised sale to civilian — Whether forfeiture sole penalty — Whether goods "chargeable with a duty "which has not been paid"—Goods entrusted to care of civilian— Whether civilian's conduct a "dealing with" them—Customs and Excise Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 44), *ss.* 257, 304.

Statute — Construction — Consolidating Act — Meaning of "chargeable "with a duty which has not been paid"—Customs and Excise Act, 1952, *s.* 304.

[Reported by GROVE HULL, Esq., Barrister-at-Law.]

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A civilian bought from American servicemen cigars and spirits which had been imported free of duty for the use of United States servicemen under an agreement between the British and American Governments, and kept them for his own use. Later, he desired to buy a further supply of cigars and met an American serviceman by appointment. This serviceman had 2,420 cigars in his possession, imported duty-free as described above. He told the civilian that he intended to sell the cigars, and asked the civilian to look after them. It was arranged that the civilian should extract as many of the cigars as he wished. He took charge of the cigars and later extracted 100 for his own purposes.

He was charged with knowingly and with intent to defraud Her Majesty of the duty payable thereon being concerned in keeping goods, namely, the cigars and spirits first described above, which were chargeable with a duty which had not been paid; and, with the like knowledge and intent, being concerned in dealing with the 2,420 cigars, which were chargeable with a duty which had not been paid; in each case contrary to section 304 of the Customs and Excise Act, 1952.[1]

He was convicted upon both charges and fined. On appeal, it was contended on his behalf, inter alia, that section 257 of the Customs and Excise Act, 1952,[1] was applicable and provided the only consequence of misuse of the goods, namely, forfeiture, and that in consequence section 304 of the Act did not apply:—

Held, (1) that having regard to the opening words of section 304 of the Act, "without prejudice to any other provision of this Act," it was open to the respondent to charge the appellant under that section.

(2) That the substitution in the Act of 1952 of the expression "chargeable with a duty which has not been paid" did not affect the principle of the earlier decisions upon the meaning of the word "uncustomed" and, applying that principle, the goods which the appellant kept or dealt with were chargeable with duty since he was a person not privileged under the agreement to receive them duty-free.

M'Queen v. *M'Cann*, 1945 S.C.(J.) 151 applied.

(3) That the appellant's conduct clearly amounted to "dealing "with" the 2,420 cigars and that there was ample evidence to show intent to defraud.

[1] Customs and Excise Act, 1952, s. 257: "(1) If by virtue of any provision of this or any other Act or "under any practice whereby—"(*a*) goods chargeable with a duty "of customs are allowed to be "delivered without payment of that "duty on condition that they will not "be sold or will be re-exported or "upon any other like condition; or "(*b*) the amount of customs duty "payable on any goods depends on "their being imported on any such "condition, any goods are allowed to "be delivered without payment of "duty or on payment of duty calculated in accordance with that provision or practice, and the condition "is not observed, the goods shall, "unless the non-observance was sanctioned by the Commissioners, be "liable to forfeiture. (2) The provisions of this section shall apply "whether or not any undertaking "or security has been given for the "observance of the condition or for "the payment of the duty payable "apart therefrom, and the forfeiture "of any goods under this section shall "not affect any liability of any person who has given any such undertaking or security."

S. 304: "Without prejudice to any "other provision of this Act, if any "person—(*a*) knowingly and with "intent to defraud Her Majesty of "any duty payable thereon, . . . is "in any way concerned in . . . keeping or concealing or in any manner "dealing with any goods . . . which "are chargeable with a duty which "has not been paid, . . . he . . . "shall be liable to a penalty of three "times the value of the goods or one "hundred pounds, whichever is the "greater, or to imprisonment for a "term not exceeding two years, or to "both."

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Rex v. *Cohen* [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203 applied.

CASE STATED by a stipendiary magistrate.

On December 31, 1958, the respondent, on officer of customs and excise, laid informations against the appellant, Bernard Schneider, as follows: (1) That he on December 5, 1958, at 37, Cephas Avenue, E.1, knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in keeping certain goods, namely, 45 foreign manufactured cigars and four bottles of spirits, which were chargeable with a duty which had not been paid; (2) that he, on December 5, 1958, in Spelman Street, E.1, knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in dealing with certain goods, namely, 2,420 cigars, which were chargeable with a duty which had not been paid; in each case contrary to section 304 of the Customs and Excise Act, 1952.

The magistrate heard the charges on January 5, 24 and 31, 1959, and found the following facts: (a) No duty had been paid on any of the goods. (b) The goods had been admitted into the United Kingdom free of duty for the use of the United States armed forces under an agreement between the British and American Governments. (The agreement was not produced and the magistrate refused to admit oral evidence of its contents.) (c) The appellant carried on business as a dress manufacturer at a small factory or workshop on the top floor of premises at 6, Spelman Street, and lived at 37, Cephas Avenue. (d) The bottles of spirits referred to in the first information were bought by the appellant from an American serviceman with whom he was friendly, in the course of social visits by the serviceman to the appellant's home, and were found at the appellant's home. (e) The 45 cigars referred to in the first information were bought by the appellant from a second American serviceman, one "Hyme," and were found at the appellant's home. (f) The appellant obtained the 2,420 cigars referred to in the second information from Hyme. Having inquired as to the possibility of acquiring one or two further boxes of cigars, the appellant met Hyme by appointment in the street, and Hyme asked him to look after the 2,420 cigars. The appellant agreed and the cigars were then transferred from the car in which Hyme had brought them to the appellant's car. It was arranged that the appellant should extract whatever number of cigars he required, and that Hyme should call for the remainder, which he told the appellant he intended to sell. The appellant later took all the cigars to 6, Spelman Street and put them in his workshop there. He extracted 100 cigars, intending to give them to a customer as a Christmas present, but was unsuccessful in finding the customer and returned with the cigars to 6, Spelman Street, where he was arrested.

The appellant, in answer to questions put to him at the hearing, admitted that he knew that the American servicemen

received imported spirits and cigars, and that these goods could be bought from them more cheaply than elsewhere because they had not borne duty. He further admitted that he knew that the servicemen were not supposed to sell them, but said that he thought it would be quite legal if they did.

It was contended on behalf of the appellant: (1) that the respondent had failed to establish that duty was payable on the goods at the time when the appellant was concerned in keeping or dealing with them; (2) that the respondent had failed to prove that the appellant knew that the goods were chargeable with duty; (3) that the appellant's conduct in relation to the 2,420 cigars did not amount to " dealing with " them; and (4) that the prosecution had failed to establish an intent to defraud.

On behalf of the respondent it was contended: (1) that the quantity of cigars involved in the second charge showed that Hyme did not intend to smoke them himself; that it was a reasonable inference that the goods were to be sold, if not by the appellant then by Hyme, and that, therefore, the cigars were being dealt with in an unauthorised manner and the appellant was concerned in so dealing with them; (2) that the words in section 304 of the Act, " in any manner dealing with " were wide enough to cover the appellant's acts of taking and looking after goods of another person in the circumstances established; and (3) that the expression in section 304 of the Act " goods . . . which are charge- " able with a duty which has not been paid " had the same meaning as the expression " uncustomed goods " in section 186 of the Customs Consolidation Act, 1876.

The magistrate was of opinion that in the case of each charge the prosecution had proved that the goods were chargeable with duty, and that the appellant knew that they were so chargeable; that the facts amounted to a " dealing with " the cigars, the subject of the second charge; and that in each case the appellant intended to defraud Her Majesty of the duty payable on the goods.

John Hall for the appellant.
J. R. Cumming-Bruce for the respondent.

No cases, other than those which are referred to in the judgment, were cited in argument.

Cur. adv. vult.

October 22. ASHWORTH J. read the following judgment of the court. This is an appeal by way of case stated from a decision of Mr. Geraint Rees, one of the metropolitan magistrates, before whom the appellant was charged in respect of two offences under section 304 of the Customs and Excise Act, 1952. In the first charge it was alleged that at his house at 37, Cephas Avenue, E.1, he knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in keeping

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certain goods, namely 45 cigars and four bottles of spirits, which were chargeable with a duty which had not been paid. In the second charge it was alleged that in Spelman Street, E.1, where his business premises were situate, he knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in dealing with certain goods, namely, 2,420 cigars, which were chargeable with a duty which had not been paid.

[His Lordship stated the facts and continued:] This is not the first case in which this court has had to consider the effect in regard to customs duty of a sale or disposal by an American serviceman of goods which have been imported into the United Kingdom duty free for the use of American forces stationed here. As Lord Goddard C.J. said in *Sayce* v. *Coupe* [1]: "The importance of the case is this: it is well known that at the present time when large numbers of American soldiers and airmen are in this country, by an arrangement which Her Majesty's Government have made with the American Government, dutiable articles are allowed to be imported into this country for the use of the American troops without payment of duty. The result is that there are a good many sales of duty-free articles taking place surreptitiously, . . . with the consequence that this country loses the benefit of the customs duty payable, . . ."

In the course of his able argument on behalf of the appellant Mr. Hall contended that if goods, which have been imported duty free for the use of American troops, are used for some other purpose, as for example if they are sold to members of the public, section 257 of the Customs and Excise Act, 1952, is applicable and provides the only consequence of such misuse, namely, forfeiture of the goods. [His Lordship read section 257 (1) of the Act and continued:] It is to be noted that by way of contrast to sections 44 and 45 of the Act section 257 is not followed by a section providing for a penalty in the event of such misuse of goods imported duty-free as is alleged in the present case. Moreover, section 257 does not contain any words referring to other possible consequences apart from forfeiture of the goods, and indeed in subsection (2) care has been taken to preserve the liability of any person who has given an undertaking or security for the observance of the condition upon which the goods have been admitted into the country duty-free. In our judgment, however, this argument is met by the opening words of section 304 under which the appellant was charged: "Without prejudice to any other provision of this Act . . ." Further, we should have been surprised if the consequences of misuse were limited to forfeiture of the goods, since in many cases the goods would have been consumed before steps could be taken to forfeit them. On this point, therefore, we are of opinion that it was open to

[1] [1953] 1 Q.B. 1, 5; [1952] 2 T.L.R. 664; [1952] 2 All E.R. 715.

the respondent to charge the appellant under section 304, notwithstanding the provisions of section 257.

Mr. Hall also contended that it was incumbent upon the prosecution to establish that duty was payable and had not been paid at the time when the appellant was concerned in keeping or dealing with the goods, and that this onus had not been discharged. So far as actual payment of duty is concerned, it is found as a fact that no duty had been paid on any of the goods the subject of the charges, and that finding was not contested. The question whether at the material times duty had become payable is more difficult. In *M'Queen* v. *M'Cann* [2] the word " uncustomed " in section 186 of the Customs Consolidation Act, 1876, was being considered in relation to facts not unlike those in the present case, and Lord Normand, then Lord Justice-General, said [3]: " There might have been a considerable difficulty about " the construction of the word ' uncustomed ' were it not for the " decision in *Attorney-General* v. *Thornton* [4] that wines, which " were a dutiable commodity but which had been brought into " the country free of duty for the use of an ambassador and his " family, must, when afterwards sold, bear the appropriate duty, " and that the auctioneer was bound to pay such duty out of the " proceeds of their sale. The ground of the judgment is that " duties attach to goods brought into the country and that, though " the duty is not paid at the moment of bringing in because they " are by special arrangement allowed to come in free of duty, " the duty is leviable later when the commodities pass into other " than the privileged person's hands." The principle of that decision was applied in *Sayce* v. *Coupe*.[5] It is true that since January 1, 1953, the Act of 1952 has become applicable and that in section 304 the expression " chargeable with a duty which has " not been paid " has been substituted for the word " uncus- " tomed," but in our judgment the alteration in wording has not affected the principle of the earlier decisions.

So far as the first charge is concerned, which relates to spirits and cigars admittedly bought by the appellant from American servicemen, we are of opinion that at the material time duty had clearly become payable. In the second charge the appellant was alleged to have been concerned in dealing with 2,420 cigars, of which he only bought 100. The circumstances in which the full quantity of 2,420 cigars came into the appellant's possession have already been described, and it is enough for us to hold that at least when the appellant put the cigars into his car, upon the footing that he could buy as many as he wanted and return the balance, the privilege under which the cigars were not dutiable ceased to apply and the goods became chargeable to duty. It was also argued that what the appellant did in relation to the goods did not amount to " dealing with " them within the meaning

[2] 1945 S.C.(J.) 151.
[3] Ibid. 153.
[4] (1824) M'Cle. 600.
[5] [1953] 1 Q.B. 1.

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of section 304. The relevant words are very wide, "in any "manner dealing with," and without attempting any precise definition of their meaning we are of opinion that the appellant's conduct clearly fell within them.

Mr. Hall further contended that, assuming the goods to have become dutiable, there was no finding that the appellant knew that duty was payable, and accordingly the charges ought to have been dismissed. It is true that there is no such finding in the second paragraph of the case stated, where such a finding might have been expected, but in the sixth paragraph the learned magistrate in stating his opinion says in terms: "In the case of each "charge the appellant knew that the goods were chargeable with "duty," and in our opinion the evidence before him was quite sufficient to enable him to take that view. In regard to the point that no intent to defraud was proved, the principle laid down in *Rex* v. *Cohen* [6] is applicable, and in our view there was ample evidence to show such intent.

For these reasons we are of opinion that the magistrate came to a correct conclusion, and this appeal is accordingly dismissed.

Appeal dismissed with costs.

Solicitors: *Judge & Priestley; Solicitor, H.M. Customs and Excise.*

[6] [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203.

[CHANCERY DIVISION.]

1959
Oct. 22, 23, 27; *Nov.* 13.

Danckwerts J.

J. BOLLINGER AND OTHERS *v.* COSTA BRAVA WINE CO. LTD.

[1958 J. No. 6442.]

Passing off—Non-exclusive trade description—Geographical term—Use of name "champagne"—Right to exclusive use of description claimed by class of producers in Champagne district of France—Description used by producers of wine outside district—Whether unlawful trade competition—Whether action lies at suit of class.

Statutory Duty — Civil action, whether created — False trade description—Whether breach of duty owed to rival trader—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3, 19 (*as amended by Merchandise Marks Act,* 1953 (1 & 2 *Eliz.* 2, *c.* 48), *ss.* 1, 4).

Tort—New tort—Unlawful trade competition—Deliberate damage to property of another—Development of passing off.

The plaintiffs, J. Bollinger and eleven other companies incorporated under French law, suing on behalf of themselves and all other persons producing wine in the Champagne district of France

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[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

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J. Bollinger v. Costa Brava Wine Co. Ltd.

which was supplied to England and Wales, claimed an injunction restraining the defendants, the Costa Brava Wine Co. Ltd., from applying the trade descriptions "champagne" or "Spanish Champagne" to wine made in Spain or from grapes grown in Spain, from passing off such wine as wine produced in the Champagne district by selling it as "Spanish Champagne" or under any other name including the name "champagne" and a declaration that the description "Spanish Champagne" or one including "champagne" was a false trade description. By their statement of claim the plaintiffs alleged that their wine was a naturally sparkling wine produced in the Champagne district by a process of double fermentation from grapes grown in the district, that it had long been known to the trade and public in the United Kingdom as "champagne" and as such had acquired a high reputation and that a member of the public or trade would understand "champagne" to mean their wine. They further alleged that the descriptions used by the defendants were false trade descriptions of wine produced in Spain, that sales of the wine by the defendants were an offence under section 2 (2) of the Merchandise Marks Act, 1887,[1] and were in breach of the statutory duty which the defendants owed to the plaintiffs and that the defendants were acting in unlawful trade competition with the plaintiffs. The defendants denied that they had passed off their wine for that of the plaintiffs, or that if they had so passed it off, they had done anything for which the plaintiffs had a cause of action in English law; they also denied that the descriptions were false trade descriptions within the meaning of section 2 (2), or that the subsection imposed any statutory duty upon them, and that any of their alleged acts constituted unlawful competition; alternatively, they contended that unlawful competition was not a cause of action known to English law.

On the preliminary trial of the following points of law: (a) whether, assuming the truth of the plaintiffs' allegations, if the defendants had, as alleged, passed off their wine for that of the plaintiffs they had done any act in respect of which the plaintiffs had a cause of action according to English law; (b) whether section 2 (2) imposed a statutory duty on the defendants or a duty owed

[1] Merchandise Marks Act, 1887, as amended, s. 2: "(1) Every person "who—(*d*) applies any false trade "description to goods . . . shall, subject to the provisions of this Act, "and unless he proves that he acted "without intent to defraud, be guilty "of an offence against this Act. (2) "Every person who sells, or exposes "for, or has in his possession for, "sale, or any purpose of trade or "manufacture, any goods or things "to which any forged trade mark or "false trade description is applied or "to which any trade mark or mark "so nearly resembling a trade mark "as to be calculated to deceive is "falsely applied, as the case may be, "shall, unless he proves either—(*a*) "that, having taken all reasonable "precautions against committing an "offence against this Act, he had, at "the time of the commission of the "alleged offence, no reason to suspect "the genuineness of the trade mark, "mark or trade decription, and that, "on demand made by or on behalf "of the prosecutor, he gave all the "information in his power with respect to the persons from whom he "obtained such goods or things; or "(*b*) that otherwise he acted innocently."

S. 3: "The expression 'trade description' means any description, "statement, or other indication, direct "or indirect, . . . (*b*) as to the place "or country in which any goods were "made or produced, or (*c*) as to the "mode of manufacturing or producing "any goods, or (*d*) as to the material "of which any goods are composed. ". . . The expression 'false trade "description' means a trade description which is false or misleading in "a material respect as regards the "goods to which it is applied. . . ."

S. 19: "(1) This Act shall not "exempt any person from any action, "suit or other proceeding which "might, but for the provisions of "this Act, be brought against him."

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by them to the plaintiffs, and, if it did, whether it gave rise to an action in law; and (c) whether the plaintiffs' allegation that the defendants' acts constituted unlawful trade competition was sufficient to support a cause of action in English law:—

Held, (1) that the law of passing off was not so limited in scope as to allow a person competing in trade to attach to his product a name or description with which it had no natural association, so as to make use of the reputation and goodwill gained by a product genuinely indicated by that name and description, and that it made no difference if the persons truly entitled to describe their goods by that name were a class producing goods in a certain locality and not merely one individual, for the description was part of their goodwill and a right of property. The law would fail if, as a general rule, it could offer no remedy for the deliberate act of one person causing damage to the property of another and it should, and did, provide a remedy for the type of unfair competition alleged in the statement of claim. Accordingly, on the assumptions made therein, the plaintiffs had a right of action under paragraphs (a) and (c) of the points of law (post, pp. 980 and 981).

Pillsbury-Washburn Flour Mills Co. Ltd. v. *Eagle* (1898) 86 Fed.Rep. 608, and dicta of Lord Parker in *A. G. Spalding & Brothers* v. *A. W. Gamage* (1915) 32 R.P.C. 273, 284; 31 T.L.R. 328, of Lord Herschell in *Reddaway* v. *Banham* [1896] A.C. 199, 209; 21 T.L.R. 295; 13 R.P.C. 218, of Romer L.J. in *Samuelson* v. *Producers' Distributing Co. Ltd.* [1932] 1 Ch. 201, 210; 48 R.P.C. 580, and of Goddard L.J. in *Draper* v. *Trist* [1939] 3 All E.R. 513, 526; 56 R.P.C. 429 applied.

Dent v. *Turpin* (1861) 2 John. & H. 139, and *Southorn* v. *Reynolds* (1865) 12 L.T. 75 considered.

Whitstable Oyster Fishery Co. v. *Hayling Fisheries Ltd.* (1900) 17 R.P.C. 461 distinguished.

(2) That, on consideration of the whole Act, a breach of the Merchandise Marks Act, 1887, did not give rise to any civil right of action in a rival trader; if the protection of any class of person was contemplated, it was the purchasers of goods which might be misleadingly described, but the rights of rival traders in a passing-off action and of purchasers of goods in an action based on deceit were carefully preserved by section 19 and no cause of action was given except where expressly provided. Accordingly, the Act imposed no statutory duty on the defendants, breach of which would enable the plaintiffs to bring an action against them (post, p. 983).

Dicta of Lord Simonds in *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398, 407; 65 T.L.R. 170; [1949] 1 All E.R. 544 applied.

Preliminary points of law set down for hearing before trial under Order 25, rr. 2, 3.

The plaintiffs, J. Bollinger, Champagne Charles Heidsieck, Champagne Heidsieck & Cie., Monopole, Krug & Cie., Champagne Lanson Père & Fils, Champagne Louis Roederer, Maison A. Mérand & Cie., Maison Moët & Chandon, G. H. Mumm & Cie., Champagne Perrier Jouët, Champagne Pol Roger & Cie. and Veuve Clicquot Ponsardin issued a writ claiming an injunction restraining the defendants, the Costa Brava Wine Co. Ltd., from applying the trade descriptions "champagne" or "Spanish "Champagne" to wine made in Spain or from grapes grown in

Spain, and from passing off, as and for wine produced in the Champagne district, wine not so produced by advertising, offering for sale, or selling it as Spanish champagne or under any other name or description that included the name "champagne," and a declaration that the description "Spanish Champagne" and any other description including the name "champagne" was a false trade description of wine made in Spain or from grapes grown in Spain.

By their statement of claim the plaintiffs alleged (1) the plaintiffs, companies incorporated under the law of France, carried on business in the Champagne district of France as producers of wine which they supplied to England and Wales. The plaintiffs were suing on behalf of themselves and of all other persons who produced wine in the district and who supplied it to England and Wales.

(2) The wine produced by the plaintiffs was a naturally sparkling wine produced in the Champagne district by a process of double fermentation from grapes grown in the district, and it was and had for long been known to the trade and public throughout the United Kingdom as "champagne," and as such had acquired a high reputation. Any member of the trade or public in the United Kingdom ordering champagne or seeing wine advertised or offered for sale as champagne would expect it to be a naturally sparkling wine produced in the Champagne district from grapes grown there.

(3) The defendants, who carried on business at No. 75, Gray's Inn Road, London, W.C.1, as wine and spirits merchants, had passed off and threatened and intended to pass off, as and for champagne, wine not produced by the Champagne houses in the Champagne district from grapes grown in that district, offering for sale and selling the same as "Spanish Champagne."

(4) The descriptions "champagne" and "Spanish Cham- "pagne" were false trade descriptions of wine produced in Spain, and the sale by the defendants of wine to which a false trade description had been applied was an offence under section 2 (2) of the Merchandise Marks Acts, 1887 to 1953, and was in breach of the statutory duty which the defendants owed to the plaintiffs.

(5) The acts of the defendants constituted unlawful competition with the plaintiffs in the way of trade. By paragraph (6) the plaintiffs claimed that they had suffered damage, and that the defendants intended to continue what they had been doing.

The defendants by their defence admitted that a naturally sparkling wine produced in France had for a number of years past been sold in England under the description "champagne"; and that they were, and intended to continue, selling a wine produced in Spain under the name "Spanish Champagne," but they denied that if they had passed off their wine for champagne they had done any act in respect of which the plaintiffs had a cause of action against them according to English law. They also denied

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that the names " Spanish Champagne " or " champagne " were false trade descriptions, or that section 2 (2) of the Merchandise Marks Act, 1887, imposed any statutory duty on them, or that any statutory duty was owed by them to the plaintiffs; alternatively, they contended that if the section did impose any such statutory duty it was not actionable at the suit of any of the plaintiffs. The defendants did not admit that any of the acts alleged constituted unlawful competition with the plaintiffs in the way of trade, and, alternatively, contended that if such acts did constitute such unlawful competition the same was not relevant to any cause of action known to English law.

By an order dated June 30, 1959, and made on the defendants' application, the following points of law were ordered to be set down for hearing in the non-witness list and disposed of before the trial of the action, pusuant to R.S.C., Ord. 25, rr. 2 and 3, and Ord. 36, r. 1: (a) that assuming the truth of paragraphs 1 and 2 of the statement of claim, if the defendants had, as alleged in paragraph 3 thereof, passed off or threatened or intended to pass off as or for champagne wine not produced by the plaintiffs in the Champagne district from grapes grown in the Champagne district and supplied by the plaintiffs to England and Wales, they had not thereby done any act in respect of which any of the plaintiffs had a cause of action against them according to the law of England; (b) that section 2 (2) of the Merchandise Marks Acts, 1887 to 1953, did not impose any statutory duty on the defendants, or any statutory duty owed by the defendants to the plaintiffs and, alternatively, if the said section did impose any such statutory duty, it was not in law actionable at the suit of any of the plaintiffs or at all; and (c) that the allegation in paragraph 5 of the statement of claim that the acts of the defendants constituted unlawful competition was insufficient to support any cause of action known to English law.

R. O. Wilberforce Q.C., P. J. Stuart Bevan, R. K. Kuratowski and *E. G. Nugee* for the plaintiffs.

Sir Milner Holland Q.C., F. E. Skone James and *S. H. Noakes* for the defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Mogul S.S. Co.* v. *McGregor, Gow & Co.*[2]; *Phillips* v. *Britannia Hygienic Laundry Co.*[3]; *Square* v. *Model Farm Dairies (Bournemouth) Ltd.*[4]; *Jamieson & Co.* v. *Jamieson*[5]; *Solomons* v. *Gertzenstein*[6]; *Britannic Merthyr Coal Co.* v. *David*[7]; *Dawson & Co.* v. *Bingley Urban District Council*[8];

[2] (1889) 23 Q.B.D. 598.
[3] [1923] 2 K.B. 832; 39 T.L.R. 530.
[4] [1939] 2 K.B. 365; 55 T.L.R. 384; [1939] 1 All E.R. 259.
[5] (1898) 14 T.L.R. 160.
[6] [1954] 2 Q.B. 243; [1954] 3 W.L.R. 317; [1954] 2 All E.R. 625.
[7] [1910] A.C. 74.
[8] [1911] 2 K.B. 149; 27 T.L.R. 308.

Read v. *Croydon Corporation* [9]; *Lavender* v. *Diamints* [10]; *London Armoury Co. Ltd.* v. *Ever Ready Co. (Great Britain) Ltd.* [11]; *Cooper* v. *Whittingham* [12]; *Stevens* v. *Chown* [13]; *Attorney-General* v. *Ashborne Recreation Ground Co.* [14]; *Devonport Corporation* v. *Tozer* [15]; *Chamberlaine* v. *Chester and Birkenhead Railway Co.* [16]; *Carlton Illustrators* v. *Coleman & Co. Ltd.* [17]; *Hannay & Co.* v. *Smurthwaite* [18]; *Kat* v. *Diment.* [19]

Cur. adv. vult.

November 13. Danckwerts J. read the following judgment, which after referring to the statement of claim, the defence and the points of law continued: It appeared from the arguments before me that the points of law (a) and (c) were, in substance, part of the same cause of action relied upon by the defendants, so that there were really only two points of law to be decided.

It appears, therefore, that, if the points of law are decided entirely against the plaintiffs, this will bring the action to an end; but, if any of the points of law are decided in the plaintiffs' favour, it does not necessarily follow that the action will succeed, because, on the facts, it will still be open to the defendants to show that they have not been guilty of any sort of passing-off and that the description used by them for their wine is not a false trade description or otherwise contrary to the provisions of the Merchandise Marks Acts, 1887 to 1953. I am not deciding these questions of fact and evidence at this hearing, and I am not concerned with the question whether the plaintiffs are entitled to sue on behalf of all the wine producers in the Champagne district of France.

It is desirable, I think, to state the assumptions upon which the arguments proceeded in a clear form. These are the assumptions: (1) The plaintiffs carry on business in a geographical area in France known as Champagne; (2) The plaintiffs' wine is produced in Champagne and from grapes grown in Champagne; (3) The plaintiffs' wine has been known in the trade for a long time as "champagne" with a high reputation; (4) Members of the public or in the trade ordering or seeing wine advertised as "champagne" would expect to get wine produced in Champagne from grapes grown there; and (5) The defendants are producing a wine not produced in that geographical area and are selling it under the name of "Spanish Champagne."

It was admitted on behalf of the plaintiffs that the action was not a "passing-off action" in the sense that there was any

[9] (1938) 55 T.L.R. 212; [1938] 4 All E.R. 631.

[10] [1949] 1 K.B. 585; 65 T.L.R. 163; [1949] 1 All E.R. 532.

[11] [1941] 1 K.B. 742; 57 T.L.R. 343; [1941] 1 All E.R. 343.

[12] (1880) 15 Ch.D. 501.

[13] [1901] 1 Ch. 894; 17 T.L.R. 313.

[14] [1903] 1 Ch. 101; 19 T.L.R. 39.

[15] [1903] 1 Ch. 759.

[16] (1848) 1 Exch. 870; 11 L.T.O.S. 270.

[17] [1911] 1 K.B. 771; 27 T.L.R. 65.

[18] [1893] 2 Q.B. 412.

[19] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657.

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allegation that the defendants' product was passed off as wine produced by any of the plaintiffs individually. The plaintiffs' first contention (which is the subject of points (a) and (c)) is that where a number of persons produce goods in a geographical area and these goods become known by the name of the geographical area and, as such, acquire a reputation, persons who produce similar goods outside the geographical area and attach the name of the geographical area to their goods are guilty of what is described in paragraph 5 of the statement of claim as "unlawful competition" and are passing off their goods as the goods of other persons in a way which the law prohibits. It was said that the name "champagne" was part of the plaintiffs' goodwill which was injured by the defendants' conduct and that the law was not so limited as to deprive persons so injured of a right of action to protect their property, and that it is not an objection that the plaintiffs have no exclusive right to the name "champagne" in the sense that they share the right to use it with all other persons who produce wine in the Champagne area.

The defendants, on the other hand, claim that the plaintiffs' case could not come within the well-settled ambit of a passing-off action, and contended that the law did not provide a civil remedy for such matters as were the subject of the plaintiffs' complaint.

On the assumptions which have to be made for the purpose of these arguments (which, as I have pointed out, do not necessarily represent the true facts of the case), the taking of the name of a product which is associated with growers in a different district appears, prima facie, to be a reprehensible course of conduct, but whether it is actionable must depend upon principle and the authorities which are relevant. A very large number of cases, as well as textbooks, were cited to me in argument.

The well-established action for "passing-off" involves the use of a name or get-up which is calculated to cause confusion with the goods of a particular rival trader, and I think it would be fair to say that the law in this respect has been concerned with unfair competition between traders rather than with the deception of the public which may be caused by the defendant's conduct, for the right of action known as a "passing-off action" is not an action brought by the member of the public who is deceived but by the trader whose trade is likely to suffer from the deception practised on the public but who is not himself deceived at all.

This aspect seems to me to be obscured in the passage in Clerk and Lindsell on Torts (1954), 11th ed., p. 2, to which I was referred: "An action at common law lay for 'passing-off' "where there was an intent to deceive on analogy to an action "for fraud, but unless the plaintiff proved that there was an "intent to deceive no action lay. In equity, however, an in-"junction could be obtained to restrain the defendant from

" continuing a practice that was calculated to deceive, although " there was no proof of an intent to deceive. Damages was not " a remedy available in equity, but where the defendant had " full knowledge of all the facts equity treated him as if he had " an intention to deceive, and in such a case directed against " him an account of profits arising from his fraud, but only from " the date of his knowledge. Accordingly, where the 'passing-" 'off' was entirely innocent on the part of the defendant, who " desisted so soon as the facts were brought to his notice, the " plaintiff had no remedy by way of injunction and none for an " account of profits. At common law no action would lie at all, " but had there been a deceit an action would lie independently " of proof of damage, though only nominal damages might be " obtainable. It will, therefore, be observed that there were two " different causes of action, one arising from deceit and the other " from an equitable quasi-property. Under the dual administra-" tion of law and equity since 1873 this fact seems to have been " obscured, so that as long ago as 1915 it could be suggested that " nominal damages would lie for an innocent passing-off. It is " not suggested that the present law is less logical than the old, " but this confusion has left a legacy in the uncertainty which " surrounds the true nature and extent in this 'quasi-property' " in a trade description or name or, perhaps, goodwill."

The last few words seem to me to be truly related to the nature of the " passing-off " action, but nowhere in that passage is the point made clear that the plaintiff is not deceived; he has caught the defendant deceiving other persons by pretending that his goods are those of the plaintiff. The point is that the deception is injuring the plaintiff's trade.

Winfield on Torts (1954), 6th ed., pp. 733 et seq., seems to me to approach the subject more correctly in regarding the cause of action as being an example of competition which is unlawful. After pointing out that, in general, trade competition is lawful, the author refers to the examples of unlawful competition, such as interference by threats or slander of title, and includes " passing-off," concluding that the basis of the proceedings is the protection of rights of property affecting the plaintiff's trade, for there is no right of action where there is no interference with a plaintiff's trade (see *Day* v. *Brownrigg* [1]—the " Ashford " Lodge " case). That difficulty does not arise in the present case. The whole basis of the plaintiffs' complaints is the damage which is alleged to be caused to the plaintiffs' trade in the wine called " champagne."

The view that the law is interfering to protect rights of property is clearly supported by the observations of Lord Parker in *A. G. Spalding & Brothers* v. *A. W. Gamage Ltd.* [2] (the " Orb " football case), where he says [3]: " There appears to be considerable

[1] (1878) 10 Ch.D. 294.

[2] (1915) 32 R.P.C. 273; 31 T.L.R. 328.

[3] 32 R.P.C. 273, 284.

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" diversity of opinion as to the nature of the right, the invasion " of which is the subject of what are known as passing-off actions. " The more general opinion appears to be that the right is a right " of property. This view naturally demands an answer to the " question—property in what? Some authorities say property in " the mark, name or get-up improperly used by the defendant. " Others say, property in the business or goodwill likely to be " injured by the misrepresentation. Lord Herschell in *Reddaway* " v. *Banham* [4] expressly dissents from the former view; and if " the right invaded is a right of property at all, there are, I think, " strong reasons for preferring the latter view "; and Lord Parker points out [5] that the plaintiff was not the party deceived.

The statements of Lord Parker and Lord Herschell are good enough for me; and the same view is supported by the statements of Romer L.J. in *Samuelson* v. *Producers' Distributing Co. Ltd.*,[6] and of Goddard L.J. in *Draper* v. *Trist*,[7] where he says [8]: " In " passing-off cases, however, the true basis of the action is that " the passing-off by the defendant of his goods as the goods of the " plaintiff injures the right of property in the plaintiff, that right " of property being his right to the goodwill of his business."

The plaintiffs claim that their goodwill in the name or description " champagne " is injured by the defendants' conduct. Sir Milner Holland, on behalf of the defendants, did not contest the correctness of the statements in those cases, but pointed out that each of them was a case of interference with the name or description of the goods of a particular trader. The issue still is whether an action lies at the suit of one or more traders who, as well as others, use or are entitled to use the particular name or description.

I was referred by Mr. Wilberforce on behalf of the plaintiffs to a number of English cases, which were admitted not to be decisive. The earliest of these is the strange case of " the " dippers," that is to say, *Weller* v. *Baker*.[9] This case related to medicinal springs at Tunbridge Wells, and by certain articles of agreement made between the lord of the manor and the free tenants it had been agreed that no person should be permitted to follow the employment of a " dipper " except persons who had been chosen by the homage at the courts baron and approved by the lord of the manor, preference being given to the wives, widows and daughters of the freehold tenants, the number being limited to twelve. These articles of agreement were confirmed by a statute of George II. The " dippers " were women who attended at the springs and delivered the water therefrom to persons resorting thereto, and the dippers were rewarded with gratuities for doing this. The defendant, Dorcas Baker, who, though chosen by the homage, was not approved by the lord of the manor,

[4] [1896] A.C. 199, 209; 12 T.L.R. 295; 13 R.P.C. 218.
[5] 32 R.P.C. 273, 283.
[6] [1932] 1 Ch. 201, 210; 48 R.P.C. 580.
[7] [1939] 3 All E.R. 513; 56 R.P.C. 429.
[8] [1939] 3 All E.R. 513, 526.
[9] (1769) 2 Wils.K.B. 414.

proceeded to dip water and to receive gratuities, and the action was brought by the six chosen dippers and their husbands claiming that the defendant's conduct deprived them of moneys which they would otherwise have received. It was held by the Court of King's Bench that an action on the case lay for the defendant's interference with the plaintiffs' "right of employment" (being both an injury and damage), and that all the dippers had properly joined in the action. The court certainly considered that the defendant's conduct was a tort, and it would appear that the plaintiffs' employment was regarded as a freehold right of property; but the case does not seem to be very close to the present problem.

Dent v. *Turpin*[10] relates to the watchmakers who were concerned with the great clock at Westminster. E. J. Dent had three places of business, and when he died in 1853 he bequeathed two of the businesses to his stepson, Frederick Rippon, who subsequently took the name of "Dent," and the other to his stepson, Richard Dent. The testator always labelled his watches "Dent, "London." The defendants were watchmakers and exporters who had no connection with the name "Dent" at all, but labelled their watches "Dent, London." The plaintiff was the administratrix of Frederick Dent who herself had carried on his business. On demurrer it was argued that the plaintiff could not take proceedings without joining the administratrix of Richard Dent. Page-Wood V.-C. held that the plaintiff was entitled to succeed, observing that[11] "it is quite enough to aver, as the bill does, "that these articles were manufactured and marked with the "trade mark in question, without the consent of the plaintiff or "of the other person entitled to use the name of Dent." This was, of course, clearly a case of passing-off by using the plaintiff's mark, but it does appear to show that the plaintiff need not have an exclusive right to the mark if the defendant has no right to it at all.

Very much to the same effect is *Southorn* v. *Reynolds*.[12] One of two brothers who separately manufactured clay tobacco pipes at Broseley in Shropshire, and sold them under the name of "Southorn's Broseley pipes," in continuation of a business founded by their father, brought the action against the defendant, Reynolds, who was a pipe manufacturer in the City Road, London, and had no establishment at or any connection at Broseley, and, somewhat impudently, it would appear, sold his pipes in boxes conspicuously labelled "Reynold's purified clay pipes made by "Southorn, from Broseley." He had gone to Broseley to obtain someone of the name of "Southorn" and had taken into his employment an individual of that name who was simply an ordinary workman. Page-Wood V.-C., following his own decision in *Dent* v. *Turpin*,[13] granted an injunction, in spite of the objection taken that the plaintiff had not an exclusive right to the name.

[10] (1861) 2 John. & H. 139.
[11] Ibid. 143.
[12] (1865) 12 L.T. 75.
[13] 2 John. & H. 139.

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In this case both a surname and a geographical description were involved.

Braham v. *Beachin* [14] is of interest because the case concerns a name which was geographical. The defendants, who did not work a colliery in the parish of Radstock but did work seams of coal connected with the seams of coal in the parish of Radstock, called themselves "The Radstock Colliery Proprietors." The plaintiffs were the Dowager Countess Waldegrave and the trustees of her marriage settlement, and they worked all the coal in the parish of Radstock, with a small exception. Fry J. granted an injunction restraining the defendants, unless and until they should acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style used by them, or any other name or style signifying that the defendants were proprietors of any colliery at Radstock. The relevance of this case is weakened, however, because it appears that the order was really made on the basis that "The Radstock Colliery Proprietors" would be taken to refer to the plaintiffs' business, and, therefore, in substance, the case is one of ordinary passing-off.

Now come the two oyster cases. In *The Free Fishers and Dredgers of Whitstable* v. *Elliott* [15] the plaintiffs were a company incorporated under a statute of George III, and were entitled to the soil of the marine manor of Whitstable, to the exclusive right of fishing therein, and also to the exclusive right of taking tolls from ships anchoring in the bay. The defendant, who was the contractor for the refreshment department of the Royal Courts of Justice, sold what he called "Whitstable native oysters" in the building at 2s. per dozen. The plaintiffs claimed that the only genuine Whitstable native oysters were those produced upon their beds, and alleged that the defendant's oysters were French oysters known in the trade as "seconds." It appeared that the oysters sold by the defendant came from the bed of the Sea Salter and Ham Oyster Co. at Whitstable, which were adjacent to those of the plaintiffs, but it also appeared that these oysters had not been born in the estuary of the Thames but on the coast of France, and had been laid down on the beds of the Sea Salter Co. until they arrived at maturity. Stirling J. found that the term "Whitstable native oysters" was not a proper description of the defendant's oysters. He said that the term "Whitstable" was properly applicable to any oysters matured at Whitstable, but that the term "native" meant oysters which came into being at a few places on the coast of Essex, and not only at Whitstable. So that "Whitstable native oysters" meant oysters matured at Whitstable, but also born there or at one of the places in Essex.

In a reserved judgment Stirling J. seems to have come to the conclusion that the name "Whitstable native oysters," primarily descriptive and geographical, had come to be the trade name of the plaintiffs, and he remarked that if the defendant or the Sea

[14] (1878) 7 Ch.D. 848.

[15] (1888) 4 T.L.R. 273.

Salter Co., from whom he purchased, were selling oysters properly designated as " Whitstable native oysters " he could not have interfered. He felt suspicious about the conduct of the Sea Salter Co., but thought that the defendant might have acted in innocence. But, as the defendant declined to give an undertaking to discontinue the use of the name, an injunction was granted.

There is obviously some relevance in this case to the present, but I think that there is some justification for the comment of Sir Milner Holland that it was a case of ordinary passing-off.

The other oyster case (to which my attention was called by Sir Milner Holland) is *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries Ltd.*[16] The plaintiffs were, apparently the same corporation as the plaintiffs in the earlier case, and they claimed that the proper word " Whitstable " in the trade description of oysters was confined to the plaintiffs and the Sea Salter Co. and indicated the oysters of one or other and no other. The plaintiffs complained that the defendants had recently taken to selling oysters, not those produced by the plaintiffs or the Sea Salter Co., as " Whitstables," " Whitstable natives, selected," and other similar names and were passing off these oysters as those cultivated or matured by the plaintiffs or the Sea Salter Co. The action was dismissed, and it appears that the result of the case turned entirely on the question whether the description " Whitstable " oysters " had acquired a secondary meaning, namely, either the plaintiffs' oysters or those of the Sea Salter Co.

Buckley J. said[17]: " In all cases such as this the question " to be determined is one of fact, and what I have to try here " first is whether these words ' Whitstable natives,' or ' Whit- " ' stable oysters,' which, according to their ordinary meaning " would convey oysters, or oysters of a kind, coming from " Whitstable, have a secondary meaning, by which the trade and " the public understand them to mean not simply that thing— " that class of goods—but certain goods which the plaintiffs only, " or the plaintiffs and the Sea Salter Company, supply. I answer " that question of fact by saying that the evidence satisfies me " that the words are understood by the trade to mean not the " plaintiff company's goods, or the Sea Salter Company's goods, " but a particular class of goods which are known in the trade " by that name."

Sir Milner Holland, very naturally, relied on this case, but I do not think that it is conclusive against the plaintiffs in the present case, because it appears to me that Buckley J. reached a finding of fact (which he stated and discussed[18]) which differs in nature from the assumptions of fact which I am required to make for the purposes of the present case, and he seems to have thought that the term meant merely a particular class of oysters

[16] (1900) 17 R.P.C. 461.
[17] 17 R.P.C. 461, 474.
[18] Ibid. 471, 475.

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having certain characteristics, which is not of the same kind as the assumption on which I have to act.

I turn now to the Scottish case, *Dunnachie* v. *Young & Sons*.[19] The pursuers, who were two separate firms, manufactured firebricks at the farm of Glenboig from fireclay on the farm and had registered trade marks "Glenboig" and "Star Works, Glenboig," with "J. D." and a star; and their firebricks had attained a great reputation at home and abroad. The defendants made firebricks from a seam of clay identical in character with the clay worked at Glenboig, but about two miles from Glenboig, and stamped their bricks "Youngs Glenboig," advertising them as made from Glenboig clay. The court granted an interdict; but it is plain that, apart from the fact that the two firms who had the right to use the word "Glenboig" for their firebricks were the pursuers, the case is simply a passing-off case. Though "Glenboig" was a geographical expression, it was the trade mark, in whole or in part, of each of the aggrieved firms.

I must now deal with the three American cases to which I was referred. The first of these, *New York and R. Cement Co.* v. *Coplay Cement Co.*,[20] decided by two judges of the Federal Circuit Court in Pennsylvania, is in the defendants' favour. Some fifteen or twenty parties, including the plaintiffs, manufactured cement in the town of Rosendale, in the State of New York, and the cement made in Rosendale and its vicinity had for many years been known as "Rosendale Cement." The defendants were manufacturing and selling cement as "Anchor "Rosendale Cement," though it was made in Lehigh County, Pennsylvania. The court held that it was insufficient to show that the plaintiffs had a mere right in common with others to use a particular trade mark, trade name or style of goods, and it was necessary to show an exclusive ownership or property therein. The court did not review the authorities and said that they relied upon the general principles of the law which seemed to be the most applicable to the case. So the action failed. The court was oppressed with the difficulties which might arise if persons could bring actions in respect of such things as Dresden china or Irish linen, and thought it might "open a Pandora's "box of vexatious litigation." But the proposition of the need for exclusive right, as stated by the court, apart from the other American cases, seems to me to be at variance with the English cases *Dent* v. *Turpin*[21] and *Southorn* v. *Reynolds*.[22]

The next case, *Pillsbury-Washburn Flour Mills Co. Ltd.* v. *Eagle*,[23] a decision of three Federal judges on appeal from the Circuit Court of the Northern District of Illinois, is, in my view, irreconcilable with the last-mentioned case. This was an action by a number of manufacturers, including one, the one named in the case, which was an English company, who for many years

[19] (1883) 10 R. 874.
[20] (1890) 44 Fed.Rep. 277.
[21] 2 John. & H. 139.
[22] 12 L.T. 75.
[23] (1898) 86 Fed.Rep. 608.

had manufactured flour on a large scale at the city of Minneapolis in Minnesota. The defendants were wholesale and retail grocers, selling flour at Chicago, Illinois. The plaintiffs sought to stop them from using on barrels and sacks containing flour the words "Minnesota Patent" or "Minneapolis, Minnesota" or "Minne-apolis, Minn." The plaintiffs had for many years identified their flour by the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota," or "Minnesota Patent." The use of the words "Minnesota" or "Minnesota Patent" was understood by the trade and the public to mean flour made under a certain patent process somewhere in the State of Minnesota. Originally, before 1893, it appeared that the defendants had stocked and sold the plaintiffs' flour under the name and description used by them, but after 1893 proceeded to use the names and descriptions complained of for flour produced at Milwaukee, in Wisconsin, which was alleged to be inferior flour sold at a cheaper price.

The court, after an extensive examination of the authorities, including numerous English cases, and among them nearly all the leading English cases on ordinary passing-off, came to the conclusion that an injunction ought to be granted, reversing the decision of the court below. A curious circumstance is that the *New York & R. Cement Co.* case [24] was referred to on an incidental point without any note of disapproval.

Sir Milner Holland sought to weaken the relevance of this case by reason of the court's reliance on a number of the ordinary cases of passing-off and said that the pleading in the case was simply on the basis of passing-off. Mr. Wilberforce's reply to this was to observe that the court was dealing with two propositions as it went through the cases, (1) that geographical expressions may constitute a trade description, and (2) that the plaintiffs need not have an exclusive right to use the trade description. The case is, of course, not binding upon me, and it was contended by Sir Milner Holland that it was not in accordance with English law.

The remaining American case is *California Fruit Canners' Association* v. *Myer.*[25] The headnote is: "Canning companies "in California, who put up and sell fruits grown in that state, "have the right to use thereon the name 'California' as a trade "designation, and, when their products have become well and "favourably known by such name, are entitled to protection by "injunction against the fraudulent use on cans of the same kind "of fruit, grown and put up elsewhere, of labels designating it "as California fruit, and falsely stating that it is put up in that "state." This fairly states the effect of the case, which was decided by a single Federal judge in the Circuit District of Maryland, and the short judgment follows the *Pillsbury-Washburn Flour Mills* case.[26]

[24] 44 Fed.Rep. 277.
[25] (1899) 104 Fed.Rep. 82.
[26] 86 Fed.Rep. 608.

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Sir Milner Holland contended that the mere fact that a defendant's conduct is injurious to the plaintiff or even, maybe, unlawful, does not necessarily give the plaintiff a cause of action; and no doubt this is true in certain circumstances. He relied upon (amongst other cases) *Institute of Patent Agents* v. *Lockwood*,[27] in which the Institute of Patent Agents and three registered patent agents practising in Glasgow sought to prevent the defender describing himself as a patent agent, and were held not entitled to an injunction. But this case has probably more relevance on the question relating to the Merchandise Marks Act and is not of assistance on the present point.

Another instance of loss being caused without the person so damnified being entitled to a remedy is *Abbott* v. *Sullivan*,[28] to which I was also referred; and there are, of course, the examples of mere extravagance of language which are recognised as part of everyday life, such as "the puffing" cases, an instance of which is *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*.[29]

The substance of Sir Milner Holland's argument was that, before a person can recover for loss which he suffered from another person's act, it must be shown that his case falls within the class of actionable wrongs. But the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another. There are such cases, of course, but they occur, as a rule, when the claims of freedom of action outweigh the interests of the other persons who suffer from the use which a person makes of his own property. (For example, see *Day* v. *Brownrigg*[30] and *Mayor of Bradford* v. *Pickles*.[31])

There seems to be no reason why such licence should be given to a person, competing in trade, who seeks to attach to his product a name or description with which it has no natural association so as to make use of the reputation and goodwill which has been gained by a product genuinely indicated by the name or description. In my view, it ought not to matter that the persons truly entitled to describe their goods by the name and description are a class producing goods in a certain locality, and not merely one individual. The description is part of their goodwill and a right of property. I do not believe that the law of passing-off, which arose to prevent unfair trading, is so limited in scope. In my view, the decision in the *Pillsbury-Washburn Flour Mills* case[32] is good sense, and I find nothing in the English cases which is at all inconsistent with the reasoning of the American court, except possibly some of the remarks of Buckley J. in *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries Ltd.*,[33] which, I think, related to the particular circumstances of the trade in oysters in those cases.

[27] [1894] A.C. 347.
[28] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.
[29] [1899] 1 Q.B. 86; 15 T.L.R. 29.
[30] 10 Ch.D. 294.
[31] [1895] A.C. 587; 11 T.L.R. 555.
[32] 86 Fed.Rep. 608.
[33] 17 R.P.C. 461.

I think that the law should and does provide a remedy for the type of unfair competition which is set out in paragraph (a) of the points of law; but I wish to emphasise again that this conclusion is based upon the assumptions of fact which I am required to make for the purpose of the present hearing, and I must not be taken to have accepted in any other way the allegations that what the defendants have been doing causes or is likely to cause any confusion with the wine produced in the Champagne district of France. I think that it is desirable to state this, lest persons who have not followed the basis of the present hearing should be under misapprehension as to the effect of my decision. In short, I am not deciding whether the description "Spanish "Champagne" is calculated to deceive.

I turn now to the point depending upon the Merchandise Marks Acts, 1887 to 1953. It is desirable to see what the Acts do. The really relevant Act is the Act of 1887. Section 2 creates offences as to trade marks and trade descriptions. It provides "(1) every person who—(*a*) forges any trade mark; or "(*b*) falsely applies to goods any trade mark or any mark so "nearly resembling a trade mark as to be calculated to deceive; "or (*c*) makes any die, block, machine, or other instrument for "the purpose of forging, or of being used for forging, a trade "mark; or (*d*) applies any false trade description to goods; or "(*e*) disposes of or has in his possession any die, block, machine, "or other instrument for the purposes of forging a trade mark; "or (*f*) causes any of the things above in this section mentioned "to be done, shall, subject to the provisions of this Act, and "unless he proves that he acted without intent to defraud, be "guilty of an offence against this Act." Paragraph (*d*) is the material paragraph for the purposes of the present case.

Subsection (2) contains ancillary provisions relating to the exposure of offending things for sale. Subsection (3) contains the penalties for offences, which are severe, being on conviction on indictment imprisonment for a term not exceeding two years, or a fine, or both imprisonment and fine, and up to four months' imprisonment or a £20 fine on summary conviction, with increased penalties on summary conviction for second or subsequent offences.

Among the definitions in section 3 (1) of "Trade description" is "any description, statement, or other indication, direct or "indirect, . . . (*b*) as to the place or country in which any "goods were made or produced, or (*c*) as to the mode of manu-"facturing or producing any goods, or (*d*) as to the material of "which any goods are composed. . . . The expression 'false "'trade description' means a trade description which is false "or misleading in a material respect as regards the goods to "which it is applied, . . ." The words "or misleading" were added by the Act of 1953.

It is not necessary to set out all the provisions of the Act, but section 17 may be noted, as it provides that on the sale or

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in the contract for the sale of any goods the vendor shall be deemed to warrant that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

In section 19, there is a saving provision that the Act shall not exempt any person from any action, suit or other proceeding which might, but for the provisions of this Act, be brought against him.

There have been a very large number of decisions on the question whether a duty is imposed by a statute so as to create a civil cause of action. In *Cutler* v. *Wandsworth Stadium Ltd.*[34] the principles are described by Lord Simonds as follows[35]: "The only rule which in all circumstances is valid is that the "answer must depend on a consideration of the whole Act and "the circumstances, including the pre-existing law, in which it "was enacted. But that there are indications which point with "more or less force to the one answer or the other is clear "from authorities which, even where they do not bind, will "have great weight with the House. For instance, if a statutory "duty is prescribed but no remedy by way of penalty or other-"wise for its breach is imposed, it can be assumed that a right "of civil action accrues to the person who is damnified by the "breach. For, if it were not so, the statute would be but a "pious aspiration. But 'where an Act' (I cite now from the "judgment of Lord Tenterden C.J. in *Doe* v. *Bridges*[36]) 'creates "'an obligation, and enforces the performance in a specified "'manner, we take it to be a general rule that performance "'cannot be enforced in any other manner.' This passage was "cited with approval by the Earl of Halsbury L.C. in *Pasmore* "v. *Oswaldtwistle Urban District Council.*[37] But this general "rule is subject to exceptions. It may be that, though a specific "remedy is provided by the Act, yet the person injured has a "personal right of action in addition. I cannot state that pro-"position more happily, or indeed more favourably to the appel-"lant, than in the words of Lord Kinnear in *Black* v. *Fife Coal* "*Co. Ltd.*[38] 'If the duty be established, I do not think there "'is any serious question as to the civil liability. There is "'no reasonable ground for maintaining that a proceeding by "'way of penalty is the only remedy allowed by the statute. "'The principle explained by Lord Cairns in *Atkinson* v. *New-*"'*castle Waterworks Co.*[39] and by Lord Herschell in *Cowley* "'v. *Newmarket Local Board*[40] solves the question. We are "'to consider the scope and purpose of the statute and in

[34] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.
[35] [1949] A.C. 399, 407, 408.
[36] (1831) 1 B. & Ad. 847, 859.
[37] [1898] A.C. 387, 394; 14 T.L.R. 368.
[38] [1912] A.C. 149, 165; 28 T.L.R. 150.
[39] (1877) 2 Ex.D. 441, 448.
[40] [1892] A.C. 345, 352; 8 T.L.R. 788.

" ' particular for whose benefit it is intended. Now the object " ' of the present statute is plain. It was intended to compel " ' mine owners to make due provision for the safety of the " ' men working in their mines, and the persons for whose " ' benefit all these rules are to be enforced are the persons " ' exposed to danger. But when a duty of this kind is imposed " ' for the benefit of particular persons, there arises at common " ' law a correlative right in those persons who may be injured " ' by its contravention.' An earlier and a later example of the " application of this principle will be found in *Groves* v. *Wimborne* " (*Lord*) [41] and *Monk* v. *Warbey* [42] in the former of which cases " the Act in question was described by A. L. Smith L.J. [43] as " ' a public Act passed in favour of the workers in factories and " ' workshops to compel their employers to do certain things for " ' their protection and benefit.' "

In *Cutler* v. *Wandsworth Stadium Ltd.*,[44] however, the statute, which required the provision of space for bookmakers at dog-racing tracks, was held not to give a cause of action to an individual bookmaker against the occupier of a licensed dog-racing track.

The principles discussed have often been applied, and I do not think that there is any advantage in going through the circumstances of the cases in which the result has either been the one way or the other. Looking at the Merchandise Marks Acts, 1887 to 1953, as a whole and considering the other provisions of the Acts, as well as the provisions to which I have referred specifically, I do not find it possible to reach the conclusion that the statutes give a rival trader a civil right of action. If the Act had the protection of any class of persons in mind I think it was the purchasers of goods which might be misleadingly described. But I do not think that the Acts give a civil cause of action to anyone, except where expressly provided. The severe penalties contained in the Acts are, in my view, the remedies provided by the Acts, apart from specific provisions in particular cases. For instance, section 17 of the 1887 Act gives to a purchaser a right of action for breach of warranty, which would appear to be unnecessary if the other provisions of the Act already gave a cause of action. Moreover, both rival traders in a passing-off action and purchasers of goods in an action based on deceit have rights of action apart from these statutes and those rights are carefully preserved by section 19 of the Act of 1887.

I was referred by Mr. Wilberforce to two Irish cases in which relief was obtained by rival traders in a civil action based on the provisions of the Merchandise Marks Act, 1887. These are *Thwaites & Co.* v. *McEvilly* [45] and *J. Donohoe Ltd.* v. *Cherry*

[41] [1898] 2 Q.B. 402; 14 T.L.R. 493.
[42] [1935] 1 K.B. 75; 51 T.L.R. 77.
[43] [1898] 2 Q.B. 402, 406.
[44] [1949] A.C. 398.
[45] [1904] 1 I.R. 310; 21 R.P.C. 397.

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Brothers Ltd.[46] But in these cases it seems to have been assumed that the statute created a civil right of action, and I do not think that I can treat them as deciding the point which I have to decide.

In my view, therefore, the answer on point (b) must be that the Acts do not impose any statutory duty on the defendants which enables the plaintiffs to bring an action against them.

Order accordingly.
Leave to appeal to both sides.
Costs to be costs in the action.

Solicitors: *Monier-Williams & Keeling; Summer & Co.*

[46] (1908) 26 R.P.C. 545.

[COURT OF APPEAL.]

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Nov. 16.

Hodson and Ormerod L.JJ.

WILTSHIRE *v.* FELL.

[Plaint No. L. 14.]

Debt—Committal order—Power of revocation—Committal for non-payment of debt—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Section 5 of the Debtors Act, 1869, contains a power, in certain circumstances, to make an order committing a debtor to prison for non-payment of debt, but there is no power in that section or elsewhere in the Act to revoke the order.

A committal order was made by a county court judge for non-payment of instalments of a judgment debt, later he revoked it, being convinced of the debtor's genuine inability to pay:—

Held, that since there was no power in the statute empowering the judge to revoke the order, once he had made it, he was functus officio and the order could only be revoked on appeal; although that did not take away the judge's power to vary the effect of the order, to suspend its operation or to keep control of the case.

Dictum of Cockburn C.J. in *Evans* v. *Wills* (1876) 1 C.P.D. 229, 234 applied.

Decision of Judge Elder-Jones reversed.

Appeal from Judge Elder-Jones, sitting at Devizes County Court.

Frederich Wiltshire, a judgment creditor, appealed against an order made on July 13, 1959, by Judge Elder-Jones at Devizes County Court for the revocation of an order previously made by him on January 19, 1959, committing Frank Fell to prison for non-payment of instalments of a judgment debt.

The following statement of facts is taken substantially from the judgment of Hodson L.J.

A judgment was obtained against the debtor on February 14,

1955, for £24 13s. 3d. and costs. On that an instalment order was made under which he was to pay 2s. 6d. a week. He made default in the instalment order, and on May 14, 1956, an order was made committing him to prison for 14 days in respect of £4 13s. accumulation of instalments; that order was suspended on the payment of 7s. 6d. a week. The debtor made certain payments but on January 19, 1959, there was £19 2s. 6d. outstanding. An order for committal was made, seven days suspended so long as 2s. 6d. a week was paid. Nothing was paid and a warrant was issued on March 25, 1959, but on 10s. being paid to the officer and an offer of 5s. a week being made, it was not executed.

The matter came before the judge again on July 13, 1959, when he decided that, having regard to the genuine inability of the debtor to pay from time to time because of the misfortune of his wife's mental condition, and to the fact that he was not trying to avoid his obligations, he would revoke the committal order. The creditor appealed against that revocation.

G. G. Macdonald for the judgment creditor.

The debtor was not represented and did not appear.

The case cited in argument is referred to in the judgment.

HODSON L.J. stated the facts and continued: There are several grounds of appeal, but the only ground which it is necessary to discuss is that the judge had no power to make the order for revocation. Imprisonment for debt now depends upon the Debtors Act, 1869, which took the place of the old procedure for imprisonment. The old procedure involved the satisfaction of debt by imprisonment. By the Debtors Act, 1869, there could, under section 5, be no imprisonment which was to operate as a satisfaction or extinguishment of any debt but the power to commit to prison was still retained, although the Act was intended "for the abolition of imprisonment for debt, for the "punishment of fraudulent debtors, and for other purposes." In section 5 certain exceptions are set out which provide that the court "may commit to prison for a term not exceeding six weeks, "or until payment of the sum due, any person who makes default "in payment of any debt or instalment of any debt due from him "in pursuance of any order or judgment of that or any other "competent court." It is unnecessary to read the whole of that section, which provides that the jurisdiction exercised under it shall be exercised in respect of a judgment in the county court by a judge or his deputy "where it is proved to the satisfaction "of the court that the person making default either has or has "had since the date of the order or judgment the means to pay "the sum in respect of which he has made default, and has "refused or neglected, or refuses or neglects, to pay the same.

"Proof of the means of the person making default may be

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"given in such manner as the court thinks just; and for the "purposes of such proof the debtor and any witnesses may be "summoned and examined on oath, according to the prescribed "rules." The section continues: "For the purposes of this "section any court may direct any debt due from any person in "pursuance of any order or judgment of that or any other com- "petent court to be paid by instalments, and may from time to "time rescind or vary such order." The meaning of that last paragraph at first sight is not very clear, but it seems that the words "may from time to time rescind or vary such order" must relate back to the word "direct" in the first line of the paragraph, and those words enable the court to vary a direction as to any debt due from any person under any order or judgment. It does not seem to me that "such order" can relate back to the words "any order or judgment," as otherwise it would be doing the surprising thing of enabling the judge to vary a judgment which had previously been delivered. There are no other words in that section or elsewhere in the Act which enable a judge to revoke an order for committal to prison which he has made.

In contrast, there is section 27 of the Administration of Justice Act, 1956, which provides for penalties in the case of debtors failing to attend on the hearing of a judgment summons for examination as to their means. That section provides that a judge may in such a case make an order committing a debtor to prison for a period not exceeding 14 days in respect of the failure to attend or the refusal to give evidence, having attended. Section 27 (4) provides: "The judge may at any time revoke an "order committing a person to prison under this section and, "if he is already in custody, order his discharge." There is, therefore, the omission from the Act of 1869 of any power such as that contained in the Act of 1956 to revoke an order made for committal to prison. There is, furthermore, some assistance to be derived from *Evans* v. *Wills*.[1] Where a debtor had been committed upon a judgment summons under the Debtors Act, 1869, for non-payment of a debt, it was held in that case that a second warrant of commitment could not be issued against him in respect of the same debt. It was pointed out that where the order or judgment made the debt payable by instalments the debtor might be committed for the full period of six weeks for default in payment of the instalments.

Archibald J., following Cockburn C.J., delivered the second judgment and referred to the old law and the introduction of the Debtors Act, 1869, which now regulates the position of debtors; and having read section 5 he continued[2]: "The question is "whether an order of commitment may be made more than once "for the same debt. The proviso in section 5 seems to me only "to have altered the law to the extent that is expressed: it

[1] (1876) 1 C.P.D. 229. [2] Ibid. 235.

"gives no authority to commit 'from time to time.' I do not "therefore think the judge had any power in this case to make "the second order of commitment. He must exercise the autho- "rity given to him once for all. The second proviso in section 5 "imposes (amongst others) this restriction upon the judge's "power, viz., that 'such jurisdiction shall only be exercised "'where it is proved to the satisfaction of the court that the "'person making default either has or has had since the date of "'the order or judgment the means to pay the sum in respect "'of which he has made default, and has refused or neglected, "'or refuses or neglects, to pay the same.' And it contains this "further enactment, that, 'for the purposes of this section, any "'court may direct any debt due from any person in pursuance "'of any order or judgment of that or any other competent court "'to be paid by instalments, and may from time to time rescind "'or vary such order.' Thus, there may be a fresh imprisonment "for default in payment of each instalment."

Then there is set out a proviso that no imprisonment is to operate as a satisfaction of the debt; but for that proviso imprisonment would operate in satisfaction of the debt, even as against the goods of the debtor.

Cockburn C.J. in his judgment said[3]: "[a judge] may make "an order for the commitment of the debtor for six weeks, or "any less period; but, having once done that, he is functus "officio. We cannot give the judge a power which the legislature "has not conferred upon him. And this is in analogy to the old "law. When a man was once arrested on a ca. sa., he could "not if let out be imprisoned a second time for the same debt. "It is true that where, under this Act, an order is made for "payment of the debt by instalments, each instalment becomes "a separate debt for default in payment of which a separate order "of commitment may be made. This, no doubt, is somewhat "anomalous; for the debtor may thus be imprisoned under "repeated commitments for a whole year. But there is the "enactment, and we must give effect to it. It does not, however, "by any means follow that, where the debt is not ordered to be "paid by instalments, there can be more than one commitment "for the same default. I do not think the Act has given any "such power."

In my judgment, the position is that the Act having given no power to revoke a committal order, the committal order which has been made must stand and can only be revoked upon appeal. That does not, in any way, take away from the judge the power to vary the effect of the order or to suspend its operation or in any way to remove his control of the case.

The difficulty the creditor is in, if the order is revoked, is that he cannot, in the future, obtain any further sanction in respect of the amount which was involved in the order of January 19,

[3] 1 C.P.D. 229, 234.

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1959. For these reasons, the appeal must be allowed, and the order of the judge must be varied in so far as he has purported to revoke the order for commitment. He did, in fact, having revoked the order for commitment, make a different instalment order, which, at the rate of 5s. a week, would, I suppose, operate as a term of the suspension of the committal until the matter is further reviewed by him. All that this court is doing, and all that it is asked to do, is to reverse the judge's revocation of the committal order itself.

ORMEROD L.J. I agree. The power which is given to a county court judge to commit a debtor to prison if he is in default in payment of a judgment debt is a statutory power and depends upon section 5 of the Debtors Act, 1869. That section sets out precisely the circumstances in which a judge has power to commit, and the maximum period for which he is empowered to commit a debtor to prison; but the section makes no provision for the judge to revoke the order if, in the circumstances, he should think that a proper thing to do. As there is no power of revocation in section 5 or in any other section, so far as I am aware, it would appear that the only means of having an order set aside is by appeal. Whether, in fact, the revoking of an order in this way would mean that a judgment creditor would be unable in future to obtain another judgment summons, and thereby be deprived of his sanction, as has been suggested in the argument, is a matter about which I am not entirely satisfied. It might be that the revocation of an order would have the effect that no order had in effect been made, and, therefore, another committal order could be made in respect of that money. But that is not a matter involved in this appeal and I make no further comment on it.

So far as the power of the judge to revoke an order which he has made under this section is concerned, I agree that he has no such power. The matter is summed up as neatly as it can be by the words of Cockburn C.J. in *Evans* v. *Wills*, where he said: "he may make an order for the commitment of the debtor for "six weeks, or any less period; but, having once done that, he "is functus officio." I agree that this appeal should be allowed.

Appeal allowed; order revoking the committal order reversed with costs.

Solicitors: *Vallance & Vallance for Parry, Mackan & Hamilton, Bristol.*

I. G. R. M.

[NORWICH CONSISTORY COURT.]

In re ST. SWITHIN'S, NORWICH.

1959
Feb. 13;
June 22.

J. H. Ellison Ch.

Ecclesiastical Law—Faculty—Lease—Faculty to rector to grant option to take lease—Jurisdiction of consistory court.

Charity—Land held on trust for—Powers of trustees—Incumbent of living—Church vested in him—Whether he has Settled Land Act powers—Court with jurisdiction to approve grant of lease—Application for faculty to consistory court—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 29—*Charitable Trusts Amendment Act*, 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

A faculty was sought to enable the rector, in whom the freehold of a church was vested, to grant to a bank an option to take a lease of the church:—

Held, (1) that section 29 (1) of the Settled Land Act, 1925,[1] did not apply to consecrated buildings and land such as churches and churchyards, vested in an incumbent for the duration of his incumbency (post, p. 994).

(2) That the consistory court was not a court of competent jurisdiction within the meaning of section 29 of the Charitable Trusts Amendment Act, 1855,[2] capable of approving the grant by the rector as trustee of the option; accordingly, the court could not entertain the application (post, p. 995).

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

[1] Settled Land Act, 1925, s. 29: "(1) For the purposes of this section, all land vested . . . in trustees on or for charitable, ecclesiastical, or public trusts or purposes shall be deemed to be settled land, and the trustees shall, without constituting them statutory owners, have in reference to the land, all the powers which are by this Act conferred on a tenant for life and on the trustees of a settlement. In connection only with the exercise of those powers, and not so as to impose any obligation in respect of or affect—(*a*) the mode of creation or the administration of such trusts; or (*b*) the appointment or number of trustees of such trusts; the statute or other instrument creating the trust or under which it is administered shall be deemed the settlement, and the trustees shall be deemed the trustees of the settlement, and . . . a separate instrument shall not be necessary for giving effect to the settlement. . . . (3) Nothing in this section affects the jurisdiction of the court, Charity Commissioners . . . or other competent authority, in regard to the administration of charitable, ecclesiastical or public trusts."

S. 51: "(1) A tenant for life may at any time . . . grant by writing an option to purchase or take a lease of the settled land . . . at a price or rent fixed at the time of the granting of the option. (2) Every such option shall be exercisable within an agreed number of years not exceeding ten. (3) The price or rent shall be the best which, having regard to all the circumstances, can be reasonably obtained. . . ."

[2] Charitable Trusts Amendment Act, 1855, s. 29: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of parliament, under any act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

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PETITION for a faculty.

The rector and churchwardens of the parish of St. Swithin, jointly with Westminster Bank Ltd., petitioned for a faculty enabling the rector, in whom the freehold of the church was vested, to grant to the bank an option to take a lease of the church. The petition was unopposed.

W. S. Wigglesworth for the petitioners.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

June 22. J. H. ELLISON Ch. read the following judgment: This faculty suit is promoted by the rector and churchwardens of the parish of St. Swithin in the city and diocese of Norwich, together with the Westminster Bank Ltd., to whom, for the sake of brevity, I shall hereafter refer to as "the bank." By their joint petition, dated November 28, 1958, they pray this court to decree a licence and faculty enabling the rector, in whom the freehold is vested, to grant to the bank an option exercisable on short notice at any time during the 10 years commencing Christmas, 1957, to take a lease of the church for a period of seven years, but determinable by the bank at the end of the first three or five years if they wish, at an annual rent of £225, the bank paying rates and being responsible for internal repairs and otherwise subject to the terms and conditions of a draft lease filed with the petition. The bank would only wish to exercise the option if certain special events arose. In return, the bank propose to pay the rector the annual sum of £75 until the option is exercised or determined, and the arrangement gives them the right to determine by six months' notice after the first three years. Furthermore, the bank would renew the present antiquated electrical installation in accordance with an approved scheme.

I am much indebted to counsel for his assistance in a difficult and somewhat unusual case.

The facts proved by the rector, the Reverend Arthur Richard Freeman, and by Frank Mortimer, a churchwarden, in so far as they relate to the present situation, are briefly these. Since 1871 the benefice has been united with that of St. Margaret's. The union was effected under the Pluralities Act, 1838, but that Act provided for the union of benefices only and not parishes. The two parishes are still separate and St. Swithin's is strictly the parish church. The separation is, however, purely theoretical, as for many years St. Margaret's and St. Swithin's have in practice been treated and worked as a single parish unit in which reside no more than 40 souls. A service is held each Sunday at St. Margaret's, and an evensong once a month, at each of which services the congregation numbers between eight and ten persons. Save for one

annual service, St. Swithin's has not been used since 1939 and is redundant and superfluous to present or future foreseeable pastoral requirements. There is no lighting, no heating, in fact it is a liability, and the rector busies himself with another cure of souls elsewhere.

I also understand that during the war years and for some time afterwards the church was used for the storage of goods by a certain commercial manufacturing company, the bishop having originally approved this under powers conferred by the Clergy (National Emergency Precautions) Measure, 1939, and the regulations made thereunder dated September 3, 1939.

As regards the proposed user of the church by the bank, at an early stage Mr. Wigglesworth made an application that the court should hear his observations and that part of the evidence in camera, on the grounds that questions of the national interest were involved which it would be undesirable to discuss in public. In my judgment, that was the proper course to be taken in the special circumstances. It would, therefore, be inappropriate for me to touch on those matters in detail in this judgment. Suffice it to say that if this court has a jurisdiction, this is a case where I should exercise my discretion in favour of granting the faculty sought. In saying this, no one should think that I am laying down a general proposition that a consecrated building when pastorally redundant may be used as a bank where the public may change their money. I certainly could not approve that. In *Reg.* v. *Twiss* [1] Cockburn C.J. made these strong remarks: "... I do not hesitate to express a very decided opinion that the "doctrine laid down by Dr. Lushington is perfectly correct, that "when ground is once consecrated and dedicated to sacred pur- "poses, no judge has power to grant a faculty to sanction the "use of it for secular purposes, and that nothing short of an Act "of Parliament can divest consecrated ground of its sacred "character. ..." In that case the writ of prohibition was in fact refused and those remarks were obiter. Both before that case, for example in *Campbell* v. *Paddington (Parishioners and Inhabitants)*,[2] and subsequently, the courts have granted faculties for secular and ecclesiastical purposes combined, provided that the secular purpose is not one of such nature as to be wholly inconsistent with the sacredness of consecration. The principles were fully discussed in *In re St. Nicholas, Leicester.*[3] Then there are the later well-known examples of *In re The Parish of Bideford* [4] and *In re St. Mark's Church, Lincoln.*[5] In those cases it was approved that parts of the churchyard could be used for road widening for the benefit of the public generally, and in the later case benefit from such user also accrued to a commercial omnibus undertaking. In the present case the circumstances are peculiar. The events when a certain type of user by the bank

[1] (1869) L.R. 4 Q.B. 407, 412.
[2] (1852) 2 Rob.Eccl. 558.
[3] [1899] P. 19.
[4] [1900] P. 314; 16 T.L.R. 540.
[5] [1956] P. 166; [1956] 3 W.L.R. 147.

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would come into operation are exceptional. I am satisfied that the particular user in those events would not be repugnant to the principles laid down, and would not be wholly inconsistent with consecration.

I now pass to the two more difficult questions which I have to decide. The first is whether the rector has the powers of a tenant for life under the Settled Land Act, 1925, in respect of a church the freehold of which is vested in him, to grant an option of this nature. Secondly, is the consistory court a court of competent jurisdiction under the Charitable Trusts Amendment Act, 1855, able to approve such an arrangement? These are certainly novel points of far-reaching consequence and importance.

The first of those questions turns on the application of sections 29 and 51 of the Settled Land Act, 1925. [The chancellor read them and continued:]

Section 51 clearly applies to those persons upon whom by reason of the provisions of section 29 all the powers of a tenant for life are conferred. The terms of the proposed option fall with the section as regards duration and I am satisfied that the monetary arrangements are the best which could reasonably be made in the present circumstances. But, in my opinion, land vested in trustees for ecclesiastical purposes as referred to in section 29 does not include consecrated buildings and land such as churches and churchyards, which are vested in an incumbent for the duration of his incumbency. To hold otherwise would seem to me to introduce the gravest complications. It is true that to some extent an incumbent holds the land in a capacity as trustee for himself, for his successor incumbents and for the parishioners, present and future, in their respective spheres. The exercise of some of those elements of trusteeship seems to be antithetic to the exercise of some of the powers of a tenant for life. Section 29 (1) expressly confers all the powers of a tenant for life without any reservations, and one such power is that of sale and exchange given by section 38. If an incumbent can grant an option under section 51, why should he not sell the church under section 38? Any notion of sale or exchange is, of course, wholly inconsistent with the incumbent's duty to preserve the church, with its ornaments, furnishings and beauty for posterity, and also with the parishioners' rights at common law to worship in the church and be buried in the parish churchyard. If Mr. Wigglesworth's argument is correct, a curious situation would arise by reason of section 29 (3). That subsection provides, in effect, that the jurisdiction of the court, the Charity Commissioners, the Minister of Education or other competent authority is not affected in regard to the administration of (inter alia) ecclesiastical trusts. In the first place it would seem rather curious that Parliament omitted express reference to the ecclesiastical authorities if it intended that the Act should affect the vast number of churches and churchyards within the realm. But by reason of section 113 (1) and (2), the court in that context

means the Chancery Division of the High Court and the Palatine Courts of Lancaster and Durham. I do not think that Parliament ever intended that those courts should engage themselves in matters relating to consecrated churches and churchyards, the administration of which has from time immemorial fallen within the jurisdiction of the ordinary exercised through the consistory court.

A further argument was addressed to me which, if I understand it correctly was this. Section 29 of the Settled Land Act, 1925, must be read together with the Charitable Trusts Acts, 1853 and 1855. It was then said that the corporate property of deans and chapters of cathedrals on the one hand, and of certain university colleges on the other hand, would have fallen within the scope of those Acts had they not been expressly excluded by section 62 of the Act of 1853. When one comes to the Settled Land Act, 1925, section 29 (6) expressly excludes the lands held by the university colleges but is silent on the question of lands held by deans and chapters of cathedrals. It is said, therefore, that by implication the Settled Land Act, 1925, applies to property held by deans and chapters. The reason why university colleges were excluded from the Settled Land Act seems to me a simple one, namely, that in the general reorganisation of real property law which took place in 1925, it was more convenient to treat those special matters in a separate enactment passed at the same time, namely, the Universities and College Estates Act, 1925. It is not necessary for me to express any view to what extent the Settled Land Act, 1925, applies to the secular property and lands vested in deans and chapters, such as farm lands or residential property situated within the close; indeed, that is not a matter within the competence of the consistory court to decide. In so far as consecrated land is concerned, ingenious though the argument is, I do not think that it is one of merit, and it certainly does not inspire me to hold that, because consecrated churches are not expressly excluded, therefore, by implication, incumbents can exercise powers under the Settled Land Act, 1925, in respect of such churches. What I respectfully call the absurdity of the position was illustrated when Mr. Wigglesworth frankly conceded that the argument led by stages directly to the proposition that the dean and chapter of Norwich Cathedral would have an unfettered power to sell the cathedral church, unfettered by reason that the cathedral is, in any event, outside the control or jurisdiction of the consistory court. Although charitable purposes as a rule include both ecclesiastical and public purposes, my view is that in using all three expressions in section 29 (1), Parliament intended no more than to include for that purpose those ecclesiastical and public trusts which are not charitable in the legal sense. For example, it wished to include the case of a gift to a vicar, for distribution among such parochial institutions or purposes as he shall select, which is clearly a trust for an ecclesiastical purpose, but the court has held that the same would

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not qualify as a charitable trust: *In re Stratton.*[6] Similarly, the vesting of land in an unincorporated society comprising subscribing members, the objects of which are the encouragement of literature, science or art, constitutes a public trust within the section: see *In re Cleveland Literary and Philosophical Society's Land.*[7] Although these are not necessarily charitable trusts, *Oxford Group* v. *Inland Revenue Commissioners*[8] affords another example of a trust for ecclesiastical purposes in the sense of the promotion of religion, but the objects were such that it was held not to be a charitable trust to which taxation relief was available.

I take the view that, had Parliament intended consecrated churches and consecrated land to fall within the scope of the Settled Land Act, 1925, it would have expressly said so, and provided for the detailed administrative matters which would follow as a conseqence.

The second question, namely, whether the consistory court or the chancellor are respectively a court or a judge of competent jurisdiction enabled under section 29 of the Charitable Trusts Amendment Act, 1855, to approve trustees or administrators of charities making certain grants in relation to land comprising the trust, seems to be purely a question of construction. A "court" is referred to in section 9 of the Act of 1855 in connection with persons who refuse to comply with certain requisitions or orders of the board of commissioners. They are deemed to be in contempt of the Court of Chancery, now the Chancery Division of the High Court. The expression "a court or a judge" also occurs in sections 12 and 23 in connection with the transfer of stocks and shares and the holding and payment of moneys, but nowhere in that Act are those words precisely defined. There is no definition section. The Act of 1855 is, by and large, essentially an amending Act, although I am mindful that in *In re Mason's Orphanage and London & North Western Railway Co.*[9] Lindley L.J. expressed the view that section 29 was in fact an additional section to the principal Act of 1853 rather than an amending section. Section 1 provides that the Act and the principal Act of 1853, namely, the Charitable Trusts Act, 1853, shall be construed together as one Act. Turning then to the principal Act one finds a number of different sections conferring jurisdiction upon various courts and judges, depending either on the situation of the charitable trust or on the amount of annual income. For instance, section 28 first refers to the ordinary, special or statutory jurisdiction of the Court of Chancery in relation to charities, and then proceeds to confer on the Master of the Rolls and the Vice-Chancellors in chambers a like jurisdiction if the income exceed £30 per annum. Under section 29 a like jurisdiction was conferred on the Chancellor and Vice-Chancellor of the County

[6] [1931] 1 Ch. 197; 47 T.L.R. 32.
[7] [1931] 2 Ch. 247.
[8] [1949] 2 All E.R. 537.
[9] [1896] 1 Ch. 596; 12 T.L.R. 236.

Palatine of Lancaster. Later, under the Palatine Court of Durham Act, 1889, a similar jurisdiction was conferred upon that court also. Under sections 32 and 38 of the Act of 1853, the county courts were given jurisdiction if the charity income did not exceed £50 per annum.

In my opinion, a court or judge of competent jurisdiction means the Court of Chancery, now the Chancery Division of the High Court, or one of those courts or judges upon whom jurisdiction is expressly conferred by the Charitable Trusts Act, 1853, and that does not include the ecclesiastical court. It is of interest to observe that in one place the ecclesiastical court is expressly mentioned, namely, in section 11 of the principal Act of 1853, but this is not in a juridical context, but is in connection with certain persons being granted power to examine and search its registers and records. In my judgment, this court cannot entertain the present application, and for the reasons which I have given this petition must be dismissed.

By way of postscript I should like to add these few words. Although I am left in no doubt that I must come to this decision as a matter of law, nevertheless, the practical consequences are perhaps unfortunate. It means that this court is unable to assist these parishioners by relieving them of the burden of a redundant church which might otherwise be put to better use by others. I hope that this case may be brought to the notice of the commission now inquiring into the means of disposing of redundant churches. I am not advocating any extension of the Settled Land Act, 1925, or the Charitable Trusts Acts, because I doubt very much whether those branches of statute law are apt media for approaching questions relating to redundant churches. But some extension of the present rather limited powers of the consistory court would unquestionably be of assistance in solving that general problem. St. Swithin's is by no means the first case during my chancellorship where difficulties of a purely legal nature have been experienced, and which have prevented the court exercising its discretion on the merits.

Petition dismissed.

Solicitors: *Milles, Day & Co. for Hansell, Hales, Bridgwater & Preston, Norwich.*

[PRIVY COUNCIL.]

J. C.* 1959 Dec. 1.

SHEIK MOHAMED BASHIR . . . . . APPELLANT;

AND

COMMISSIONER OF LANDS . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Landlord and Tenant—Forfeiture of lease—Relief from forfeiture—Lease of Crown land—"Special conditions"—Breach—Whether "covenants" or "conditions of defeasance"—Relief from forfeiture—Jurisdiction of court—Principles applicable in granting relief—Crown Lands Ordinance, 1915 (*Laws of Kenya*, 1948, *s.* 155), *s.* 83—*Registration of Titles Ordinance*, 1919 (*Laws of Kenya*, 1948, *c.* 160), *ss.* 20, 21; *Sch. I, form B.* (1).

Eastern Africa—Kenya.

Section 83 of the Crown Lands Ordinance, 1915, of Kenya, provides: "... if there shall be any breach of the lessee's covenants ... "the Commissioner may serve a notice upon the lessee specifying ... the covenant of which a breach has been committed, "and ... may commence an action in the Supreme Court for the "recovery of the premises, and, on proof of the facts, the Supreme "Court shall, subject to relief upon such terms as may appear "just declare the lease forfeited. ...

"In exercising the power of granting relief against forfeiture "under this section the court shall be guided by the principles of "English law and the doctrines of equity."

By a Crown grant of January 8, 1953, operating as a lease made, not as a deed inter partes but as a deed poll in the form B (1) prescribed by the Registration of Titles Ordinance, 1919, of Kenya, a town plot in Nairobi was granted to the appellant for a term of 99 years subject to the provisions of the Crown Lands Ordinance, 1915, and to a number of "special conditions" set out in the grant, the first of which provided that the appellant should erect within 36 months an hotel at a specified cost and in compliance with particularised specifications, the other "special conditions" being expressed for the most part in such a way as to impose an imperative obligation on the appellant to perform and observe them. The appellant having erected no buildings on the plot within the prescribed time the respondent, the Commissioner of Lands, claimed possession of the plot on the ground that the stipulation in the first of the special conditions was a "condition" of the lease the non-fulfilment of which entitled him to treat the lease as avoided. The appellant contended that the special conditions were "covenants" and claimed, inter alia, that in the circumstances he should be granted relief from forfeiture under section 83 of the Ordinance of 1915:—

Held, that on construction and in light of the relevant legislation, the special conditions set out in the grant would have constituted covenants within the meaning of section 83 of the Crown Lands Ordinance, 1915—as distinct from and contrasted with conditions of defeasance—in a lease inter partes under that Ordinance, and that the special conditions were equally covenants when included, as here, in a grant operating as a lease but made as a deed poll in form B (1) prescribed by the Registration of Titles

* *Present*: LORD COHEN, LORD DENNING and LORD JENKINS.

Ordinance, 1919, which, by section 20, provided that all land comprised in any grant issued after the coming into force of that Ordinance should be subject to it. The court, accordingly, had jurisdiction to grant relief from forfeiture under section 83 of the Ordinance of 1915 (post, p. 1008).

Even assuming that the special conditions could be regarded as possessing the dual character of covenants and conditions, a stipulation of that combined character would nevertheless be a covenant within the meaning of section 83, and the remedy by way of forfeiture (subject to relief) conferred by that section would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question (post, p. 1008).

The effect of the second paragraph of section 83 is that where a case for forfeiture has been made out the court, in determining whether and on what terms relief should be granted is to be guided by the principles on which the English courts exercised their power under the English statute law in force at the date when the Ordinance came into operation, and by the doctrines of equity; that means that the court is to be guided (not necessarily bound) by the principles laid down by section 14 (2) of the Conveyancing Act, 1881, and the decisions of English courts thereunder so far as applicable to a case under section 83, and by the doctrines of equity (post, p. 1009).

Dedhar v. *Commissioner of Lands*, 1957 E.A.C.A. 104 approved.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 17 of 1959) from a judgment of the Court of Appeal for Eastern Africa (March 24, 1958) allowing an appeal by the present respondent, the Commissioner of Lands, from a judgment of the Supreme Court of Kenya (March 4, 1957) whereby the present appellant, Sheik Mohamed Bashir, was granted, upon conditions, relief from forfeiture to the respondent of certain land in Nairobi which was leased to him by Crown grant.

The following facts are taken from the judgment of the Judicial Committee: This case concerned a Crown grant dated January 8, 1953, and made by the Governor of Kenya (acting by the respondent Commissioner of Lands), whereby a town plot in Nairobi was granted by the Governor to the appellant, Sheik Mohamed Bashir, for the term of 99 years from September 1, 1952, subject to the progressive rent therein mentioned, and subject also to the provisions of the Crown Lands Ordinance (Ch. 155), and to a number of stipulations referred to in the grant as, and therein set out under the heading of, " Special Conditions."

The " Special Conditions " comprised 12 numbered paragraphs of which the first was in these terms: " 1. The grantee shall erect " complete for occupation within thirty-six months of the com- " mencement of the term an hotel building of approved design " on proper foundations constructed of stone burnt-brick or con- " crete with roofing of tiles or other permanent materials approved " by the Commissioner of Lands and shall maintain the same " (including the external paintwork) in good and substantial " tenantable repair and condition. The building shall be of at " least six storeys and the cost of construction shall be at least " shillings seven million."

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The grant was made by the Governor in exercise of his powers under the Crown Lands Ordinance of 1915 (Ch. 155), and was in the form prescribed for a Crown grant of land for a term of years by section 21 of and form B (1) in the First Schedule to the Registration of Titles Ordinance of 1919 (Ch. 160). The form so prescribed was that of a deed poll as distinct from a deed inter partes, but it was not now disputed that, albeit made in that form and executed only by the Governor and not by the appellant, the grant constituted in law a lease from the Governor to the appellant for the term and at the rent therein mentioned, and was subject to all provisions of the relevant Ordinances applicable to such leases.

The appellant admittedly failed to erect any buildings on the plot within the period of 36 months prescribed by paragraph 1 of the " Special Conditions," and founding himself on that default the commissioner by a plaint dated November 16, 1955, began the present proceedings claiming (in effect) possession of the plot and mesne profits on the ground that the stipulation contained in paragraph 1 of the special conditions was a condition of the lease constituted by the grant, the non-fulfilment of which entitled him to treat the lease as avoided; or alternatively, in case it should be held contrary to his contention that the stipulation in question was a covenant as distinct from a condition, a declaration of forfeiture of the lease and damages for breach of covenant.

By his defence, the appellant admitted the alleged breach of covenant, but contended that the " Special Conditions " were, and were to be construed as, covenants. He alleged various facts and circumstances on which he relied as disqualifying the commissioner from claiming forfeiture (a contention not now maintained) and claimed that the action should be dismissed or, alternatively, that he should be granted relief under section 83.

Rudd J., who tried the case at first instance in the Supreme Court of Kenya, held (by a judgment dated March 4, 1957), that the " Special Conditions " were covenants within the meaning of section 83, and accordingly, that he had jurisdiction to grant relief under that section, which (by a decree dated May 2, 1957), he proceeded to do.

On appeal by the commissioner to the Court of Appeal for Eastern Africa (Sir Kenneth O'Connor P., Sir Ronald Sinclair C.J. (Kenya) and Forbes J.A.), that court by an order dated March 24, 1958, allowed the appeal, set aside Rudd J.'s decree of May 2, 1957, and substituted therefor a declaration that the title of the appellant to the land in question had been extinguished as from November 16, 1955 (the date of the plaint), with consequential directions as to possession and mesne profits.

From that order of the Court of Appeal for Eastern Africa the appellant now appealed to this Board.

1959. Oct. 21, 22. *Dingle Foot Q.C.*, *Swaraj Singh* and *J. R. Bisschop* for the appellant.

Geoffrey Cross Q.C., *J. G. Le Quesne* and *H. G. Sherrin* for the respondent.

The following cases, in addition to the case referred to in the judgment, were cited in argument: *Hyman* v. *Rose* [1]; *Murugiah* v. *Jainudeen* [2]; *Eaton* v. *Lyon* [3]; *Hill* v. *Barclay* [4]; *Barrow* v. *Isaacs & Son* [5]; *Bargent* v. *Thomson* [6]; *In re Brain* [7]; *Rex* v. *Chapman*.[8]

December 1. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: In order to appreciate the materiality of the distinction between the commissioner's alternative claims, it is necessary to consider section 83 of the Crown Lands Ordinance. That section provides as follows: "83. If the rent or royalties or any part "thereof reserved in a lease under this Ordinance shall at any "time be unpaid for the space of thirty days after the same has "become due, or if there shall be any breach of the lessee's cove- "nants, whether express or implied by virtue of this Ordinance, "the Commissioner may serve a notice upon the lessee specifying "the rent or royalties in arrear or the covenant of which a breach "has been committed, and at any time after one month from the "service of the notice may commence an action in the Supreme "Court for the recovery of the premises, and, on proof of the "facts, the Supreme Court shall, subject to relief upon such "terms as may appear just, declare the lease forfeited, and the "Commissioner may re-enter upon the land.

"In exercising the power of granting relief against forfeiture "under this section the court shall be guided by the principles of "English law and the doctrines of equity."

It will be seen that if the stipulation contained in paragraph 1 of the special conditions was a covenant within the meaning of this section, it was open to the commissioner at any time after one month from the service of the prescribed notice (which he had in fact served on September 29, 1955), to take proceedings under this section for a declaration of forfeiture of the lease; but that if he took that course his claim was liable to be defeated by a successful prayer for relief on the part of the appellant. It will be seen further that on the footing that the stipulation in question was a covenant within the meaning of section 83, it was only by invoking that section that the commissioner could assert a claim to forfeiture for its breach.

On the other hand, if the commissioner could succeed in making good his primary contention that the stipulation in question was a condition, as distinct from a covenant within the

[1] [1912] A.C. 623; 28 T.L.R. 432.
[2] [1955] A.C. 145; [1954] 3 W.L.R. 682.
[3] (1798) 3 Ves.Jun. 689.
[4] (1811) 18 Ves.Jun. 56.
[5] [1891] 1 Q.B. 417; 7 T.L.R. 175.
[6] (1864) 4 Giff. 473.
[7] (1874) 44 L.J.Eq. 103.
[8] [1931] 2 K.B. 606; 47 T.L.R. 620.

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meaning of section 83, he was in a far stronger position. He had then no need to ask the court for a declaration of forfeiture of the lease, for that was automatically brought about through the non-fulfilment of the condition, without any need for an express proviso for re-entry, and the court would have no jurisdiction to grant the appellant relief under section 83, inasmuch as that section would be inapplicable.

As appears from the foregoing, the substantial question in the appeal is whether the " Special Conditions " set out in the grant were, as the appellant contends, " covenants " within the meaning of section 83, so as to give the court power to grant relief from forfeiture under that section, or were, as the commissioner contends, conditions of defeasance as distinct from " covenants " and were therefore outside the scope of section 83; the commissioner being accordingly entitled to assert the forfeiture entailed under the general law by breach of a condition of defeasance, without thereby exposing himself to a claim for relief on the part of the appellant under section 83.

By the expression " condition of defeasance " their Lordships mean a condition of the kind described, and contrasted with a covenant, in the following passage from the judgment of Sir Kenneth O'Connor P., which their Lordships are content to adopt: " At common law, a condition is a qualification annexed " to an estate, whereby the latter shall either be created (con- " dition precedent), enlarged, or defeated (condition subsequent), " upon its performance or breach. The main distinction between " a condition subsequent for the cesser of the term of a lease upon " the happening of a certain event and a lessee's covenant is that " (subject to any right of relief from forfeiture given to the lessee) " upon breach of a condition the lessor may re-enter, because the " estate of the lessee is determined; whereas a breach of covenant " only gives him the right to recover damages (or to obtain an " injunction) unless the right to re-enter is expressly reserved to " him by the lease. Foa, Landlord and Tenant, 7th ed., pp. 311, " 312."

The special conditions were clearly not conditions precedent. They all related to things which the grantee was to do or refrain from doing after the grant had been made. The question is whether they were conditions subsequent, the non-fulfilment of which brought the term to an end without any necessity for an express proviso for re-entry, or were obligations in the nature of covenants the breach of which (in the absence of any express proviso for re-entry) could only afford the commissioner grounds for relief in the shape of damages or injunction unless he chose to avail himself of the statutory provision for forfeiture contained in section 83 and succeeded in repelling any claim to relief under that section.

To these alternatives must be added the third possibility that the special conditions might combine in themselves the dual character of covenants and conditions of defeasance, as being

agreements not only enforceable as such against the lessee but also constituting conditions on the due performance of which the continuance of the term was made to depend. This combination of covenant and condition is commonly brought about by the usual express proviso of re-entry, with which this case is not directly concerned, as the grant contains no such proviso. It would, however, also be brought about by any form of words importing an intention that a given stipulation should possess this dual character.

Their Lordships will later revert to this third possibility, in the meantime treating the classification of covenants on the one hand and conditions of defeasance on the other as exhaustive.

The point at issue turns upon the true construction of the grant, which must be construed in the light of the relevant legislation. The Ordinances immediately relevant are the Crown Lands Ordinance (Ch. 155 of 1915) and the Registration of Titles Ordinance (Ch. 160 of 1919). But it is also proper to refer to the earlier Crown Lands Ordinance of 1902 which, though replaced by the Ordinance of 1915, was relied on in argument by Mr. Cross (for the commissioner) as showing that while the appellant's argument might well have prevailed under the Ordinance of 1902, the Ordinance of 1915 made a radical change in the law, with the effect of investing stipulations such as the " Special Conditions " with the character or conditions of defeasance as distinct from the character of " covenants " which they previously bore.

The Ordinance of 1902 provided for the inclusion of implied covenants in leases of Crown lands. Some of these covenants were to be included in all leases (see sections 12 and 13). These were ordinary covenants by lessor and lessee which no doubt were regarded as universally appropriate. Other lessees' covenants, which might not be appropriate in all cases, were to be implied in all leases except where expressly varied or excepted (see section 14). By section 15 the covenants by the lessee therein set out were to be implied in all building leases unless expressly varied or excepted. By section 16 a similar provision was made for the implication of certain lessees' covenants in leases of agricultural land. Section 18 (1) was in terms closely resembling those of the present section 83, omitting the second paragraph which was introduced in 1915.

Under the Ordinance of 1902 the difficulties which have now arisen with respect to the application of section 83 could hardly have arisen with respect to section 18 (1), for effect would have been given to stipulations such as the " Special Conditions " by means of express or implied covenants indubitably falling within section 18 (1).

The Crown Lands Ordinance of 1915, however, wholly repealed the Ordinance of 1902 and introduced new and different provisions with respect to leases. Section 3 of the Ordinance of 1915 empowers the Governor (by paragraph (i)) to " grant, lease or " otherwise alienate . . . any Crown lands for any purpose and

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" on any terms and conditions as he may think fit "; (by paragraph (ii)) to " wholly or partially remit . . . all or any of the " covenants, agreements or conditions contained in any lease, " agreement or licence . . . "; and (by paragraph (iii)) to " extend . . . the time to the purchaser lessee or licensee for " performing the conditions contained in any agreement, lease or " licence liable to revocation for such period, and upon such terms " and conditions, as he may think fit."

Section 5 provides for the appointment of a Commissioner of Lands to administer the Ordinance.

Part III of the Ordinance deals with the letting of town plots, to which category the plot now in question belongs. Section 13 provides that leases of town plots may be granted for any term not exceeding 99 years. By section 15 it is provided that leases of town plots shall, unless the Governor shall otherwise order in any particular case or cases, be sold by auction. By section 14, before any town plot is disposed of under section 15, the commissioner is required to " determine (*a*) the rent which shall be " payable in respect of such plot; . . . (*c*) the building conditions " to be inserted in the lease of the plot; and (*d*) the special " covenants, if any, which shall be inserted in the lease."

Section 16 requires notice to be given of the place and time of sale, and such notice is required to state (inter alia) " (*e*) the " building conditions and the special covenants, if any, to be " inserted in the lease to be granted in respect of any plot; . . ."

The lease in the present case was not in fact sold by auction, but the sections dealing with that method of disposal were relied on by Mr. Cross for their use of the expression " building " conditions " in contrast to the expression " special covenants." On the other hand, section 17 (also dealing with sales by auction) uses the expression " terms and conditions of the sale " in which " conditions " clearly does not mean " conditions of defeasance." Section 21 provides that in every lease of a town plot there is to be implied " a covenant by the lessee not to divide the plot and " assign any portion thereof." It is interesting to note that an express stipulation to the same effect appears as number 5 of the special conditions in the present case. Subsection (2) of section 21, which enables applications for leave to sub-divide to be made, provides that " no such application shall be entertained " unless the building conditions (if any) in the lease have been " complied with." Subsection (3) of the same section provides that new leases granted under subsection (2) shall be granted " on the same terms and conditions as the original lease." Other examples of implied covenants are to be found in various sections which need not be referred to in detail. See, for example, sections 36, 37, 38 and 39. Section 47, under the heading of " Part V—Disposal of Land for Special Purposes," implies covenants (a) not to assign, sublet, etc., without previous consent, and (b) not to use the land leased for any purpose other than the purpose or purposes specified in the lease. It is not clear that the

plot now in question falls within Part V, but there is some significance in the fact that here again the " Special Conditions " include (as No. 4) a stipulation restricting user of the premises to " hotel purposes only except that shops may be constructed on " the ground floor," and (as No. 7), a stipulation against disposal of the land until special condition No. 1 has been complied with. Sections 63 and 64 contain references to the grant of leases " upon " such conditions as may be specified in such leases or as may be " prescribed " (section 63), and " upon such conditions as " the Governor " may deem expedient " (section 64).

Section 76 provides for an implied covenant for quiet enjoyment for the benefit of the lessee " paying the rent and fulfilling " the conditions " contained in the lease. Section 77 provides for implied covenants and conditions in every lease or licence by the lessee or licensee (putting it shortly) (a) to pay the rent and royalties thereby reserved, and (b) to pay the taxes charged on the land or the buildings thereon.

Their Lordships have already referred to the terms of section 83. By section 84 provision is made for the forfeiture of a licence for (inter alia) any breach of the conditions of the licence express or implied. By section 86 the acceptance by or on behalf of the Crown of any purchase-money or any rent or other payment is not to be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition annexed to any sale, lease or licence of or respecting Crown land. Section 157 provides procedure under which possession may be obtained against any person in occupation of Crown land whose right, title or interest has expired or been forfeited, but this clearly cannot have been intended to override section 83.

Having considered all the various references to " covenants," " conditions " and " terms " which are to be found in the Ordinance of 1915, their Lordships are unable to hold that this enactment draws any clear cut or consistent distinction between the word " covenant " as meaning an obligation laid on the lessee which he is to be contractually bound to observe or perform, and the word " condition " as meaning a stipulation which the lessee may fulfil or not as he chooses but which, if not fulfilled, is to operate as a condition of defeasance. Mr. Cross did not seek to maintain that the word " conditions " was throughout the Ordinance used in the sense just stated, and admitted that it was sometimes simply used as equivalent to " terms." But he argued that in sections 14 and 16 " the building conditions to be " inserted in the lease " contrasted as it was with " special " covenants " did mean " conditions " in the technical sense of conditions of defeasance, so that the " building conditions " when inserted in the lease could only be framed as " conditions " in that sense and could not be imposed as obligations in the nature of covenants. Their Lordships find it impossible to accept this

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view. It appears to them that the expression "building conditions" means simply conditions as to building in the sense of the terms, or requirements, or stipulations, as to building which the lessee is to be bound to observe and perform under the lease. In their Lordships' judgment clear words would be necessary to justify the imputation to the legislature of an intention that the "building conditions" should not take effect as covenants but merely as conditions of defeasance, which would involve a radical departure from the commonly accepted practice. Their Lordships find no words in the Ordinance clearly enjoining acceptance of this construction of the Ordinance, and they decline to adopt it.

Accordingly, as the law stood between the enactment of the Ordinance of 1915 and the enactment of the Registration of Titles Ordinance, 1919, there was nothing to prevent "building conditions" under sections 14 and 16 of the former from being so framed as to operate as covenants on the part of the lessee. It is to be observed, however, that the special conditions in the present case were not strictly "building conditions" within sections 14 and 16, because the lease was not sold by auction, and, moreover, that the special conditions were not confined to building. But this, if anything, assists the appellant's case, for it is not suggested that it was not open to the Governor (apart from any restriction to be spelt out of sections 14 and 16 of the Ordinance where applicable) to impose such stipulations (whether by way of condition or covenant) as he thought fit.

On the other hand, their Lordships find it impossible to collect from the various references to covenants and conditions in other parts of the Ordinance any sufficient indication to justify the view that the words "lessee's covenants" in section 83 means lessee's covenants and conditions so as to bring within its scope mere conditions of defeasance. But they see no reason for excluding covenants which are also conditions, as constituting agreements or promises by the lessee to perform given stipulations, and at the same time making their performance a condition of the continuance of the lease. Indeed, as Rudd J. has pointed out, the provision for forfeiture in section 83 itself has the effect of turning all covenants into conditions in this sense.

Their Lordships should next state that in their opinion it is plain that under the Ordinance of 1915 the proper form of lease was an ordinary lease inter partes.

The next stage in the inquiry is to consider whether the special conditions in the present case, if inserted just as they stand in a lease of the plot granted between 1915 and 1919, would have operated as lessee's covenants or merely as conditions of defeasance. This depends on the true construction of the hypothetical document. One must assume that the words of demise expressed the demise to be made "subject to the following special conditions," and that the lease went on to set out under the heading "special conditions" the 12 numbered paragraphs set out in the actual grant with which this case is concerned, but, like the

actual grant, contained no statement in so many words that the grantee covenanted, or agreed, or promised to perform or observe such conditions.

The special conditions in question as set out in the present grant (omitting No. 1 to which reference has already been made) were in these terms:

"SPECIAL CONDITIONS.

"2. The building shall not be erected until plans (including "block plans showing the positions of the buildings and a system "of drainage for disposing of sewage surface and sullage water) "drawings elevations and specifications thereof shall have been "approved in writing by the Local Authority and the Commis- "sioner of Lands.

"3. The grantee shall properly connect the drainage and "sewage systems with any town systems when in the opinion "of the Commissioner of Lands and the Local Authority the latter "systems are so far completed as to enable the grantee so to do.

"4. The land and buildings shall be used for hotel purposes "only except that shops may be constructed on the ground floor.

"5. The grantee shall not subdivide the land.

"6. The buildings shall conform to a building line prescribed "by the Local Authority.

"7. The grantee shall not sell transfer sublease or otherwise "alienate or part with the possession of the land nor enter into "any charge (other than with the consent of the Commissioner "of Lands for the raising of a loan for building purposes) or agree- "ment of sale in respect thereof until Special Condition Number "1 has been complied with.

"8. The grantee shall pay to the Commissioner of Lands on "demand such sum as the commissioner may estimate to be the "proportionate cost of constructing all roads drains and sewers "serving the land.

"9. The grantee shall pay such rates taxes charges duties "assessments or outgoings of whatever description as may be "imposed charged or assessed by any government or local autho- "rity upon the land or the buildings erected thereon including any "contribution or other sum paid by the Governor in lieu thereof.

"10. The Governor or such person or authority as may be "appointed for the purpose shall have the right to enter upon the "land and lay and have access to water mains service pipes and "drains telephone or telegraph wires and electric mains of all "descriptions whether overhead or underground and the grantee "shall not erect any building in such a way as to cover or inter- "fere with any existing alignments of main or service pipes or the "telephone or telegraph wires and electric mains aforementioned.

"11. The main entrance to the building shall be set back to "provide for the setting down of vehicular passengers on the land "and similar provision shall be made for tradesmen's vehicles.

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" 12. The water supply system of the building shall include " storage for at least twenty-four hours' requirements."

These conditions must be construed as a whole, and the mere fact that they are described as conditions is by no means conclusive of their character. It will be seen that they relate to a number of different matters of varying importance, all of which according to ordinary conveyancing practice would be made the subject of covenants with a suitable proviso for re-entry on breach. It will be seen further that they are for the most part expressed in such a way as to impose an imperative obligation on the lessee to perform and observe them. Paragraph 1 provides that " The grantee shall erect . . . " " and shall maintain . . ." Pargraph 2 is in the passive, but imposes restrictions on the doing of that which the grantee is obliged to do under No. 1, i.e., the erection of the building. Then by No. 3 " The grantee shall " connect . . . " No. 4 is expressed in the passive as is usual in the case of a restriction as to user.

Then comes No. 5, " The grantee shall not subdivide the " land." No. 6 relates to the building line, and may be said to concern the way in which the grantee is to carry out his obligation under No. 1. By No. 7 " The grantee shall not sell . . ." By No. 8 " The grantee shall pay to the commissioner . . ." By No. 9 " The grantee shall pay such rates taxes " etc. By No. 10 " . . the grantee shall not erect " etc. Nos. 11 and 12 again refer to the characteristics of the building which the grantee " shall erect " under No. 1. Their Lordships therefore construe the special conditions as plainly designed to make it obligatory on the grantee to observe and perform them, as distinct from merely providing a list of stipulations which the grantee could comply with if he chose, but non-compliance with which would work a forfeiture. This view is strongly reinforced by the inclusion of the provisions in Nos. 8 and 9 for the payment of the sums therein mentioned. It could hardly be intended that these provisions were not to give the commissioner the right to sue the grantee for the amount mentioned in No. 8, or any sum which the commissioner might have had to spend in respect of the matters mentioned in No. 9. Again, it would be surprising if the commissioner was not to be entitled to restrain by injunction a sub-division of the land in breach of No. 5. The same observation applies to the restriction as to user contained in No. 4. The provision as to the repair of the building in No. 1 calls for similar comment. It would be surprising if the commissioner was to be unable to sue for damages in the event of the grantee's failure to repair.

All in all, this set of stipulations appears to their Lordships to include provisions wholly unsuitable for treatment merely as conditions of defeasance as distinct from covenants; and, inasmuch as the question turns on the intention of the parties to be collected from the document as a whole, this is a circumstance of considerable importance.

For these reasons their Lordships are of opinion that in a lease inter partes under the Ordinance of 1915 and before 1919, the special conditions would have constituted covenants within the meaning of section 83 of that Ordinance.

It remains to consider whether this conclusion as to the effect of the special conditions if they had appeared in a lease inter partes between 1915 and 1919 holds good with respect to those same conditions when included, as they actually are, in the grant now under consideration, being a grant operating as a lease but made as a deed poll in the form B (1) prescribed by the Registration of Titles Ordinance of 1919.

This Ordinance provides by section 1 (2) that "except so far "as is expressly enacted to the contrary no Ordinance in so far as "it is inconsistent with this Ordinance shall apply or be deemed "to apply to land whether freehold or leasehold which is under "the operation of this Ordinance." By section 2 "grant" is defined as meaning (inter alia) "any . . . lease . . . for a period "exceeding one year, made by and on behalf of the Crown . . ."

By section 20 "all land which is comprised in any grant "issued subsequent to the commencement of this Ordinance shall "be subject to this Ordinance, and shall not be capable of being "transferred . . . or otherwise dealt with except in accordance "with the provisions of this Ordinance and every attempt to "transfer . . . or otherwise deal with the same, except as afore-"said, shall be null and void and of no effect."

By section 21 "Grants shall be issued in duplicate in form B "(1) or B (2) in the First Schedule, as the case may be . . . The "grant in duplicate shall be delivered out of the Land Office to "the registrar of the registration district in which the land is "situated, who shall register the grant . . . and thereafter deliver "one of the duplicates to the Commissioner of Lands for issue "to the grantee, and retain the other to be bound up in the "register hereinafter directed."

As has already been stated, form B (1) is the form prescribed for a grant of land by the Crown for a term of years, or in other words a Crown lease, and the present grant was made in that form, viz., as a deed poll and not as a deed inter partes.

It is argued on the commissioner's side that a deed in this form (the use of which is made obligatory by section 21 of the Ordinance of 1919) could not contain any covenants on the part of the lessee, inasmuch as he not only did not execute, but was not even expressed to be a party to, the grant. The effect of this argument, were it to prevail, would be far-reaching. It would be impossible for the commissioner to impose any express covenants on a lessee of Crown land, although the Ordinance of 1915 clearly authorises this. By parity of reasoning it would be impossible for any covenants on the part of such lessee to be implied. If it is indispensably necessary that the lessee should be a party to and execute the lease in order to be fixed with a covenant or obligation to do or abstain from doing what the lease expressly

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says he shall do or abstain from doing, then it must surely be equally necessary that he should be a party to and execute the lease in order to be fixed with a covenant to do or abstain from doing what the lease by statutory implication says he shall do or abstain from doing. Section 83 of the Ordinance of 1915 would thus, in effect, be wholly abrogated, except in cases of non-payment of rent.

The abolition of covenants and substitution of conditions of defeasance would prevent the commissioner from enforcing the terms of the lease except by forfeiture, which might well be against his interest. On the other hand, the lessee would be liable to suffer forfeiture without any claim for relief, however trifling the breach of condition, and however valuable to him the lease might be.

Their Lordships would not, unless constrained to do so, attribute these sweeping and untoward changes in the law to a form scheduled to what may be described as a procedural Ordinance.

It will be remembered that the form of grant B (1) is expressed to be subject to "the provisions and conditions contained in the "said Ordinance" (i.e., for present purposes the Ordinance of 1915). The effect of that language is reproduced in the present grant by the words "and subject also to the provisions of the "Crown Lands Ordinance (Chapter 155)." These words appear to their Lordships to import into the document itself a reference to section 83 of the Ordinance of 1915, and also to the covenants implied by sections 21 (1) and 77, the implication of which postulates a document in which covenants are capable of being implied. It would appear further that there are no express covenants in the document to which section 83 could apply, unless the special conditions are treated as covenants for the purposes of that section.

Their Lordships' conclusion on this by no means easy question is that, on accepting the lease and going into possession under it (as he undoubtedly did), the appellant contracted obligations to observe and perform the special conditions which amounted to covenants for the purposes of section 83.

Reverting to the possibility that the special conditions might be regarded as possessing the dual character of covenants and conditions, their Lordships would say that, in their opinion, a stipulation of that combined character would nevertheless be a covenant within the meaning of section 83, and the remedy by way of forfeiture (subject to relief) conferred by section 83 would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question.

It follows, in their Lordships' view, that Rudd J. did have jurisdiction to make the decree of May 2, 1957, relieving the appellant from forfeiture.

There remains the question whether, given the jurisdiction to grant relief, the judge was right in holding that this was a case

in which relief from forfeiture should be granted and, if so, whether the terms on which he granted relief were terms on which he could properly grant it in the exercise of his discretion.

This aspect of the case was included in grounds 2, 3 and 4 of the commissioner's memorandum of appeal to the Court of Appeal for Eastern Africa, but as that court decided in his favour on ground 1 (want of jurisdiction), it was unnecessary for it to consider grounds 2, 3 and 4, and it refrained from doing so. In connection with these grounds the commissioner applied to the Court of Appeal to adduce further evidence bearing upon the question whether or not it would be just to grant relief, and tending to show that the present appellant was no longer financially able to build an hotel.

There was some discussion before their Lordships as to the principles upon which the court should exercise its discretionary jurisdiction to grant relief against forfeiture in cases in which (subject to any relief the court may think fit to grant) the commissioner is shown to be entitled to a declaration of forfeiture under section 83. This turns on the words "subject to relief "upon such terms as may appear just" in the first paragraph of the section, in conjunction with the second paragraph, which provides that "In exercising the power of granting relief against "forfeiture under this section the court shall be guided by the "principles of English law and the doctrines of equity."

It appears to their Lordships that the effect of the second paragraph of section 83 is that where a case for forfeiture (subject to any relief the court may think fit to grant) has been made out under the first paragraph of the section, the court, in determining whether relief should be granted and, if so, on what terms, is to be guided by the principles upon which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law in force at the date when the Ordinance came into operation, and by the doctrines of equity. In their Lordships' opinion the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute, and the statute law referred to must be the statute law in force at the date when section 83 became law, inasmuch as there are no words in the second paragraph to give the reference an ambulatory effect, and prima facie, a Kenya Ordinance could hardly be taken in the absence of some indication to the contrary, to adopt in advance future English legislation of unknown content. This means, in effect, that the court is to be guided (which does not mean necessarily bound) by the principles laid down by section 14 (2) of the Conveyancing Act, 1881, and the decisions of the English courts under that section, so far as applicable to a case under section 83, which (apart from requiring a bare notice of the breach) does not include the preliminary steps prescribed by section 14 (1) as necessary in order to make the forfeiture enforceable; and that the court should also have regard to the doctrines of equity. This accords with

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the view expressed in the case in the Court of Appeal for Eastern Africa of *Dedhar* v. *Commissioner of Lands*,[1] a case which is also noteworthy in that it was assumed without argument that a " Special Condition " in a post-1919 Crown lease of a town plot was a covenant within the meaning of section 83. For the reasons given in the judgment of Sir Kenneth O'Connor P. (at pp. 152 and 153 of the Record) their Lordships cannot accept the argument that the second paragraph of section 83 does not import a reference to section 14 of the Act of 1881 because that Act did not bind the Crown in England.

The view their Lordships have taken as to the application of section 83 makes it unnecessary for them to dicuss the question whether the appellant could otherwise have made good a claim to relief under the pure doctrines of equity on the ground of accident or surprise.

Their Lordships would express their indebtedness to the full and careful judgments of Sir Kenneth O'Connor P. and Rudd J. from which they have derived much assistance.

For the reasons above stated their Lordships are of opinion that this appeal should be allowed, and the order of the Court of Appeal for Eastern Africa dated March 24, 1958, should be discharged, and that the case should be remitted to the Court of Appeal for Eastern Africa to hear and determine the grounds of appeal contained in 2, 3 and 4 of the commissioner's memorandum of appeal to that court, and also the commissioner's application to adduce fresh evidence bearing upon these grounds.

Their Lordships will humbly advise Her Majesty accordingly. The commissioner must pay the costs of this appeal and of the hearing in the Court of Appeal. The order as to costs made in the Supreme Court will not be disturbed. The costs of the further hearing will be in the discretion of the Court of Appeal.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

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[1] [1957] E.A.C.A. 104.

[PRIVY COUNCIL.]

ABERFOYLE PLANTATIONS LTD. . . APPELLANT;

AND

KHAW BIAN CHENG . . . . . RESPONDENT.

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Dec. 1.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA.

Vendor and Purchaser—Completion—Date of—Conditional agreement—Condition to be performed by date fixed for completion of sale—General principles applicable to performance of conditional contracts—Malaya.

Contract—Time for performance—Conditional contract—Date fixed for completion of sale—Condition then unfulfilled.

At the date of a conditional agreement of November 8, 1955, for the sale by the appellant company to the respondent of a rubber estate totalling 1,336 acres in the State of Perak, the appellant vendor had a good title to 1,154 acres, but its title to the other 182 acres depended on the success of its negotiations with the Ruler of Perak for the renewal of seven previously expired leases. Clause 4 of the agreement provided that "the purchase is conditional on the "vendor obtaining . . . a renewal of the seven leases . . . so as to "be in a position to transfer the same to the purchaser . . . and "if for any cause whatsoever the vendor is unable to fulfil this "condition this agreement shall become null and void and the "vendor shall refund to the purchaser the . . . deposits already "made . . ." The agreement, in clause 9, stipulated that completion was to take place on or before April 30, 1956 (subsequently extended by the purchaser to May 31, 1956), and that on "the "purchaser paying the balance of the purchase price . . . the vendor "shall as soon as possible thereafter" execute a transfer of the property to the purchaser. The condition not having been fulfilled by June 11, 1956, the purchaser on that date brought the present action against the vendor claiming the return of deposits paid:—

Held, that on the true construction of the agreement the condition in clause 4 had to be performed at latest by April 30, 1956, the date fixed for completion of the purchase (or by the extended time granted by the purchaser), and accordingly, the respondent was entitled to the return of his deposits. Until the condition was fulfilled there was no contract of sale to be completed, and by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at the latest. Similar considerations applied where a conditional contract of sale fixed no specific date for completion of the sale by the performance of both sides of the bargain, but did, as here, fix the date for the performance by the purchaser by payment of the purchase-money even though no definite date was fixed for the performance by the vendor of his part by the transfer of the property. The provision made for the contingency that it might not be possible for the vendor to produce the necessary transfers immediately on payment of the balance of the purchase-money did not prevent the transaction from amounting for the present purpose to completion

* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

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of the purchase, though some delay in the actual execution of the transfer might be allowable by virtue of the words "as soon as "possible."

The above views were in accord with the following general principles as warranted by authority and manifestly reasonable: (1) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date. (2) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time. (3) Where a conditional contract of sales fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles (post, p. 1016).

Smith v. *Butler* [1900] 1 Q.B. 694; 16 T.L.R. 208 and *In re Sandwell Park Colliery Co.* [1929] 1 Ch. 277 applied.

Judgment of the Court of Appeal of the Federation of Malaya affirmed.

APPEAL (No. 36 of 1958) from an order of the Court of Appeal of the Federation of Malaya (June 2, 1958) allowing by a majority an appeal by the present respondent, Khaw Bian Cheng, from an order of the High Court of the Federation (November 8, 1957) dismissing his action against the present appellant, Aberfoyle Plantations Ltd.

The following facts are taken from the judgment of the Judicial Committee: The Harewood Estate, a rubber estate in the State of Perak, which was conditionally agreed to be sold by the appellant company to the respondent under an agreement of November 8, 1955, consisted of rubber plantations extending in round figures to a total area of some 1,336 acres. That area was made up of (a) some 1,154 acres held by the vendor's predecessor in title, Harewood Rubber Estates Ltd., as registered proprietor under certificates of title or grants from the Ruler of Perak, as to which no question arose; and (b) some 182 acres comprised in seven leases from the Ruler to Harewood Rubber Estates Ltd. which had in fact expired on June 19, 1950.

The vendor had succeeded to Harewood Rubber Estates Ltd.'s interests in 1951, as a result of an amalgamation under which the vendor acquired all the assets of Harewood Rubber Estates Ltd. in exchange for shares.

That meant that the vendor as beneficial owner of the 1,154 odd acres could readily procure the transfer of the legal title to the purchaser; and also that the vendor as between itself and Harewood Rubber Estates Ltd. would be entitled to the benefit of any renewals of the seven leases comprising the 182 odd acres if and when granted. But unless and until new leases were granted the vendor had no assignable interest in the 182 odd acres. Since the expiration of the leases in June, 1950, negotiations for their renewal, pursued over a matter of five years, had by the date of the agreement of November 8, 1955, achieved no conclusive result, the delay being largely due to protracted consideration by the State Government of the policy to be pursued

with regard to the granting of State leases. In the meantime Harewood Rubber Estates Ltd., or the vendor, had remained in permissive occupation of the land comprised in the expired leases: and so the matter stood when the agreement of November 8, 1955, was entered into.

The position thus was that at the date of the agreement the vendor had a good title to the 1,154 odd acres, but that its title to the 182 odd acres depended on the success of its negotiations for the grant of new leases; and it was to the latter title that the condition giving rise to the present litigation related.

The material provisions of the agreement of November 8, 1955, were as follows: Clause 1 provided that " Subject to the condition " contained in clause 4 the vendor will sell and the purchaser will " buy " the property known as the Harewood Estate as described in the schedule to the agreement, which description included the land comprised in the seven expired leases. Clause 2 stated the price to be $525,000 apportioned as therein mentioned between land and buildings and movable plant, machinery and utensils, and continued as follows: " To account of this sum of $525,000 " the purchaser shall pay to the vendor the sum of $50,000 on the " signing of this agreement, a further sum of $50,000 on or " before February 1, 1956, and to pay the balance on or before " April 30, 1956. The purchaser shall only be entitled to enter " into possession of the estate after the purchase money of " $525,000 has been paid in full, and all profits earned prior to " that time shall belong to the company."

Clause 4, which contained the condition, should be stated in full: " The purchase is conditional on the vendor obtaining at the " vendor's expense a renewal of the seven (7) leases described " in the schedule hereto so as to be in a position to transfer the " same to the purchaser and if for any cause whatsoever the " vendor is unable to fulfil this condition this agreement shall " become null and void and the vendor shall refund to the pur- " chaser the deposit or deposits already made under clause 2 " hereof notwithstanding anything contained in clause 10 hereof."

Clause 7 provided that " the purchaser shall take over, pur- " chase and pay for at cost " the various items therein mentioned " as at midnight on the day immediately preceding the date of " completion of sale." By clause 8: " All rubber harvested and " on hand as at midnight on the day immediately preceding the " date of completion of sale . . . shall belong to and remain the " property of the vendor . . ."

Clauses 9 and 10 were of importance. They were in these terms: " 9. Completion of the purchase shall take place at the " offices of Messrs. Grumitt, Reid & Co. Ltd. on or before the " 30th day of April, 1956, and upon the purchaser paying the " balance of the purchase price to the vendor, the vendor shall " as soon as possible thereafter execute a proper transfer or " transfers of the property to the puchaser or as he shall direct, " such transfer or transfers to be prepared and perfected, save as

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" to the execution thereof by the vendor, by and at the expense " of the purchaser and in the meantime the vendor agrees to " allow the purchaser to lodge a caveat against all the lands " pending the execution of the said transfer or transfers. And " the vendor shall if the purchaser so requires execute in favour " of the purchaser an irrevocable power of attorney authorising " the purchaser to execute all such transfers and documents as " shall be necessary for effectually vesting in the purchaser the " said mining leases." (It was agreed that the reference to " the said mining leases " at the end of clause 9 was intended as a reference to the seven new leases which the vendor was required to obtain under clause 4 by way of renewal of the seven expired leases.)

" 10. If from any cause (other than the vendor's default) " the purchase shall not be completed on the 30th April, 1956, or " the second deposit of $50,000/- shall not be made on or before " the 1st February, 1956, as herebefore provided then this agree- " ment shall become null and void and the deposit or deposits " already made will be forfeited."

Clause 11 provided that " Upon actual completion of the sale " the purchaser shall be entitled to possession of the property " hereby agreed to be sold and shall as from that date be liable " for all outgoings . . ." The same clause also provided that " The vendor shall not be liable for any deterioration of the " property after the time fixed for completion."

The two deposits of $50,000 payable under clause 2 were duly paid, but the vendor had not by April 30, 1956, fulfilled the condition stated in clause 4 by obtaining a renewal of the seven leases. It was true that by letter dated April 25, 1956, the Collector of Land Revenue informed the vendor's solicitors that the Ruler in Council had approved the issue of fresh leases, and that the vendor's name would be recorded in the Roll of Approved Applications; but it was not suggested that the procuring of such approval and enrolment amounted to compliance with the condition, requiring as it did the obtaining by the vendor of " a renewal " of the seven (7) leases . . . so as to be in a position to transfer " the same to the purchaser."

In those circumstances the purchaser's solicitors wrote to the vendor's solicitors on May 4, 1956, a letter concluding with this paragraph: " We refer you to clause 4 of the agreement under " which our client is entitled to rescind the contract and claim " back the deposit. But, before doing so, our client is prepared " to give your clients time till the 31st day of May, 1956, by " which date they should produce to us the issue documents of " title in respect of all the lands contracted to be sold and satisfy " us that they are in a position to make a good title and give a " registrable transfer. It must be understood that the extension " hereby granted is the utmost that our client agrees to and such " time must be deemed to be of the essence of the contract. If " a good title to convey all the lands capable of registration is

" made out by 31st May, 1956, our client will pay over the " balance of purchase price and complete the transaction. Other- " wise, the contract will stand cancelled and your clients must " pay back the deposit with interest together with our client's " costs of investigating the title."

The condition being admittedly still unfulfilled, the purchaser by plaint dated June 11, 1956, began the action giving rise to the present appeal. The action claiming the return of the deposits was brought in the High Court at Ipoh and heard by Good J., who by an order dated November 8, 1957, dismissed it with costs. On appeal by the purchaser to the Court of Appeal for the Federation of Malaya (Thomson C.J., Sir John Whyatt C.J. (Singapore) and Barakbah J.), that court by a majority (Sir John Whyatt C.J. dissenting), allowed the appeal, the order to that effect being dated June 2, 1958. From that order the vendor now appealed to this Board with the support of two of the four judicial opinions so far delivered.

1959. Oct. 28, 29. *J. A. Plowman Q.C.* and *J. A. Wolfe* for the appellant.

Geoffrey Cross Q.C. and *T. A. C. Burgess* for the respondent.

All the cases cited in argument are referred to in the judgment.

Dec. 1. The judgment of their Lordships was delivered by LORD JENKINS. The question in this case is whether upon the true construction of a conditional agreement dated November 8, 1955, and made between the defendant (now appellant) Aberfoyle Plantations Ltd. (hereinafter called " the vendor ") of the one part, and the plaintiff (now respondent) Khaw Bian Cheng (hereinafter called " the purchaser ") of the other part, being an agreement providing, subject to the condition therein mentioned, for the sale by the vendor to the purchaser of a rubber estate in the State of Perak known as the Harewood Estate, and in the events which happened, the purchaser became entitled to the return of deposits amounting to $100,000 paid by him to the vendor thereunder, on the ground that the condition in question had not been performed by the vendor within the time thereby limited for its performance. The case has given rise to a considerable difference of judicial opinion in the courts below.

[His Lordship stated the facts set out above and continued:] Their Lordships may now return to the question exhaustively debated before them and in the courts below: Within what period of time did the agreement (read in conjunction with the purchaser's solicitors' letter of May 4, 1956) require the condition contained in clause 4 to be performed? The answer to that question must plainly depend upon the true construction of the agreement, or in other words, upon the intention of the parties as expressed in, or to be implied from, the language they have used.

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But, subject to this overriding consideration, their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

See *Smith* v. *Butler*,[1] where the purchaser treated a conditional contract as at an end for non-fulfilment of the condition before the date fixed for completion, and it was held that the vendor had until the date fixed for completion to perform the condition; that the contract had therefore gone off through the default of the purchaser; and that he could not recover his deposit. Romer L.J. (as he then was) said this[2]: "To my mind "it is reasonably clear that the vendor has until the time fixed "for completion, or, if no time for completion is fixed, then a "reasonable time, in which to procure the assent of the mort-"gagee to the acceptance of the purchaser as mortgagor," such acceptance being the condition in question in that case.

In *In re Sandwell Park Colliery Co.*[3] Maugham J. (as he then was) held (following *Smith* v. *Butler*[4]) that where in a debenture holder's action the receiver contracted to sell property included in the debentures subject to the contract being approved and sanctioned by the court, and no date was fixed for obtaining such approval, it had to be obtained before the date fixed for completion of the contract. Maugham J., after referring to *Smith* v. *Butler*[4] and quoting the passage from the judgment of Romer L.J. to which their Lordships have already referred, continued as follows[5]: "I think, taking the judgments as a whole, it is "reasonably apparent that the court took the view that the date "fixed for completion was the time by which the condition had "to be performed, and considered that if that time had passed "the purchaser might have recovered the deposit. The cases of "*In re Head's Trustees and Macdonald*[6] and *Bellamy* v. *Deben-"ham*,[7] though not so closely in point, seem to me to support the "view that a condition precedent to the validity of a contract for "sale of land must prima facie, in the absence of express pro-"vision, be fulfilled before the date fixed for completion."

Earlier in the judgment of Maugham J. comes this important passage bearing particularly on the third of the propositions above stated[8]: "Courts of equity, in dealing with actions for specific

[1] [1900] 1 Q.B. 694; 16 T.L.R. 208.
[2] [1900] 1 Q.B. 694, 699.
[3] [1929] 1 Ch. 277.
[4] [1900] 1 Q.B. 694.
[5] [1929] 1 Ch. 277, 283.
[6] (1890) 45 Ch.D. 310.
[7] [1891] 1 Ch. 412; 7 T.L.R. 199.
[8] [1929] 1 Ch. 277, 282.

" performance relating to land, have been accustomed to give " effect to the real intention rather than to the precise words " fixing the date for completion. The effect is that a clause fixing " the date for completion is equivalent to a clause stating that " completion shall be on that date or within a reasonable time " thereafter. But there is no ground for a similar construction " in the case of a condition upon which the validity of the con- " tract as one sale ' (sic: q. " one of sale ") ' depends. The " distinction is obvious. In the first case both parties are bound, " and a moderate delay in completion is thought not to injure " either. In the latter, the very existence of the mutual obliga- " tions is dependent on the performance of the condition. The " purchasers do not know in the first instance if their purchase- " money will ever be required. In general, and in the present " case, there is no promise or undertaking by the vendor that " the condition will be fulfilled. Equity has, I think, never " applied its liberal views as to time to such a condition. If a " date is mentioned, the condition must be exactly complied with. " If a date is not mentioned, the condition must be fulfilled " within a reasonable time; there is no difference between the " views of law and equity in considering what is a reasonable " time, and the uncertain position of the purchasers must be " borne in mind."

Before parting with these two authorities their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.

Similar considerations are in their Lordships' judgment applicable where a conditional contract of sale fixes no specific date for completion of the sale by the performance of both sides of the bargain, but does fix a date for the performance on the part of the purchaser of his part of the bargain by payment of the purchase-money, even though no definite date is fixed for the performance on the part of the vendor of his part of the bargain by the transfer of the property. In such a case it could hardly have been intended that the purchaser should on the date specified perform his part of the bargain unless by that date a binding contract had been brought into existence by fulfilment of the condition; for unless that had happened by the date specified there would on that date in truth be no contract for the purchaser to perform.

Reverting to the present agreement with these general principles in mind, their Lordships ask themselves whether upon the true construction of this agreement the condition stated in clause 4 had (as the purchaser contends) to be fulfilled at latest by April 30, 1956 (extended to May 31, 1956, by the purchaser's

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solicitors' letter of May 4), as the date fixed by the parties for the completion of the purchase, or at all events for the performance by the purchaser of his part of the bargain by payment of the balance of the purchase-money; or only had to be fulfilled (as the vendor contended) within a reasonable time, on the footing that the agreement did not expressly or by implication fix any particular date by which it was to be fulfilled.

Mr. Plowman's argument for the vendor (as developed before their Lordships) was to this effect: (i) Having regard to the surrounding circumstances in which the agreement was made it can hardly have been the intention of the parties that the condition (postulating as it did the bringing to a satisfactory conclusion of negotiations which had been dragging on for a matter of six years) must be fulfilled within so short a time as the period of just under six months from the date of the agreement (i.e., November 8, 1955) to April 30, 1956. (ii) Their Lordships should therefore be predisposed in favour of a construction which would give the vendor a reasonable time within which to fulfil the condition. (iii) The agreement was well capable of being, and should be, construed as allowing a reasonable time for that purpose. (iv) In view of the absence of any express provision in the contract limiting the time for the fulfilment of the condition, an intention to allow a reasonable time was to be inferred, and the purchaser could only escape this conclusion on the footing that April 30, 1956, was the date fixed for completion of the contract, so as to bring the case within the principle of *Smith* v. *Butler*[9] and *In re Sandwell Park Colliery Co.*[10] (v) Clause 9 showed that although the parties themselves described April 30, 1956, as the date on which the contract was to be completed, what was to take place on that day did not amount to completion, because on payment of the purchase-money the vendor was only made liable under that clause to execute a proper transfer or tranfers "as soon as "possible thereafter," and this qualification of a vendor's ordinary obligation to convey against payment of the purchase-price should be taken to have been advisedly inserted in clause 9, so as to give the vendor a reasonable time to fulfil the condition if it had not already done so, the purchaser's position being protected in the meantime by the caveat and power of attorney therein mentioned.

If he was right so far, Mr. Plowman contended with force that time not being originally of the essence of the contract the purchaser could not make it so by serving the notice of May 4,1956, because it could not then be said that the vendor had been guilty of any delay or default such as had to be shown in order to entitle the purchaser to serve such a notice, and he referred their Lordships to Fry on Specific Performance, 6th ed., p. 510, para. 1092;

[9] [1900] 1 Q.B. 694. [10] [1929] 1 Ch. 277.

Green v. *Sevin* [11]; *Stickney* v. *Keeble* [12]; and *Smith* v. *Hamilton*.[13] He also contended that, even if a case for the service of such a notice had been made out, the notice (given on May 4, 1956, to expire on May 31) was in all the circumstances of the case unreasonably short. Given acceptance of the contention that the vendor was entitled to a reasonable time to fulfil the condition, their Lordships would be disposed to agree. But the view they have formed as regards the time for fulfilment of the condition makes it unnecessary to dwell further on this aspect of the case.

The argument presented by Mr. Cross on the purchaser's side, in favour of the view that the agreement demanded fulfilment of the condition at latest by April 30, 1956 (extended by the letter of May 4 to May 31, 1956), appears to their Lordships to be far more convincing. This argument rightly stresses the fact that at the very outset of the agreement the vendor's obligation to sell, and the purchaser's obligation to buy, were by clause 1 expressed to be subject to the condition contained in clause 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.

Then in clause 4 itself "the purchase" was made "conditional upon" the vendor obtaining a renewal of the leases, and in the event of the vendor being "unable to fulfil this "condition" the agreement was to "become null and void," and the vendor was to refund the deposit or deposits already made under clause 2, notwithstanding anything contained in clause 10. Reference back to clause 2 shows that the first deposit was to be paid on the signing of the agreement, and the second on February 1, 1956, while the balance of the purchase-money was to be paid on April 30, 1956. But clause 4, in the event of the agreement becoming null and void, only required repayment of the deposit or deposits already made under clause 2, without any such requirement as to the balance of the purchase-money. This seems to their Lordships to afford some indication that the condition was to be fulfilled (if at all) by the date fixed for the payment of the balance of the purchase-money (viz., April 30, 1956), for the case of avoidance of the agreement on any later date for non-fulfilment of the condition would demand a provision for repayment of the entire purchase-money and not merely the deposit or deposits. It is next to be observed that clauses 9 and 10 contained express provisions as to the completion of the purchase on April 30, 1956. Clause 9 provided that the purchase should be completed at the offices of a named company on or before April 30, 1956, going on to say: "and upon the purchaser "paying the balance of the purchase price to the vendor the "vendor shall as soon as possible thereafter execute a proper "transfer or transfers to the purchaser or as he shall direct. . . ." This appears to their Lordships to amount to the fixing of

[11] 13 C.D. 589, 599.
[12] [1915] A.C. 386; 31 T.L.R. 221.
[13] [1951] 1 Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928.

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April 30, 1956, as the date for completion of the purchase for the purposes of the first of the principles deducible from *Smith* v. *Butler*[14] and *In re Sandwell Park Colliery Co.*,[15] and at all events to be well within the extension of that principle above enunciated. On April 30, 1956, the purchaser was to pay the balance of the purchase-money. That would entitle him to possession of the premises (see clauses 2 and 11), and make the vendor a bare trustee for him. The vendor, on his part, would become immediately bound to execute the transfers necessary to vest the legal estate in the purchaser, subject to such allowance of time within which to perform that duty as might be indicated by the words "as soon as possible." The provision thus made for the contingency that it might not be possible for the vendor to produce the necessary transfers immediately upon the payment of the balance of the purchase-money did not, in their Lordships' opinion, prevent the transaction described as completion of the purchase in clause 9 from amounting for the present purpose to completion of the purchase, which is the description applied to it by the parties themselves. A provision in a sale agreement to the effect that the sale should be completed on such a date and at such a place, when the purchaser should pay the purchase-price, and the vendor should thenceforth hold the property in trust for the purchaser, would, in their Lordships' view, clearly amount to a provision for completion of the sale. At all events, the purchaser, by paying the balance of the purchase-money in accordance with clause 9, would fully discharge his part of the bargain, which must, in their Lordships' view, necessarily presuppose the existence of a binding agreement, of which he would be discharging his part. Clause 10, which requires completion of the purchase (i.e., by payment of the purchase-money) on April 30, 1956, on pain of forfeiture of the deposits, points in the same direction.

The references in clauses 7 and 8 to "the date of completion "of sale" must, in their Lordships' view, be taken for the present purpose as meaning April 30, 1956, as the date agreed by the parties for completion, and so construed appear to their Lordships to support the purchaser's contention.

To take a broader view of the matter, it seems to their Lordships that the vendor's contention as to the construction and effect of the agreement would produce results so unreasonable that the parties should not be taken to have intended them unless the language they have used clearly shows the contrary. The purchaser would have been obliged to perform his part of the bargain on or before April 30, 1956, by paying the balance of the purchase-money before there was any binding contract, and with no assurance that a binding contract would ever emerge. On the other hand, the vendor would have been under no effective obligation to procure the fulfilment of the condition within any

[14] [1900] 1 Q.B. 694. [15] [1929] 1 Ch. 277.

foreseeable time or at all. Again, from the vendor's point of view, he would have been under an obligation on April 30, 1956, to let the purchaser into possession or receipt of the rents and profits against payment of the purchase-money, before it was known whether fulfilment of the condition would ever be procured. It is unnecessary to enlarge on the confusion which would thus have resulted in the event of the agreement ultimately being avoided for non-fulfilment of the condition.

On the vendor's side it was argued that the provision in clause 9 to the effect that the vendor should " as soon as possible " thereafter execute a proper transfer or transfers of the property " to the purchaser " included the doing of what had to be done in order to fulfil the condition stated in clause 4, and thus allowed the vendor a reasonable time after April 30, 1956, within which to comply with the condition. Their Lordships cannot agree. Under clause 4 what the vendor had to do was to obtain a renewal of the seven leases so as to be in a position to transfer the same to the purchaser. Under clause 9 the vendor was to transfer the property sold (including the leases so renewed) " as soon as " possible " after the payment by the purchaser on April 30 of the balance of the purchase-money. But he must by then have obtained the renewal of the leases so as to be in a position to transfer them, even though some delay in the actual execution of the transfer might be allowable by virtue of the words " as soon " as possible." The provisions in clause 9 regarding the lodging of a caveat and granting of a power of attorney appear to their Lordships to be (as Mr. Cross submitted) more appropriate to the protection and transfer of existing registered interests than to the procuring of interests yet to be obtained.

Their Lordships can attach no importance to the vendor's argument based on surrounding circumstances. The parties chose to fix April 30, 1956, by the agreement as the date for what they themselves described as " completion " and must be bound by that choice.

It should also be placed on record that certain evidence as to an alteration made in clause 4 of the draft of the agreement when the matter was in negotiation, which Good J. appears to have admitted, was, in their Lordships' view, wholly inadmissible for the purpose of construing the agreement itself, and was by common consent excluded from consideration at the hearing before them.

For the reasons above stated, which substantially accord with those expressed by the majority of the Court of Appeal, and also accord with the principles of *Smith* v. *Butler* [16] and *In re Sandwell Park Colliery Co.*,[17] their Lordships are of opinion that the purchaser's appeal to that court was rightly allowed, and that the present appeal by the vendor must fail.

Their Lordships will therefore report to the Head of the

[16] [1900] 1 Q.B. 694.

[17] [1929] 1 Ch. 277.

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Federation of Malaya as their opinion that this appeal ought to be dismissed and that the appellant ought to pay the costs of this appeal.

Solicitors: *Shelton, Cobb & Co.; Peacock & Goddard.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1959
Nov. 2, 3, 30.

UNIT CONSTRUCTION CO. LTD. . . . APPELLANT;
AND
BULLOCK (INSPECTOR OF TAXES) . . RESPONDENT.

Residence—Company—Income tax—Unauthorised management outside country of registration—Finance Act, 1953 (1 & 2 *Eliz.* 2, *c.* 34), *s.* 20 (9).

By section 20 (9) of the Finance Act, 1953: "For the purposes "of this section, 'company' includes any body corporate, but refer- "ence to a company shall be taken to apply only to a company "resident in the United Kingdom and carrying on a trade wholly "or partly in the United Kingdom."

Three companies which were wholly owned subsidiaries of A. B. & Co. Ltd., a company resident in the United Kingdom, were registered in Kenya. The boards of the three subsidiaries, situate in Kenya, were entirely distinct from the board of the parent company, but that board exercised control in matters of policy and, in effect, told the boards of the subsidiaries what to do, and those boards always accepted the instructions and acted accordingly. That arrangement was not authorised by the memoranda or articles of the subsidiaries. The appellant company, also a wholly owned subsidiary of A. B. & Co. Ltd., made certain payments to the Kenya subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax under Case I of Schedule D. It was admitted that if the Kenya subsidiaries were "resident in the United Kingdom" within the meaning of section 20 (9), then the payments in question were subvention payments which the appellant company was entitled to deduct:—

Held, that it was the actual place of management of a company and not the place where it ought to be managed which fixed the residence of a company, and by that test this company was "resident in the United Kingdom" (post, pp. 1026, 1032, 1036).

Union Corporation Ltd. v. *Inland Revenue Commissioners* [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646; (C.A.) [1953] A.C. 482; [1953] 2 W.L.R. 615; [1953] 1 All E.R. 729; (H.L.) *Egyptian Delta Land & Investment Co. Ltd.* v. *Todd* [1929] A.C. 1; 44 T.L.R. 747 and *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 C.L.R. 15; (H.C. of A.) (1941) 64 C.L.R. 241 considered.

Dicta of Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455, 458; 22 T.L.R. 756 and Lord

* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

Halsbury in *American Thread Co.* v. *Joyce* (1913) 6 T.C. 163, 165; 29 T.L.R. 266 explained.

Decision of the Court of Appeal [1959] Ch. 315; [1959] 2 W.L.R. 437; [1959] 1 All E.R. 591 reversed.

APPEAL from the Court of Appeal (Jenkins, Romer and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 12, 1959, dismissing an appeal by the appellant company, Unit Construction Co. Ltd., from an order of the Chancery Division (Wynn-Parry J.) dated July 22, 1958, whereby an appeal by the respondent, Vernon William Bullock (Inspector of Taxes), on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and their decision was reversed.

The facts are fully stated in the report of proceedings in the Court of Appeal ([1959] Ch. 315; [1959] 2 W.L.R. 437).

F. Heyworth Talbot Q.C. and *John Creese* for the appellant company.

Roy Borneman Q.C. and *Alan Orr* for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Gramophone & Typewriter Ltd.* v. *Stanley* [1]; *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain) Ltd.* [2] and *In re Hilckes.* [3]

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS. My Lords, the appellant company is a wholly-owned subsidiary of an English company, Alfred Booth & Co. Ltd. So are three companies, Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd., all of which are companies registered in Kenya under the laws of that colony. To these three companies, to which I will sometimes refer as "the African subsidiaries," the appellant company made certain payments in the years 1952 and 1953 and claims to be entitled under section 20 of the Finance Act, 1953, to deduct them for the purpose of its assessment to income tax under Case I of Schedule D for the relevant years. It is common ground that it is entitled to do so if, and only if, such companies were then "resident in "the United Kingdom and carrying on a trade wholly or partly "in the United Kingdom."

My Lords, the claim of the appellant company was sustained by the Commissioners for the Special Purposes of the Income Tax Acts, but upon a case stated by them was rejected by Wynn-Parry J., whose decision was affirmed by the Court of Appeal.

It will, I think, appear that the point for your Lordships'

[1] [1908] 2 K.B. 89; 24 T.L.R. 480.

[2] [1916] 2 A.C. 307; 32 T.L.R. 624.

[3] [1917] 1 K.B. 48; 33 T.L.R. 28.

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consideration in the present case is a short one, though any mention of so vexed a question as the residence of a company is likely to give rise to prolonged discussion. Here there are findings of fact which learned counsel for the Crown was constrained to admit that he could not challenge, and the only question is whether the conclusion in law which the special commissioners drew from those facts was correct.

I should like at the outset to say that this case was stated with conspicuous clarity for the opinion of the court, and that the detailed and careful review of the facts by the special commissioners led them irresistibly to the conclusion which they thus state: "We find that . . . the boards of directors of the African "subsidiaries (who are the people one would have expected to "find exercising control and management) were standing aside in "all matters of real importance and in many matters of minor "importance affecting the central management and control, and "we find that the real control and management was being exer-"cised by the board of directors of Alfred Booth & Co. Ltd. in "London." This being their conclusion of fact, it is not surprising that as a matter of law they concluded that these companies were resident in London. For it has been trite law for two generations or more that a limited company "resides for purposes of income "tax where its real business is carried on," and that its "real "business is carried on where the central management and "control actually abides." This test has not only been reasserted and applied over and over again in judicial decisions; it has now also received legislative recognition, see section 468 (7) of the Income Tax Act, 1952. It cannot be questioned by your Lordships. The familiar words that I have cited come from Lord Loreburn's speech in *De Beers Consolidated Mines Ltd.* v. *Howe*.[1] At that time the possibility of an artificial person such as a limited company residing in two countries at one and the same time had not been fully examined. Twenty years later in the *Swedish Central Railway Co. Ltd.* v. *Thompson*,[2] Rowlatt J. saw no difficulty in such a concept and, indeed, found it easier for a corporation to have two residences than for a natural person and, though in the same case in the Court of Appeal Atkin L.J. (as he then was) said that he felt constrained by authority to come to a different conclusion, and in the House of Lords Lord Atkinson in a powerful dissenting speech took the same view, it must now be regarded as clear law that an artificial person may, like a natural person, have more than one residence. The relevance of this consideration is that at an early stage in the proceedings (before the special commissioners, I think) it was admitted on behalf of the appellant company that the African subsidiaries were resident in Africa. I do not know what considerations led to this admission being made, but it appears to

[1] [1906] A.C. 455, 458; 22 T.L.R. 756.

[2] (1923) 9 T.C. 343, 352; (C.A.) [1924] 2 K.B. 255; (H.L.) [1925] A.C. 495; 41 T.L.R. 385.

me to have no weight, if it is conceded as a matter of law that a company may have two residences. It is not necessary for me (and I count it my good fortune) on this occasion at any rate to determine in what sense a company may be said to reside not only in that country in which, and in which alone, the central management of its business is exercised, but in another country also. I share to the full the difficulty entertained and expressed by Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation*,[3] to which reference was made in the judgment of the Court of Appeal. I leave to others the reconciliation of the *Swedish Central Railway Co.* case,[4] to which I have referred, and *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd*.[5]

What then, my Lords, were the reasons which led the courts below to hold in face of this finding of fact and this state of the law that the African subsidiaries were not resident in the United Kingdom? Undoubtedly they raise a difficult and interesting question of law, which if decided in the manner now contended for by the Crown must have far-reaching and probably deplorable consequences for the Revenue. For the contention of learned counsel for the Crown which has so far found favour with the courts is no less than this, that if by the constitution of the company, that is by its memorandum and articles of association, interpreted in the light of the relevant law, that is, in this case the law of Kenya, the management of the company's business is contemplated as being exercised and ought therefore to be exercised in Kenya or at any rate outside the United Kingdom, then for the purpose of British income tax law the facts are to be disregarded, and the control and management which as a fact are found to abide in the United Kingdom are to be regarded as abiding outside it. There is no doubt, I think, that the management of the African subsidiaries, which were incorporated in Kenya under the Kenya Companies Ordinance and registered in Nairobi, was placed in the hands of its directors and that their articles of association expressly provided that directors' meetings might be held anywhere outside the United Kingdom. Nor can there be any doubt—for this is the unchallengeable finding of the commissioners—that the management of the businesses of the companies was not exercised in the manner contemplated. Whence it follows that the businesses were conducted in a manner irregular, unauthorised, and perhaps unlawful. It is this fact which led the learned judge to say in words that were approved by the Court of Appeal[6]: "It must follow to my mind that . . . "no weight or attention can be given to the activities of the "board of the parent company in relation to Unit [the appellant "company] and the African subsidiaries for the purpose of "considering whether or not any of them are resident in the

[3] (1940) 60 C.L.R. 15; (H.C. of A.) (1941) 60 C.L.R. 241.
[4] [1925] A.C. 495.
[5] [1929] A.C. 1; 44 T.L.R. 747.
[6] [1959] Ch. 147, 165; [1958] 3 W.L.R. 504; [1958] 3 All E.R. 186.

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"United Kingdom." So also the Court of Appeal, observing upon the test of residence laid down in the authorities, said [7] that "there is no reason at all to suppose that the judges had in "mind such a case as the present in which de jure management "is vested in one company whilst de facto control is vested in "another," and again they insisted that it was "acts or elements ". . . regular and not irregular, constitutionally lawful and not "unlawful" that must be regarded in determining the question of management and therefore of residence.

My Lords, I should certainly be prepared to admit that the many judges who in the past have pronounced upon this question had not in mind such a case as this. But, with great respect to those who take a different view, the present case does not seem to lie outside the principle underlying their judgment. Nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that in greater or less degree they are irregular or unauthorised or unlawful.

The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution, however imperative. If, indeed, I must disregard the facts as they are, because they are irregular, I find a company without any central management at all. For, though I may disregard existing facts, I cannot invent facts which do not exist and say that the company's business is managed in Kenya. Yet it is the place of central management, which, however much or little weight ought to be given to other factors, essentially determines its residence. I come, therefore, to the conclusion, though truly no precedent can be found for such a case, that it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company. If it were not so, the result to the Revenue would be serious enough. In how many cases would a limited company register in a foreign country, prescribe by its articles that its business should be carried on by its directors meeting in that country, and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?

In my opinion, Wynn-Parry J. and the Court of Appeal have adopted a wrong test in this admittedly difficult case. I would allow this appeal and restore the determination of the commissioners. The respondent must pay the appellants' costs here and below.

My Lords, since writing this opinion, I have been privileged to read the opinion which my noble and learned friend, Lord Radcliffe, will deliver, and I wish to add that I concur in his observations, and in particular in the manner in which he would

[7] [1959] Ch. 315, 337; [1959] 2 W.L.R. 437; [1959] 1 All E.R. 591.

reconcile the two decisions of this House to which I have referred, and in his view of the weight that should be given to the admission made by the appellants concerning the residence of the subsidiary companies in Kenya.

LORD RADCLIFFE. My Lords, it seems that the opinion of this House on the important question raised by the appeal differs from the unanimous judgment of the Court of Appeal and the judgment of Wynn-Parry J. in the High Court. I think, therefore, that I ought to say in my own words why it is that I regard these judgments as incorrect. It is best to begin by making it plain what are the essential facts of the case and what is the exact question which requires decision.

The general facts are found for us by the special commissioners and are set out in detail in the case stated. In my view, they admit of only one conclusion, that by the year 1952 every decision of any importance that concerned the running of the businesses in Kenya of the Alfred Booth & Co. Ltd. subsidiaries was being taken in London by directors of the parent company. To manage the subsidiaries in this way was inconsistent with the provisions for their management laid down by their respective articles of association, under which the boards of directors held the managerial power and their meetings could not validly be held in the United Kingdom. On the other hand, this departure of practice from form was not due to any initial intention to conceal the former by the latter. It came about because between 1948 and 1950 the subsidiaries had been operating so unsuccessfully that the parent company decided, to use the words of the case stated (see paragraph 5 (2)), "the situation "of the African subsidiaries was becoming so serious that it was "unwise to allow them to be managed in Africa any longer, "and . . . their management must be taken over by the directors "of Alfred Booth & Co. Ltd. in London."

On those facts the seat of the "central management and "control" of the subsidiaries changed, and passed from Africa to the United Kingdom. This is a straightforward case of de facto control being actively exercised in the United Kingdom, while the local directors "stood aside" from their directorial duties and never purported to function as a board of management.

Upon those facts the question has arisen whether the subsidiaries are entitled to be regarded as resident in the United Kingdom during the years 1952 and 1953, with the consequence that each of them would fall within the description of "a com-"pany resident in the United Kingdom and carrying on a trade "wholly or partly in the United Kingdom" for the purposes of section 20 of the Finance Act, 1953. If they do, then the appellant company, which is also an Alfred Booth & Co. Ltd. subsidiary, can treat certain payments which it made to them in those years as "subvention payments" under the section and,

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accordingly, can deduct them from its assessments under Case I of Schedule D for the years 1953–54 and 1954–55.

The appellant has throughout the case admitted that the three African subsidiaries were at all material times resident in East Africa. This is spoken of as an admission, though it seems to me that it might just as well be described as a claim. The grounds upon which this "admission" was founded are not before us. I do not know whether they were supposed to be the fact of incorporation in Kenya, or the adoption of articles of association under the Kenya Companies Ordinance of 1933, or the residence in Kenya of the ostensible directors, or the practical side of business being done in Kenya, or a combination of some or all of these facts. Since it has been common ground between the parties that a company may have more than one residence for the purposes of taxation, I do not think that the admission has any particular bearing on the point that we have to decide; nor has it been so treated in any court. For my part, however, I wish that the admission had not been made. I do not know precisely what it is intended to concede; and I have found that decisions of courts are sometimes the less satisfactory on questions of principle because the issue has been prejudiced by the making of an admission which turns out to embody a legal conclusion as well as matters of fact.

The ascertainment of a limited company's residence for tax purposes involves several very familiar propositions. No statute hitherto has laid down any definition of this residence or prescribed any rules for determining it, except so far as subsection (7) of section 468 of the Income Tax Act, 1952, not only governs that section but also forms a statutory acceptance of an existing rule. I think that a statutory code could have been provided and on the whole I regret that it has not. On the other hand, the necessity of establishing some common standard for the treatment of different taxpayers meant that the courts of law were bound in course of time to produce and apply some general principle of their own to form an acceptable test of residence. No doubt it might have taken a variety of forms—the country of incorporation, the site of general meetings, the site of meetings of the directors' board were all possible candidates for selection as the criterion. In fact, as we know, the principle was adopted that a company is resident where its central control and management abide: words which, according to the decision of the House of Lords that finally propounded the test (*De Beers Consolidated Mines Ltd.* v. *Howe* [8]) are equivalent to saying that a company's residence is where its "real business" is carried on.

It is true that the law so declared substitutes a judicial formula for the general words of the statute, a form of limitation which one normally seeks to avoid. But, in the circumstances, I believe such a process to have been inevitable, and, in my opinion, the

[8] [1906] A.C. 455.

De Beers judgment,[8] followed as it is by a number of other judgments of the highest authority which have accepted the same principle, must be treated today as if the test which it laid down was as precise and as unequivocal as a positive statutory injunction. That means that there is no escape from Lord Loreburn's words[9]: "... a company resides for purposes of income tax where "its real business is carried on ... I regard that as the true rule, "and the real business is carried on where the central manage- "ment and control actually abides."

I do not know of any other test which has either been substituted for that of central management and control, or has been defined with sufficient precision to be regarded as an acceptable alternative to it. To me, at any rate, it seems impossible to read Lord Loreburn's words without seeing that he regarded the formula he was propounding as constituting the test of residence. If the conditions he postulated were present, there was residence: if they were not, other conditions did not suffice to make up residence. And so, I think, his meaning was universally understood, not least in judgments of this House (see *American Thread Co.* v. *Joyce*[10]; *New Zealand Shipping Co. Ltd.* v. *Thew*[11]; *Bradbury* v. *English Sewing Cotton Co. Ltd.*[12]), for the next twenty years.

So far as I am able to perceive, only two qualifications have since appeared which mar at all the simplicity and generality of his test. One is that the facts of individual cases have not always so arranged themselves as to make it possible to identify any one country as the seat of central management and control at all. Though such instances must be rare, the management and control may be divided or even, at any rate in theory, peripatetic. Situations of this kind do not arise just to tease the minds of judges: they are the product of some peculiar necessity, political or otherwise. *Union Corporation Ltd.* v. *Inland Revenue Commissioners*[13] was of this kind. The facts were not such as to allow of Lord Loreburn's test being applied, and therefore some other basis of decision had to be selected. The solution chosen by the Court of Appeal appears to have been that residence arose in any country in which "to a substantial degree" acts of controlling power and authority were exercised, and in this the line of reasoning followed was avowedly adapted from the judgment of Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation.*[14] It may perhaps still be open to question whether, where the facts are such that Lord Loreburn's test cannot be applied as a whole, the correct way of determining residence is, so to speak, to fragmentate his principle and establish a residence for tax purposes wherever the exercise of

[8] [1906] A.C. 455.
[9] Ibid. 458.
[10] (1913) 6 T.C. 163; 29 T.L.R. 266.
[11] (1922) 8 T.C. 208.
[12] [1923] A.C. 744; 39 T.L.R. 590.
[13] [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646; (H.L.) [1953] A.C. 482; [1953] 2 W.L.R. 615; [1953] 1 All E.R. 729.
[14] 64 C.L.R. 15.

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some portion of controlling power and authority can be identified. The point does not arise for our decision in this case, and I express no view at all upon it. I only note the decision in the *Union Corporation* case [15] as an instance of dual or multiple residence for tax purposes which has its origin in the fact that circumstances do not always make it feasible to apply the Loreburn formula.

The other difficulty that has appeared is the decision of this House in 1925 in the *Swedish Central Railway Co.* case.[16] To all appearances that laid down the proposition that, although there was a residence in Sweden by virtue of central control and management being exercised there, there was at the same time residence in England by virtue of incorporation here and the performance here of administrative duties such as exercising the custody of the company's seal and registration of transfers. The novel idea thus appeared that there were some circumstances that could establish residence for a company, even though its central management and control were being concurrently exercised elsewhere. Unfortunately it is impossible to discover from the decision what exactly those circumstances are, because, as so often arises under income tax procedure when judgment is given on cases stated by commissioners, the conclusion of the House involved nothing more positive than that the commissioners who had heard the case had facts before them upon which it was open to them in law to find that there was English residence. Conversely, when the case of *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* [17] reached this House in 1928, it was held that upon facts not markedly dissimilar from those of the earlier case the commissioners were entitled to find that there was no residence in England. With these two decisions of equal authority to be reckoned with, I think that it is impossible for anyone today to declare with any conviction what are the circumstances, or what is the combination of circumstances, that constitute residence for a company in one taxing jurisdiction at a time when the central management and control of its affairs are being actively conducted in another.

My Lords, I cannot avoid the opinion that the *Swedish Central Railway Co.* decision [18] was an unfortunate one, having regard to the course of authority both before and after its date. Few people can feel that there is any close analogy between the residence imputed to a company and the residence imputed to an individual. While it is not difficult to see that the circumstances that make an individual "resident" may reproduce themselves for him at one and the same time in more than one country, it is much harder, when a company is concerned, to feel satisfied that two quite different tests, depending upon different sets of circumstances, can each be applied concurrently for the purpose of determining residence. For any one taxing authority the relevant

[15] [1952] 1 T.L.R. 651; (H.L.) [1953] A.C. 482.
[16] [1925] A.C. 495.
[17] [1929] A.C. 1.
[18] [1925] A.C. 495.

question is whether the company is resident within the area of its jurisdiction or non-resident: it is not required to ascertain positively whether or not the company is also resident within another jurisdiction. If the accepted test is that a company is resident in that country where its central management and control abide, and the facts are that at the material date that central management and control do not abide in England, it seems that in such cases the nature of the test itself precludes the conclusion that the company is nevertheless resident here.

I am myself of the opinion that the best way of treating the matter is to regard the *Swedish Central Railway Co.*[18] and the *Egyptian Delta Land and Investment Co.*[19] decisions as if they were in effect one decision of the House and the speech of Viscount Sumner in the later case as affording an authoritative commentary on the significance of the earlier. He was party to both of them. If this is done, much of the difficulty disappears, for it is clear that Lord Sumner wished it to be understood that the Swedish Central Railway Company's business and administration were of such a nature that what managing and controlling had to be done were in fact done as much on English as on Swedish soil. He regarded the key of the earlier decision as being contained in the words of Lord Cave[20]: "The central "management and control of a company may be divided, and it "may 'keep house and do business' in more than one place; "and, if so, it may have more than one residence." On this basis the 1925 decision of the House is no more than a decision on that special class of case, such as I have already noticed with reference to the *Union Corporation*,[21] where the facts themselves are genuinely such as not to admit of a finding that central management and control are exercised in or from any one country. There will then be only one category of exception from the principle of the *De Beers* case[22] and not an undefined second class.

My Lords, what I have been saying about this question of double residence has no direct relevance to what has to be decided in the present appeal. I thought it necessary, however, to make some attempt to deal with the background because, owing to the admission that has been made asserting an African residence for the three subsidiaries, we are put in the position, if we allow the appeal, of accepting that each of them has residence in two different countries without passing upon the validity of the alleged residence in Africa or indeed knowing what are supposed to be the determining circumstances that bring it about. I do not think that satisfactory. This case ought not to be regarded as in any sense an authority on the problems of double residence for companies. It deals only with what is a different point, whether, assuming that all the acts which constitute central management and control of the subsidiaries' affairs take place in England, an

[18] [1925] A.C. 495.
[19] [1929] A.C. 1.
[20] [1925] A.C. 495, 501.
[21] [1952] 1 T.L.R. 651; (H.L.) [1953] A.C. 482.
[22] [1906] A.C. 455.

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English residence arises despite the fact that the persons who performed those acts had no authority under the companies' regulations to do so, nor could the meetings, if any, at which the decisions to act were taken validly be held in England. It is that point which has been argued before us.

The view which has hitherto prevailed both in the High Court and the Court of Appeal is expressed in the words which appear in the unanimous judgment of the latter court [23]: "... only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company." This conclusion, at any rate at first sight, is not attractive to me, since it appears to reduce to a mere formal reading of regulations an inquiry that has generally been regarded as one of "actual fact." It has been built out of two propositions, both of which were accepted before us by the respondent's counsel as containing the essence of his argument.

The first proposition lays stress on the consideration that none of the many judicial pronouncements which have asserted control and management to be the test of residence was directed to such circumstances as the present in which the company's own regulations conflict with what has been done. This, no doubt, is true, but I think it a very large step to deduce from that that such pronouncements, despite the unvarnished plainness of their language, can have no bearing on the issue now before us. After all, the purport of all of them is to repeat that the question where control and management abide must be treated as one of fact or "actuality," and here control and management in London remain a fact, despite the failure to adapt the companies' articles to the occasion. The articles prescribe what ought to be done, but they cannot create an actual state of control and management in Africa which does not exist in fact. In litigation inter partes this sort of situation may perhaps be brought about by the operation of the law of estoppel, but here I see no ground for saying, nor has it been argued, that there is any estoppel either by words or conduct which binds the appellants in the face of the Revenue.

Ought we, then, to adopt this principle that evidence of what has happened in fact must be excluded by a rule of law if what has been done is inconsistent with the regulations of a company? In my opinion, it would be wrong to do so. I cannot see how the corollary of such a principle could fail to be that, if you cannot look beyond what the regulations of the company provide for, it is only those regulations which need to be or indeed can be referred to when a question of residence arises. Companies could be equipped with the most comprehensive sets of constitutions providing for management to be located in this or that selected taxing jurisdiction, and, however much the written requirements were in fact departed from for reasons of convenience or otherwise, all efforts to establish the true facts relating to the actual

[23] [1959] Ch. 315, 338.

seat of management would founder on the ground that what had been done was merely "unconstitutional." Certainly limited companies ought to keep their internal regulations up to date and to reform them in accordance with the facts. But I cannot think that such considerations are sufficient to introduce an important qualification upon this accepted test by which you try to ascertain what are the real facts about the seat of management and control and to put in its place what seems to be the merely formal device of studying a set of written regulations. I do not believe that this would conduce to the health of revenue administration. I think it much better to adhere to the approach laid down by Lord Loreburn in the *De Beers* case [24]: "This is a pure question of "fact to be determined, not according to the construction of this "or that regulation or bye-law, but upon a scrutiny of the course "of business and trading"; or by Lord Halsbury (*American Thread Co.* v. *Joyce* [25]): ". . . the real test . . . and that which "has been accepted as a test, is where what we should call the "head office in popular language is, and where the business of "the company is really directed and carried on in that sense."

It is said that if we admit evidence of the subsidiaries' real practice and course of business we shall make the respondent's task of revenue collection very much the more burdensome. I should be sorry to do that. Their work is difficult enough as it is: nor, indeed, is the situation of the taxpayer altogether an amiable one. But residence has hitherto been regularly treated as a question of fact as to which inquiry must be conducted, and I do not see that by rejecting the idea that the printed regulations close the matter and requiring or allowing further investigation as to what really happens we are adding materially to the respondent's burden. If this makes too elaborate a test, the proposed alternative would be altogether too simple, and much of the effective administration of revenue collection will continue to depend, as it always has, upon the measure of candour and responsibility that is shown by the individual taxpayer and his professional advisers.

I would allow the appeal.

My noble and learned friend, LORD GODDARD, asks me to say that he concurs in this opinion.

LORD COHEN. My Lords, the short point for your decision is whether three companies incorporated in Kenya, all wholly owned subsidiaries of an English company, Alfred Booth & Co. Ltd. (which I shall hereafter call "the parent company"), were at the relevant periods resident in the United Kingdom within the meaning of subsection (9) of section 20 of the Finance Act, 1953. If they were so resident in the United Kingdom, but not otherwise, the appellant company, also a wholly owned subsidiary of the parent company, was entitled in computing its profits for the years 1953–54 and 1954–55 to deduct certain payments (in the

[24] [1906] A.C. 455, 459. [25] 6 T.C. 163, 165.

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section called "subvention payments") made by it to the African subsidiaries in the years 1952 and 1953.

It has been throughout common ground between the parties that the African subsidiaries were at all material times resident in East Africa, but the appellant company contends that they were also resident in the United Kingdom. The admission that the African subsidiaries were resident in East Africa is not destructive of the appellant company's contention, because ever since the decision of your Lordships' House in *Swedish Central Railway Co. Ltd.* v. *Thompson*[26] it has been well established that for income tax purposes a company can simultaneously have two residences in different countries.

Both parties accepted the test of residence laid down by Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe*,[27] where he said: "The decision of Kelly C.B. and Huddleston B. "in the *Calcutta Jute Mills* v. *Nicholson*[28] and the *Cesena* "*Sulphur Co.* v. *Nicholson*,[28] now thirty years ago, involved the "principle that a company resides, for purposes of income "tax, where its real business is carried on. Those decisions have "been acted upon ever since. I regard that as the true rule; "and the real business is carried on where the central manage- "ment and control actually abides. It remains to be considered "whether the present case falls within that rule. This is a pure "question of fact to be determined, not according to the con- "struction of this or that regulation or bye-law, but upon a "scrutiny of the course of business and trading."

Relying on this citation, Mr. Heyworth Talbot, for the appellant company, said that the question where the central management and control actually abide must be a question of fact, and that the finding of the Special Commissioners (see paragraph 10 of the case stated) that the real control and management was being exercised by the board of directors of the parent company in London is conclusive in his favour.

Mr. Borneman, for the respondent, did not, I think, seriously dispute that there was evidence on which the Special Commissioners could so find. In any event, I think it is plain from the case stated as a whole that there was ample evidence to support their conclusion, and it is irrelevant whether or not your Lordships would have reached the same conclusion.

Mr. Borneman, however, submitted that the issue between the parties was not a pure question of fact. He pointed out that in none of the reported cases had the real control and management been exercised in breach of the regulations of the company, whereas in the present case the articles of each of the African subsidiaries had been so framed that it should have been impossible for the control and management, vested as it was in the respective boards of directors, to be exercised in London. Thus,

[26] [1925] A.C. 495.
[27] [1906] A.C. 455, 458.
[28] (1876) 1 Ex.D. 428.

in article 28 of the articles of association of Booth & Co. (Africa) Ltd., it was provided that: "Directors' meetings may be held "anywhere outside the United Kingdom and clause 81 of Table A "shall be construed accordingly." A similar provision is to be found in the articles of association of each of the other African subsidiaries.

Mr. Borneman argued, and his argument found favour with both Wynn-Parry J. and the Court of Appeal, that the observations of Lord Loreburn and of other judges in decided cases as to the acts or other elements which may determine the residence of a limited company must have envisaged such acts or other elements as being regular and not irregular, constitutionally lawful and not unlawful. Accordingly, both courts below held that since the acts of the parent company on which the Special Commissioners relied constituted a usurpation of the directing power of the African subsidiaries, such acts could not warrant the attribution to the African subsidiaries of a second residence in England.

In reaching this conclusion Romer L.J., delivering the judgment of the court, relied on the judgment of the Court of Appeal delivered by Lord Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners.*[29] He cited a passage from that judgment where Lord Evershed M.R. said: "The company may "be properly found to reside in a country where it 'really does "'business,' that is to say where the controlling power and "authority which, according to the ordinary constitution of a "limited liability company, is vested in its board of directors, "and the exercise of that power and authority, are to some sub-"stantial degree to be found."

My Lords, I do not read the reference to the "ordinary "constitution of a limited liability company" as evidencing an intention to make any addition to the test indicated by Lord Loreburn in the *De Beers* case.[30] I think that all Lord Evershed M.R. was saying was that in almost every case the articles of association of a limited company vest the control of the company in the board of directors, and that, accordingly, if you found out that the board of a company habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be if, for instance, the control was vested not in the board but in managing agents. It seems to me that in the circumstances disclosed in the case stated the commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the appellant company, have been compelled to find that the African subsidiaries had no residence anywhere. Moreover, it may well be asked

[29] [1952] 1 T.L.R. 651, 663. [30] [1906] A.C. 455.

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what the position would have been had the business of each of the African companies been conducted by their duly appointed boards, but in disregard of the articles all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but Mr. Borneman shrank from carrying his argument to this logical conclusion.

Mr. Borneman suggested that unless the application of Lord Loreburn's principle was made in accordance with the Court of Appeal's interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeal's view, if they amended the relevant articles (not a very difficult process in the case of a 100 per cent. subsidiary). Moreover, the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated.

My Lords, I do not think that adherence to the test laid down by Lord Loreburn and to the application thereof which, as I think, has hitherto been adopted—namely, that the question where the central control actually abides is a question of fact for the decision of the commissioners—will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies, and, had the commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion.

For these reasons I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, there is one point that has given me some difficulty in this case. The commissioners are not, I think, concerned with whether the powers of directors of a company are exercised in accordance with the constitution of the company. If the actings of a person or corporation are such as to attract liability to tax or give some entitlement to relief from tax, so long at least as these actings are not a façade to cover a reality which has a different result, the commissioners have, I think, no concern with the legality, or otherwise, of these actings. It is the facts of the case that have to be considered with the legal results that follow. For that reason I could not agree with the ratio of the decision of the Court of Appeal. But when the facts of this case are considered I feel considerable doubt whether they establish that the "African subsidiaries" were at the material times resident in the United Kingdom. What they show is that another company, Alfred Booth & Co.

Ltd., resident in London, through its board, exercised the real management and control of the African subsidiaries. There is no suggestion that it was authorised so to do by the boards of the African subsidiaries. It is true that Alfred Booth & Co. Ltd. was the parent company and controlling shareholder of the subsidiary companies, but that does not avoid the fact that it was a different person from the African subsidiaries. I should have thought, therefore, that there might be a question whether the African subsidiaries could be said to be in any sense resident in the United Kingdom in respect that no actings of theirs could be said to show that the central management and control actually abided there. On the other hand, it is a matter of concession that the African subsidiaries have a residence in Africa, and if there is nothing to show that they have also a residence in the United Kingdom the appeal would be bound to fail. This question was not, however, raised on the appeal and did not, as I understand, enter into the decision of the Court of Appeal, and as your Lordships think that on the issues raised in this appeal the appeal should be allowed, I, with some hesitation, am prepared to agree with your Lordships.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Solicitor of Inland Revenue.*

F. C.

END OF VOLUME 3.

BIBL. LONDON UNIV.

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